OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 31 October 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 31 October 2017

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JUSTICE COMMITTEE
31st Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Maurice Corry (West Scotland) (Con)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Mandy Burton (University of Leicester)
Gillian Mawdsley (Law Society of Scotland)
Detective Superintendent Gordon McCreadie (Police Scotland)
Elaine Samuel (University of Edinburgh)
Dr Marsha Scott (Scottish Women's Aid)
Stewart Stevenson (Banffshire and Buchan Coast) (SNP) (Committee Substitute)
Sheriff Principal James Taylor

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 31 October 2017

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

Margaret Mitchell (Central Scotland) (Con): Good morning and welcome to the 31st meeting in 2017 of the Justice Committee. I extend a particular welcome to George Adam, who is the committee's latest new member. George is no stranger to the committee, having appeared before as a committee substitute. As such, he has already made his general declaration of interests.

We have apologies from Ben Macpherson. I am very pleased to welcome back to the committee Stewart Stevenson, who is attending as Ben's substitute this morning.

Agenda item 1 is a decision on taking in private item 5, which is consideration of our forward work programme. Do members agree to take that item in private?

Members *indicated agreement.*

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: Stage 1

10:02

The Convener: Agenda item 2 is our evidence-taking session on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. I refer members to paper 1, which is a note by the clerk, and to paper 2, which is a Scottish Parliament information centre paper.

Today, the committee will take evidence on two bills, so time is tight. I welcome our witnesses for the first evidence session: Sheriff Principal James Taylor, author of the independent report that preceded the bill; and Elaine Samuel, who is an honorary fellow at the University of Edinburgh and who supported Sheriff Principal Taylor's review group. Thank you both very much for attending today.

We will move straight to questions, starting with Liam Kerr.

Liam Kerr (North East Scotland) (Con): I declare an interest up front: I am a practising solicitor and a member of the Law Society in England and Wales and the Law Society of Scotland.

The Scottish Government has stated that the bill's primary objective is to address access to justice. How far do the recommendations in your report go towards tackling that issue?

Sheriff Principal James Taylor: There are two main elements for consideration today that, in my submission, will improve access to justice. The first is the facility to make damages-based agreements available to solicitors rather than continuing in the present fashion, which is for solicitors, wearing a second hat, to form their own claims management company and offer damages-based agreements. The other element relates to qualified one-way costs shifting.

As far as damages-based agreements are concerned, I would be surprised if there was a material increase in the number of cases being brought to the court or of complaints being made to the compensation recovery unit. The reason I say that is because we do not need to predict what damages-based agreements will do to the legal landscape in Scotland—they are here, alive and kicking.

In order to make sure that I had not fallen too far behind current affairs in my four and a half years of fallow, I made inquiry of one firm of solicitors that has its own affiliated claims management company to ascertain the volume of such work

that it is doing. In the past three years it has signed up 17,600 new damages-based agreements—the five-year figure is 23,800. I have seen the transcripts of the committee's earlier evidence sessions covering the increase in registrations with the CRU and so on, and that will almost certainly be the explanation for that. DBAs are out there and the public are enjoying the benefit of them.

I should say that, in that same three-year period, 14,000 cases were settled. That is because damages-based agreements do much more than give access to the courts—they give access to negotiation.

Liam Kerr: Thank you. We will come back to a few of those matters. Is there a danger of our conflating access to justice with access to the courts, which is a different concept?

Sheriff Principal Taylor: The ultimate arbiter of justice is the court.

Liam Kerr: But is it not the case that we talk in general terms about access to justice when what we mean is access to the court—not to the right result? If we equate justice with the result that people seek, which might be a myriad different things—

Sheriff Principal Taylor: Access to justice is about enabling members of the public to know what their legal rights are and to exercise those rights. That may require recourse to the courts, but more often than not, it does not, as most disputes are resolved by way of negotiation. If a member of the public is not properly advised as to how to go about the negotiating process, or, perhaps worse, does not even know of their legal right, that is a denial of justice.

The Convener: On access to justice, if the legislation is flawed and some of the provisions are in fact disadvantaging the pursuer, is Liam Kerr's question not valid? There has been access to court, but at the end of the day, justice was not seen to be done.

Sheriff Principal Taylor: If the legislation is flawed, one has to put it right. I am not sure what point you are seeking to make.

The Convener: As we continue our lines of questioning, we will cover provisions that you recommended, which are not in the bill, which at the very least could have improved it. By that definition, access to justice has not been achieved in the way that it possibly could have been.

Sheriff Principal Taylor: I would always be happy for any of my recommendations to be implemented.

Liam Kerr: The Justice Committee heard previously that a great deal of your report was based on Department for Work and Pensions data, which showed that between 2008 and 2011 the number of claims registered in Scotland rose by 7 per cent, compared with the 23 per cent by which it rose in England and Wales. The report concludes from that data that there is an issue with access to justice.

The same data shows that, between 2011 and 2016, in Scotland the number of compensation claims increased by just over 16 per cent, whereas in England and Wales the figure appears to have decreased by 4.5 per cent. Does that change your view of the recommendations that you made in 2013? Given that data, are your conclusions and recommendations on the lack of access to justice still valid?

Sheriff Principal Taylor: That data does not change my conclusions at all. I was aware of the figures. Earlier, I sought to explain—perhaps rather inelegantly—that there has been an increase in the number of claims, but that that is almost certainly because, in the past five years, damages-based agreements have become a common way of funding a party who is seeking to exercise their legal rights.

You mentioned the figure of 16 per cent. I cannot say whether this is the case, because I have not done an analysis, but it would not surprise me at all if that increase occurred as a result of the popularity of damages-based agreements, which is evidenced by the figures that I gave from one firm: 17,600 claims in three years is a lot of damages-based agreements to enter into.

Maurice Corry (West Scotland) (Con): Good morning, sheriff principal. What advantages do damages-based agreements have that justify overturning the traditional prohibition on their use by lawyers?

Sheriff Principal Taylor: If damages-based agreements are as popular as I have just indicated that they are, it would be legitimate to ask why we need all this. We need all this because, at present, they are completely unregulated. They are being offered by claims management companies, which, as we know, are currently unregulated. My report recommends that damages-based agreements should be permitted to be entered into only by regulated bodies, and I would like the bill to contain such a provision.

The lack of regulation has two major impacts. First, the percentage that the solicitor or claims management company—they are one and the same—can take is unlimited. I understand that the present rate can be anywhere between 15 and 20 per cent of all damages, including past and future loss. I know of one firm that uses a taper, which is what I recommend should be deployed, whereby

the rate falls down to 2.5 per cent at the upper levels.

The other mischief that requires to be addressed—I am pleased to say that the bill addresses it—is that, at present, there is no clarity on what "no win, no fee" actually means. Different offerers of DBAs use different definitions of what "no win, no fee" means. For example, who will pay for the medical reports? Who will pay for the court dues? Who will pay for the expert who will inevitably be required? I wanted there to be a level playing field, whereby the solicitor would have to pick up all those costs, save only for any after-the-event insurance premium. That would mean that a member of the public could go to two or three providers and get directly comparable quotes. The last thing that I would like to see is a Gocompare for claims management companies.

The Convener: Rona Mackay's question will probe damages-based agreements a bit further.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. Sheriff Taylor, you briefly mentioned future loss. Can you explain the reasoning behind your recommendation not to protect damages for future loss from inclusion in the success fee calculation in most cases? Will that lack of protection for compensation for future loss leave pursuers worse off if they pursue an action under a damages-based agreement?

10:15

Sheriff Principal Taylor: At present, the success fee that is deducted from future loss is between 15 and 25 per cent; indeed, I heard yesterday that one firm is charging 33 and a third per cent.

The public, notwithstanding what might appear—to me, at least—to be rather generous terms for solicitors, are still entering into those agreements. They do so because the agreements are simple, they understand them and they know precisely what the outcome is going to be.

I included future loss in the calculation of the success fee because to do otherwise provides an in-built incentive to solicitors to delay proceedings. The longer someone waits to get their decision, the greater their past loss will be and the smaller the future loss will be. We do not need incentives for delay.

Further, it is usually the tricky cases that proceed to court. Very often, future loss is the sticking point that prevents a settlement from occurring. It is at that point that the solicitor and the lawyer—counsel are usually involved if it is in court at that level—start to earn their corn. I think that they are entitled to be rewarded for that work.

The vast majority of claims settle. They usually settle on a lump sum, because a broad-brush approach is taken to the negotiation. There is no definition of past loss and future loss. If a case settles at the door of the court, you can bet your bottom dollar that there is no consideration of past and future loss—there is just the lump sum that the insurer is prepared to pay, and the pursuer is prepared to accept, in order to get rid of the claim.

When I was going round during the consultation period, one firm of solicitors told me of the problem that arises when there are multiple pursuers. For example, a family is injured in a road accident and the insurer of the driver of the car at fault simply says, "Here is a large sum—divvy it up among yourselves". As the solicitors told me, it would be hard enough to divvy up a sum among the individual members of a family, but it would be even harder if they had to start working out not just what each member was entitled to but what their future and past losses were. That is looking at it from the solicitor's point of view.

Few if any judges would claim that their awards for future loss are accurate to 2.5 per cent. They are not. Furthermore, few care plans are implemented to the letter, and it is the care plan upon which the future loss is predicated. The care plan ends up not being followed for a whole raft of reasons. Those might be social reasons—the family circumstances change or they have to move house; sometimes, there are medical improvements that make life much simpler for the particular handicap for which an award is being made. The 2.5 per cent is not going to make a material difference to the manner in which a pursuer is cared for post-accident, and one ends up with a balance. It is a loss of 2.5 per cent, but it provides access to justice—97.5 per cent of something is better than 100 per cent of nothing.

The evidence that we have is where I started. Damages-based agreements are popular with the public, even though they might end up paying 20 or 25 per cent of their future loss to their solicitor. I know that the position in England and Wales is different and that Lord Justice Jackson recommended in his report that future loss should not be included in the success fee. However, Lord Justice Jackson had second thoughts on that—very much so—and in one of the lectures that he gave post the publication of his report, he said:

> "ring-fencing damages in respect of future loss was out of deference to the vociferous submissions of The Personal Injuries Bar Association (PIBA), The Association of Personal Injury Lawyers (APIL) and others".

Thus, it was not as a result of the application of principle, but because the pursuers' solicitors lobby wanted future loss to be excluded. They changed their minds and wrote to Lord Justice Jackson, sending what he subsequently described

to me as forceful submissions that a deduction should be made. I met Lord Justice Jackson. What he and I said remains in confidence, but it would be a surprise to me if there would have been the same regime in England and Wales had it not been for the attempts by APIL and PIBA to persuade him that future loss should be excluded. He has explicitly said, "I deferred to them."

Rona Mackay: Thank you for that full answer. Can I ask you to clarify, very briefly, in relation to the second part of my question, that you do not think that pursuers will be worse off if they pursue an action under the bill?

Sheriff Principal Taylor: Under what I recommend they will be a lot better off because they will not be suffering 25 per cent deductions—they will be suffering 2.5 per cent deductions.

The Convener: Can I just clarify whether that just applies to awards of more than £500,000, and that anything less than that—which perhaps does not happen very often—would not be protected in that way?

Sheriff Principal Taylor: No, no. My proposal was that on the first £100,000 the deduction would be 20 per cent; between £100,000 and £400,000 the deduction would be 10 per cent; and if the award was above £500,000 the deduction would be 2.5 per cent.

The Convener: Right. We may be looking at some of the regulations that the Government is proposing, because I do not think that that is in the bill.

Sheriff Principal Taylor: No, and rightly so. That is properly placed in secondary legislation.

Rona Mackay: I have another question, to which Miss Samuel may want to contribute. Who should bear the cost of the independent actuary? Sheriff Principal Taylor's review recommends that the pursuers' solicitor should pay for the actuary. Do you think that they should be able to claim that cost as a judicial expense when the case is won and, if so, why?

Sheriff Principal Taylor: It should not be charged to the pursuer. It should be paid for by the solicitor. Whether it then becomes a legitimate part of a judicial account, I really do not know. It is some years since I have been involved in the principles of what is and is not recoverable, so I am afraid that I cannot help you there.

However, I can say this in relation to the actuary recommendation and its genesis. I went about and spoke to a considerable number of firms for both pursuers and defenders, and one pursuer's firm told me that, very often, great pressure is brought to bear upon a pursuer to accept a lump sum when a periodical payment would be far more advantageous to them. The pressure comes from family members who see the opportunity for a large pot of money—and it has to be said that some pursuers also see the attraction of having a large pot of money available to them. It was out of that discussion that the solicitors told me that, in those circumstances, they send the client to an actuary. They want the actuary to give independent advice, and hope that it will be that the pursuer should accept a periodical payment. It also has the advantage of protecting the pursuer from subsequent criticism. The idea of going to an actuary was not dreamed up by me; it came from the profession.

In one of the committee's earlier evidence sessions, Mr Stevenson said, "I could add up a few sums and call myself an actuary." I have to confess that, at the time of drafting the report, I thought that "actuary" was a protected term. It is not, and to reflect that in the bill, a definition will have to be put in that an actuary will require to be a chartered actuary or a member of the Institute and Faculty of Actuaries.

Rona Mackay: Ms Samuel, do you have a view on actuaries?

Elaine Samuel (University of Edinburgh): No.

Rona Mackay: Okay—fair enough.

The Convener: Liam Kerr has a supplementary question.

Liam Kerr: Going back to Rona Mackay's question about future loss, it has been suggested to the committee that not protecting future loss could lead to overall award inflation as courts and negotiators will ensure that the pursuer gets the full amount to which they have been judged to be entitled. How do you respond to that?

Sheriff Principal Taylor: I think that there is zero chance of there being damages inflation as a consequence of the proposals. The reason why I say that is that the judiciary does not go about with its head in the sand. I am pleased to say that people saying, "Who are the Beatles?" is a thing of the past. The judiciary knows that the litigations that come before it are being funded by damages-based agreements. In the case of Powell back in 2011, it said that claims management companies perform a useful function and damages-based agreements are a good thing. It knows that a percentage of the damages are presently going to solicitors, and we have not had any inflation of claims to date. I do not think that damages-based agreements will result in a significant rise in claims. We have seen that rise because DBAs have been popular over the past half dozen years or so.

10:30

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I can give you a definition of an actuary: someone who found accountancy too exciting. However, that probably will not do for our purposes.

On section 8, which relates to the restriction on the pursuer's liability for expenses in personal injury claims, I want to lay out a modest scenario that I have previously suggested. A guy steps out of his Rolls-Royce and is run down and severely injured by a cyclist. The cyclist is about to pay off his mortgage or has already done so, but he has a limited income—in other words, he is asset rich and income poor. It might be worth pursuing him for a damages claim, but given that in such circumstances the pursuer is fundamentally likely to be the wealthier of the two, should the pursuer have the option of knowing that it will always be the defender who will have to pick up the pursuer's legal costs? Section 8(2) really does not address that, because the assumption is that the defender is a big insurance company and the pursuer a wee person. Surely there are circumstances in which that will not actually be the case.

Sheriff Principal Taylor: The answer to your question is that if the defender is a man of straw the pursuer will not raise proceedings. After all, there is no point in obtaining a court award that cannot be enforced.

Stewart Stevenson: Forgive me, but I am positing a situation in which the defender might have a modest income but, given the modern world, their house, which might have been quite affordable to them when they purchased it, say, 30 years ago, might, if we are talking about Edinburgh, be worth something of the order of £250,000 or £300,000. They are a bit removed from being a man of straw and might well be worth pursuing, but the effects on the person would be disproportionate to the benefit that would be gained by the pursuer, if they were an extremely wealthy person. I just wonder whether the bill should be adapted to constrain the availability of qualified one-way costs shifting more than it does.

Sheriff Principal Taylor: The difficulty in constraining it as you suggest is that that will remove the certainty provided by requiring the pursuer to behave himself. The problem at the moment is that, although successful defenders in personal injury cases rarely recover their expenses, the solicitor advising the pursuer has to act responsibly and say, "I cannot guarantee that you will not be faced with a large adverse award of expenses that will probably bankrupt you." In such circumstances, the pursuer—not surprisingly—backs off.

I note the example given by, I think, the Faculty of Advocates with regard to restricting the circumstances in which qualified one-way costs shifting would apply to those parties who could be found liable to make an interim award of damages. I think that it mentioned those who are insured and public bodies, and there is a third element that escapes me just now. The difficulty with that is that you could end up with parties not bothering to insure themselves when they ought to or with parties taking on a much higher excess in order to pay a much lower premium and thereby making themselves, in effect, self-insured.

You could find parties who have policies—so QOCS would apply—but who have breached the terms of their policy with the insurers, such as the obligation for fidelity. As a consequence, one-way costs shifting would not be available in circumstances in which it should be available.

The example that you posit, sir, is one that I cannot say is impossible, but it is de minimis. We can look to England and Wales, where the rules of court are the same as what is proposed here, to find out what has happened there. We have heard of no difficulties with qualified one-way costs shifting being operated as it is proposed to be operated here. The lady to my right, Elaine Samuel, has spent a lot of time recently trying to find out what problems there might be in England and Wales as a consequence, and multiple Google searches have not come up with any answers. Surprisingly, when I read the evidence from the insurance lobby that was given to you back in September, I did not see any red flags being waved.

Stewart Stevenson: That is helpful.

Mairi Gougeon (Angus North and Mearns) (SNP): My first question is about the tests in the bill that relate to the loss of QOCS protection. Three situations are laid out in the bill in which QOCS would be lost, including fraudulent representation among others. The evidence that we have received has been split between pursuers who think that the tests are too strict and defenders who think that they do not go far enough and will not prevent spurious claims.

What are your views on that, particularly the tests laid out in the bill in relation to fraud? Does the bill implement what you recommended in your report?

Sheriff Principal Taylor: I do not think that the bill implements what I recommended in my report. Section 8(4)(a) says:

> "makes a fraudulent representation in connection with the proceedings",

whereas my preference would be for the wording to be:

"has acted fraudulently in connection with the proceedings".

"Fraudulent representation" involves word of mouth; fraud can take place through actions.

The suggestion that was made to you that, if one stayed with "fraudulent representation" one should at least define it, is, frankly, nonsense. The law of Scotland has known what fraud is for many years; it was decided back in the 19th century that

"fraud is a machination or contrivance to deceive by words or acts"—

that comes from Bell's *Principles*.

The suggestion that one could enumerate the circumstances in which fraud would be said to have taken place is a non-starter. I had to look out some really old legal textbooks, but the 11th edition of Gloag and Henderson said:

"it is impossible to enumerate the various words or acts which the law will regard as fraudulent".

I have dealt there with not just the wording, but the nonsense that you have heard from others.

Therefore, I am not in line with the pursuers' lobby for section 8(4)(a). However, I am in line with them in their criticism of 8(4)(b), because I do not think that that bar is high enough. Wednesbury unreasonableness was what I recommended, and I think that the formula that Mr di Rollo suggested to you came very close to being what I would choose to have there. I tweaked his formula ever so slightly. I suggest that, as an alternative, it should read, "if, in the opinion of the court, the pursuer's decision to raise proceedings, or their subsequent conduct, is so manifestly unreasonable that it would be just and equitable to make an award of expenses against the pursuer". Therefore, I would raise the bar.

I think that section 8(4)(c), which is on dealing with an abuse of process, is okay.

My report recommended another set of circumstances in which qualified one-way costs shifting should not apply, which is in the event that a case is summarily dismissed or, to use an expression from England, "struck out". Much has been said here—rightly—about the potential for frivolous claims being brought.

In my opinion, there are two reasons why frivolous claims will not be brought. One is that you would need to persuade a solicitor to pick up the cost of his time, the fees and the outlays, with little prospect of recovery.

Secondly, if the action raised is of no merit, there is a facility in the court, which was introduced about five years ago following the civil courts review, whereby a defender can say to the court, "This action has no merit—strike it out." In those circumstances, the benefit of qualified one-way costs shifting is lost, and should be lost. Therefore, I would add another element to section 8(4)—it could be section 8(4)(d).

Finally, in the session that the committee had with the insurance lobby, it was said by one of their number that even though the pursuer did not beat a tender, qualified one-way costs shifting continued to apply. Well, not in my world, it does not, nor in the report that I made. I accept entirely the bill team's rationale that dealing with tenders and their nuances should be in secondary legislation, because we do not want to start fiddling with the common law in an act of Parliament. I am persuaded that qualified one-way costs shifting should not be available, and should be specified as not being available, in the event that the pursuer has failed to beat a tender.

Mairi Gougeon: You touched on a few of my other questions and, in particular, on the test in relation to unreasonable behaviour. What you said about spurious claims echoed the evidence that we heard from solicitors, who said that they would not take on a case if they thought that it would not get anywhere.

Sheriff Principal Taylor: I did a little exercise to see the sort of outlays that solicitors have to pay. At present, according to the Scottish Courts and Tribunals Service website, there has to be an outlay of £214 to raise an action. Every time that there is a motion, each party has to pay £54 just to enrol the motion. Further, they have to pay £77 per half hour for the proceedings. Under a damages-based agreement, those payments have to come out of the solicitor's pocket. That is before we start looking at the costs of medical reports and experts' reports, all of which will be in the hundreds, if not the thousands, of pounds. That is a pretty strong deterrent for frivolous claims, taken with the knowledge that the defender can come into court and move a summary dismissal or, in the vernacular, "strike out" the action.

Mairi Gougeon: Thank you; that was helpful. You touched on tenders. Should that process be more clearly defined in the bill?

10:45

Sheriff Principal Taylor: No, I do not think that what I propose in regard to tenders should be dealt with in the bill, because that is getting into more technical detail. I think that that should properly be in an act of sederunt, but one line could be added to the bill. Section 8(4) says that

"a person conducts civil proceedings in an appropriate manner unless the person—"

does various things. We might say that QOCS flies off in the event that "the person—fails to beat a pursuer's tender". I hesitate to draft on the hoof, but something like that.

Mairi Gougeon: Okay. Thank you very much.

The Convener: I will go back to the Wednesbury test. Would it be your position that, as it stands, the bill might catch a weak case, as opposed to the Wednesbury test that a decision is so unreasonable that no reasonable person could have reached it? Would the wording that you have suggested meet that test?

Sheriff Principal Taylor: Yes, I think so.

The Convener: Okay, thank you.

Liam McArthur (Orkney Islands) (LD): Good morning. I will return to an issue that you raised in your initial response to Liam Kerr in relation to claims management companies. One of the red flags that has been raised south of the border about QOCS relates to the regulation of claims management companies. Such regulation will certainly not be in place at the outset in Scotland.

The Government bill team acknowledged that issue in its evidence to us, and we have since had correspondence that suggests that the Government may look to piggy-back on the Financial Guidance and Claims Bill that is being considered at United Kingdom level. What are your thoughts about the advisability of implementing the bill's provisions on QOCS in the absence of such regulation, which could be achieved either through the UK bill or through separate legislation flowing from the on-going review?

Sheriff Principal Taylor: I understand why the regulation of claims management companies might be dealt with other than in the bill. For present purposes, when we are talking about damages-based agreements, I would be content for the bill simply to have some provision that only a regulated body can enter into a damages-based agreement. That would mean that claims management companies would not be allowed to enter into those agreements until such time as they became regulated. However, my recommendation is that claims management companies fall to be regulated—it is an essential element of the report.

Liam McArthur: That certainly seemed to be the hint that the Scottish Government officials were giving us when they were setting out the objectives of the bill. To your mind, would it be sufficient to have a reference to regulated organisations or bodies for the time being, which regulation will manifest itself either through the changes to the UK legislation or whatever emerges from the Government's on-going review?

Sheriff Principal Taylor: Yes, it would be a holding element. Unregulated companies would not be allowed to enter into damages-based agreements and take 20 or 30 per cent from all loss. I actually think that most claims management companies in Scotland will disappear, because the vast majority are simply fictions—they are firms of solicitors who have set up their own tame claims management company. The ownership of the firm of solicitors is the same as that of the claims management company.

Liam McArthur: That is helpful. Thank you.

Maurice Corry: Defender representatives have argued that the provisions on QOCS and damages-based agreements will tip the balance too far towards unscrupulous pursuers unless other controls are introduced, such as fixed expenses or more extensive pre-action protocols. Do you agree with those concerns?

Sheriff Principal Taylor: Pre-action protocols undoubtedly assist in weeding out cases that are capable of settlement before they get to court. I confess that I am not completely up to speed on existing pre-action protocols, but, in general, they are worth while. Just now they are mandatory in all cases up to a value of £25,000, but I think that if the system is working you might consider extending it to cases of £50,000 or £100,000. I would have thought that a role of the Scottish Civil Justice Council would be to monitor these aspects and decide at what level the mandatory pre-action protocol should kick in and the sorts of actions it should cover.

Fixed fees are a bit of an unknown quantity. I dipped my toe in that water by suggesting that, in what was then to be a new simplified procedure, the fees should be fixed, and I would have liked to have seen the system in operation before I ventured an opinion on whether it worked and therefore should be rolled out further. As a general concept, though, I like the idea. Such a system operates very successfully in one of the patent courts in London—you can find it in my report somewhere. One of the report's key watchwords was predictability, and that is what fixed fees bring about. As I said, I like the idea of them, but I am not sure that I would necessarily tie them in with qualified one-way costs shifting.

In fact, I recommend in the report that there be budgeting of litigations; I appreciate that that is nothing to do with you, but it might give you the tenor of where I am going with this. At the outset in a commercial action, each party should set out what it believes to be the cost of the action and get the court to approve it; the court might say, "I don't like this" or "I don't like that", and the parties will be held to that for the future. That, too, provides predictability. I find it unacceptable in this day and age for a client to ask a lawyer, "How much will this litigation cost me?", only for the lawyer to reply, "I haven't a clue. How long is a piece of string?" That is just not acceptable and there are ways around it.

The Convener: Do you have any comments on cold calling by claims management companies? Most of these things will disappear, but there is still that element to deal with.

Sheriff Principal Taylor: Cold calling is the biggest mischief of claims management companies. We can go back to several sources, including Lord Justice Jackson; the Conservative peer Lord Young of Graffham, who carried out an examination of claims management companies; and the Legal Services Board in England, which did the same thing. Save for cold calling, they thought that such companies played a useful role in the process.

My report, however, recommends that claims management companies—or anyone, for that matter—not be permitted to cold call. Having a regulator in place helps in that respect. I also recommend that a professional duty be placed on a solicitor to satisfy himself that, before a case is referred to him by a claims management company, it has not been obtained through cold calling. That will require the Law Society to firm up its professional guidance provisions to ensure that if a solicitor accepts such a case without making reasonable inquiry as to whether it was obtained through cold calling, it will be professional misconduct.

I also suggest that only regulated bodies be entitled to charge a referral fee. After all, what incentive will there be for someone to acquire a piece of business by cold calling if the regulator is going to come down on top of them?

The Convener: That would avoid any problems if the Law Society decided not to implement that; they have not committed to inquiring if the referral came as a result of cold calling. However, if only regulated bodies—

Sheriff Principal Taylor: I understand that the same bill as you are praying in aid in Westminster in relation to the regulation of claims management companies will legislate for a ban on cold calling.

The Convener: Therefore, one way or another, we hope that cold calling will be caught.

Sheriff Principal Taylor: We hope so. It is the bane of all our lives, is it not?

The Convener: It certainly is.

Mary Fee (West Scotland) (Lab): Good morning, Sheriff Principal Taylor. I will ask about third-party litigation funding. You will know that there is an emerging market in England for investors to fund claims in return for a share of compensation. The bill will make it impossible for third-party funders to be found liable for expenses. The Government has said that it is its intention to catch only commercial third-party funders, but we have heard in evidence from trade unions, in particular, that there is concern that trade unions could be caught by the provision. Could you clarify for us who the recommendation on liability of third-party funders is specifically meant to catch?

Sheriff Principal Taylor: It is intended that only the venture capitalist that comes in to fund a commercial action could find itself liable for the adverse costs in a litigation. A trade union should not be caught and neither should a solicitor who provides a damages-based agreement.

My understanding from a chat yesterday with one of the bill team is that further definition will be provided to bring about what I think you and I would both choose.

Mary Fee: Your recommendation was that there should be a voluntary code of practice for third-party funders.

Sheriff Principal Taylor: Yes—as there is in England and Wales.

Mary Fee: There is no provision for such a code in the bill. However, your understanding is that something will be put forward.

Sheriff Principal Taylor: I think that there will simply be a change in a definition in existing legislation, which will make it clear that trade unions and solicitors that enter into damage-based agreements will not be caught. I do not think that it will go as far as you suggest, with a requirement that there be a code of conduct.

Mary Fee: Clarity in the bill would certainly be helpful for trade unions and no win, no fee solicitors.

Sheriff Principal Taylor: That would certainly help.

Mary Fee: Section 10 of the bill includes requirements on transparency of funding arrangements. Could you confirm whether you intend that those will apply to all parties to a civil court action, and not just to third-party funders? Your recommendation was that all parties to civil litigation should be required to disclose to others involved how the court action is being funded.

Sheriff Principal Taylor: Yes, and I stick by that.

Mary Fee: Does that recommendation include trade unions and all funders?

Sheriff Principal Taylor: Yes. I think that there should be disclosure of how actions have been funded.

Mary Fee: Thank you. That is very helpful.

The Convener: I will ask about the definition that you provided of “professional funder”, which seems to me to catch it quite nicely. The definition is:

"A funder, motivated by a desire to make a profit, who effectively purchases a stake in the outcome of a litigation".

Sheriff Principal Taylor: That is in the definitions section.

The Convener: Would it serve the purpose if that definition were to replace the one in the bill?

Sheriff Principal Taylor: Give me one second; I will look it up.

The Convener: It is in paragraph 57, in chapter 11.

Sheriff Principal Taylor: I am in the glossary at the beginning, which says:

"The funding of litigation by a party who has no pre-existing interest in the litigation, usually on the basis that (i) the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation, often expressed as a percentage of the sum recovered; and (ii) the funder is not entitled to payment should the claim fail."

That does not help us, particularly. Could you give me the number of the paragraph again?

11:00

The Convener: It is in paragraph 57 of chapter 11 of your review report.

Sheriff Principal Taylor: It would be a bit embarrassing if I had to go back on that now.

"A professional funder who finances part of a pursuer's—"

The Convener: The definition starts:

"A funder, motivated by a desire to make a profit, who effectively purchases a stake in the outcome of a litigation".

It is the second sentence in paragraph 57.

Sheriff Principal Taylor: I think that the definition is fine. It meets the point, does it not?

The Convener: Yes, I think so. I think that it is excellent.

Liam Kerr: I have a brief supplementary question. I would like to take you back to the start and to the basis of the whole process. In paragraph 43 of chapter 8 of the report, you talk about individuals being

"put off from pursuing legitimate claims for fear of an award of expenses against them."

Do you have any idea how many such pursuers exist? Is there evidence that fear of an award against them is putting them off?

This question has just sprung to mind. If the claim is "legitimate", to use the word in your report, why would an individual have an award for costs made against them? Should not the solicitor say, "You're okay on this—go forward"?

Sheriff Principal Taylor: From my time in private practice, I can say that there is no doubt in my mind that the fear of an adverse award of costs inhibits people from exercising their legal rights.

I can also speak to that personally. I had a claim that was valued at £30,000 in which my prospects of success were probably about 80 per cent. I settled my action at £10,000—one third of what it was worth—and I did that entirely on the basis that I thought that I had before-the-event insurance, but did not, which was my fault. An award of expenses of well into six figures, which is what it would have taken to litigate the £30,000 claim, was not in my or my family's interests, so that deterred me from litigating. That fear has certainly deterred a lot of my clients from litigating, so I have absolutely no doubt that it is a deterrent.

That deals with part of your question. I am sorry: what was the other part?

Liam Kerr: The second question just bounced into my mind. In paragraph 43, you talk about "pursuing legitimate claims" but, if a claim is really legitimate, why would there be an award of costs against the pursuer?

Sheriff Principal Taylor: A solicitor might think that the claim is legitimate at the outset. The pursuer will go to see them in their office and give them one set of facts. The solicitor might be perfectly honest in his assessment of those facts, but some witnesses are not very good at remembering what happened two or three weeks ago, particularly if there has been some trauma. In fact, quite a lot of research has been carried out on the effect of trauma on memory. The solicitor might be told that it is a pretty strong case and so takes it on, but the assessment of its prospects of success must be kept under continuous monitoring, because they change all the time. The case might start off as a good one, but cases can easily turn very poor. The damages-based agreements into which solicitors enter make provision for them to be able to back out if things reach the stage at which the case is no longer viable. Have I answered your question?

Liam Kerr: With very great respect, Sheriff Principal Taylor, I am not sure that you have. What you said is that individuals are put off, so they make a decision themselves not to pursue a legitimate claim.

Sheriff Principal Taylor: Yes.

Liam Kerr: When a person presents at the solicitor, they might believe that they have a legitimate claim, but are put off because the solicitor says, "I've heard your side of the tale and it seems to be a legitimate case based on the facts as you have presented them. This is what it is going to cost." At that stage—

Sheriff Principal Taylor: No. It is not usually at that stage that it happens.

Liam Kerr: At what stage are people usually put off pursuing a legitimate claim?

Sheriff Principal Taylor: That happens when the solicitor realises that negotiation will not produce a result and they will therefore have to go to court. The clock only starts ticking for an adverse award of costs when you get into court.

In the circumstances that Liam Kerr has suggested, the solicitor would write to the alleged wrongdoer and then, I would hope, a negotiation would ensue. By that time, both sides will have a fairer idea of how the land lies; rarely is there a monopoly of right on one party. At the point at which they have to go into court because the negotiation has proved unfruitful, the solicitor has to tell the person that, if they lose, they run the risk of a severe adverse award of expenses. In many cases, that could bankrupt the individual.

The Convener: Two of your recommendations that are not in the bill are the additional fee—the extra amount of judicial expenses that a judge can award where the case has been particularly complex or time-consuming—and the suggestion that additional fees should continue to be decided at the end of the case, but limited to 100 per cent uplift of the judicial expense amount. Should those be in the bill or regulated in some other way?

Sheriff Principal Taylor: Those are probably best dealt with by secondary legislation.

The Convener: They should be built in to secondary legislation.

Sheriff Principal Taylor: Yes.

I also have a suggestion about when a judge is asked to make a decision about an additional fee. A number of factors—about half a dozen—have to be taken into account, including the complexity of the case. I cannot remember them all. The provision should be extended to require the judge to consider the extent by which the pursuer's solicitor is being remunerated by way of a success fee.

The Convener: That is helpful. You also recommended that the solicitor should be required to discuss all potential funding options with the client, including legal aid or an existing insurance policy, and to write to the client with their recommendation and the reasons for it. Should that suggestion be considered, if not included in the bill?

Sheriff Principal Taylor: Lord Justice Jackson recommended that a solicitor should, before they enter a damages-based agreement, have to refer the client to an independent solicitor to make sure that all the pros and cons have been properly explained. I thought that that would be overkill and would involve too much administration, so my version is watered down from what Jackson recommended. It is important to realise that a damages-based agreement does not remove any other funding mechanism from the legal landscape; it is additional and might not be best suited to a particular pursuer.

The Convener: That is very helpful.

Sheriff Principal Taylor: I should have tried to work into one answer that we already have qualified one-way costs shifting in Scotland. It has been in operation for decades and involves the legal aid fund. A legally aided pursuer who loses an action and might, therefore, otherwise have an adverse award of expenses made against them, does not have an adverse award of expenses made against them. In very exceptional circumstances, the successful unassisted party can obtain payment of expenses out of the legal aid fund, but—as I am sure members appreciate—that applies in very limited circumstances. Therefore, we do not need to wonder how qualified one-way costs shifting will work; we already know how it works, albeit in a limited environment in Scotland.

The Convener: That will provide huge reassurance to people who are worried about the bill. The committee members all agree that your evidence has been immensely helpful to us. I thank you and Ms Samuel for attending today's meeting.

I suspend the meeting briefly to allow for a change of witnesses.

11:11

Meeting suspended.

11:16

On resuming—

Domestic Abuse (Scotland) Bill: Stage 2

The Convener: Item 3 is a stage 2 evidence-taking session on the Domestic Abuse (Scotland) Bill. I refer members to paper 6, which is a note by the clerk, and papers 7 and 8, which are SPICe papers.

I welcome our witnesses: Gillian Mawdsley, policy executive at the Law Society of Scotland—whom I particularly thank for standing in at the last moment for Grazia Robertson, who had to attend court; Detective Superintendent Gordon McCreadie, who is in public protection at Police Scotland; Dr Marsha Scott, chief executive of Scottish Women's Aid; and Professor Mandy Burton, from the school of law at the University of Leicester. I thank the witnesses for providing written submissions, which were really helpful for the committee, as always.

We will move straight to questions, starting with John Finnie.

John Finnie (Highlands and Islands) (Green): Good morning panel, and thank you for your submissions. I want to talk about the current powers, and my initial question is probably for Detective Superintendent McCreadie. I want to ask about investigation, prosecution and perhaps one other point. When police officers are investigating allegations of domestic abuse, in what circumstances might alleged abusers be detained in police custody until first appearance in court, and when might they be released on undertakings with conditions that exclude them from the victim's home?

Detective Superintendent Gordon McCreadie (Police Scotland): Currently, where there is a sufficiency of evidence after officers have conducted thorough inquiries, there are primarily two options available. The first is to charge somebody and keep them in custody. A risk assessment will be undertaken against quite strict criteria that are laid out in the joint protocol with the Crown Office and Procurator Fiscal Service and informed by the Lord Advocate's guidelines, and where there is a sufficiency of risk they will be kept in custody. Currently, about four out of five persons with sufficiency of evidence are kept in custody to appear in court. Affording somebody an appearance in court allows the court to impose bail conditions, which leads to police enforcement of those bail conditions and affords a victim some protection and space to breathe.

The second option involves undertakings. Where the risk assessment is carried out and there is a belief that the risk to the victim is on the lower side of the scale, and certain criteria are met, we can release an accused person on an undertaking to appear in court approximately 14 days after charge, so there is some due diligence and speed associated with that. That affords us the opportunity to impose police bail conditions to inhibit or exclude a person from making contact. Police bail conditions have an impact that is equal to the court bail conditions—it is a criminal offence to breach them. Where there is sufficient evidence, we currently have powers to act.

John Finnie: You mentioned risk assessments. Are those generic risk assessments or are they specific to the circumstances in which the individual has come to the attention of the police?

Detective Superintendent McCreadie: There is a domestic abuse risk assessment; in Police Scotland that is known as the domestic abuse questions, or the DAQ. It is based on academic research and ties into many of our partner agencies' risk assessment models. It informs us about the risk that the victim may face and takes account of circumstances in which we know that there may be an escalation. For example, we know that pregnancy or recent childbirth is a good indicator that a victim may be at increased risk and that if strangulation is used it shows a clear intent of harm towards the person. There are other academically informed questions that make up that domestic abuse risk assessment.

John Finnie: Do any other panel members want to comment on that?

Dr Marsha Scott (Scottish Women's Aid): I will add to what Detective Superintendent McCreadie has said. There are measures that can be taken when the police are involved and those are fairly robustly undertaken in Scotland. However, it is important to point out that the requirements for emergency barring orders under article 52 of the Istanbul convention, as well as some of the surrounding information in the document on emergency barring orders in situations of domestic violence, point out that EBOs should not be restricted to cases of high risk.

The confidence that we, as an organisation that works with victims every day, have in the DAQ is framed by the fact that it is only a risk assessment. It is based on academic evidence that has to do with predicting the murder of women, which is a horrific event but which makes up quite a small percentage of the harm that is done to women and children in the context of domestic abuse. It is a useful tool but not a panacea for preventing risk.

The key point that is made in the Istanbul convention is that EBOs should be seen as a tool to prevent harm as well as something that should

be used in the context of a crime already having been committed. The hands of the police are somewhat tied by having to focus on whether a crime has been committed, whereas an EBO can be used in a wider context.

John Finnie: There will probably be more detailed questions on that aspect later.

Rona Mackay: My question is for DS McCreadie on bail and risk assessments. How successful are those risk assessments? Does it work out most of the time?

Detective Superintendent McCreadie: It is very difficult to say. We know that it can prevent escalation in some cases. Ultimately, given that it is a risk assessment, there is always an element of risk.

Rona Mackay: It is not an exact science.

Detective Superintendent McCreadie: No, it is not. We can mitigate risk and that is probably one of the most important things that we do with a victim of domestic abuse—we do victim safety planning and put in place a trigger that will help protect them and prevent them from coming to further harm. However, there is always a degree of risk.

Rona Mackay: I just want to get an idea of the scale of the success rate.

Detective Superintendent McCreadie: We carry out domestic abuse bail checks. When a perpetrator has been released from police custody, we will visit the victim within 24 hours, signpost them to appropriate services and ensure that some support mechanism is in place. Where possible, we will carry out a check of the premises to ensure that the perpetrator is not present. We know that 3 per cent of those visits convert to a crime being detected, so in 97 per cent of cases we can suggest that, in the first 24 hours, that bail condition is operating effectively.

Stewart Stevenson: I just want to ask the detective superintendent a question about police bail. We are looking at domestic abuse here. I take it that when there is police bail with conditions—conditions that are designed to protect the victim—the victim will be told what those bail conditions are?

Detective Superintendent McCreadie: Yes. It is explicitly clear that the victim must be informed about the bail conditions, primarily so that, if the perpetrator is seen outwith their premises, they know that that is in breach of bail; we hope that it affords the victim a sense of comfort and security and allows them to plan to get appropriate support or to take whichever steps they feel are necessary to move forward in their own particular circumstances.

Stewart Stevenson: Is that a general thing that the police would do when there are bail conditions to protect an individual, outwith domestic abuse but in other similar circumstances? I ask that because I have experience of a case where it was only when it went to court many months later and the fiscal told the victim that it became apparent that bail conditions had been in place.

Detective Superintendent McCreadie: The victim information and advice service is part of the Procurator Fiscal Service. Where a person appears at court, they are notified of bail conditions. The police are particularly crucial in cases of domestic abuse but, ideally, any person who is protected by bail conditions should know.

The Convener: I think that I have probably allowed supplementaries that have pre-empted some of what you were going to ask, John, but do you want to carry on?

John Finnie: This is perhaps a question for Ms Mawdsley. In a situation in which the decision has been taken to prosecute someone, in what circumstances might they be remanded in custody after appearing—perhaps we are not talking about the first appearance in that case—or released on bail with conditions excluding them from the victim's home? What are the factors surrounding that?

Gillian Mawdsley (Law Society of Scotland): The first thing to say is that, obviously, the police will report a case to the procurator fiscal. With, for instance, the perpetrator in custody, the fiscal has to make an assessment of the information that has been supplied to ensure that there is a crime known to the law of Scotland plus sufficient evidence to proceed with a complaint or a petition, depending on whether it is solemn or summary.

At that stage, the case will call in court, be it petition or summary, in front of a sheriff and the Crown will, looking at the factors, decide whether to oppose bail. The question of bail will be a matter for the sheriff. That is the outline of the procedure with regard to the hearing.

You asked specifically what sort of factors would apply when bail is being considered. There are standard conditions of bail, which are that the person does not approach or interfere with witnesses, that they turn up at court on specific dates and so on—there are about five or six standard conditions that are imposed in every situation when someone is granted bail from a court case.

However, if someone is going to be granted bail in a domestic abuse case, I would normally expect to see additional or special conditions. Those special conditions will vary, but they will normally include the condition that they do not approach the victim; other conditions may well be that they do

not enter a particular street or attend a particular locus. These conditions will be spelled out in full and, invariably, if bail is being granted, the sheriff will ensure that all the bail conditions have been spelled out and will also explain the additional or special conditions. I say that because the question of approach or contact can be misunderstood by people. Contact means contact by any means, including social media and texting. The person will not be granted bail unless they accept those specific conditions. That is with regard to when bail is being granted.

Clearly, if bail is being opposed, it may be opposed for a number of reasons—the person's record, the number of times that he has failed to turn up at court, the seriousness of the offence, or the likelihood of reoffending. A number of factors will be put forward to support opposition to bail. From the perspective of the defence, for the perpetrator, points may be put forward as to why bail should be granted. Ultimately, it is for the sheriff or the judge to decide whether bail will be granted.

Obviously, if bail is refused, he will be remanded in custody pending trial and there are clearly time limits for summary trial petitions and solemn cases. If, however, he is granted bail and the Crown is opposed to that, it might well seek to lodge an appeal and he will be kept in custody until that appeal can be heard by the sheriff appeal court. Does that cover some of the information that you were looking for?

11:30

John Finnie: It does indeed.

Dr Scott: That was a comprehensive description of what it says on the tin, but women and children routinely tell us that there is a bit of a postcode lottery in Scotland when it comes to whether special bail conditions will be applied and the robustness of the response when they are breached.

As with EBOs, we do not think that any criminal justice intervention will fix an entire problem, but we are advocating for multiple tools in the toolkit.

A problem that we see regularly is the belief that there is a risk only when the victim and perpetrator are cohabiting. If people are not living in the same house or flat, it is often assumed that the risk is diminished and the courts are much less likely to be robust about either special bail conditions or breaches. However, as I am sure you all know, the highest risk of murder of women and children occurs when people are not living together or when the woman is seeking to leave the relationship.

It is very important that we have emergency mechanisms to protect women and children in their own homes. One of the conditions would be to look at where there are legal and police gaps at the moment, and EBOs might fill one of them.

Professor Mandy Burton (University of Leicester): The threshold for making bail conditions might require that there is a history of violence between the parties, whereas the idea is that you could have an emergency barring order even when there is not a history of violence. The threshold for bail conditions can be higher than for an emergency barring order.

John Finnie: I have a general question for everyone on the panel. Does the existence of children as a result of the relationship complicate any of the decision making that we have discussed?

Dr Scott: You have all heard me talk quite a bit about the influence of keeping children safe on women's decision making and the need to see children as victims of domestic abuse. We recommend that any barring order would need to cover the children and that the barring order would need to be seen as part of a suite of protection orders that would cover children's domestic environment as well as when they are in school settings or other kinds of settings.

We know that some EBOs in Europe do not cover children—

John Finnie: But setting aside what we will come on to, under the existing arrangements does the fact that there are children alter judicial decisions or police decisions?

Dr Scott: There is quite a bit of evidence that courts are reluctant to interfere in custody and visitation arrangements and so might be less likely to impose sanctions in which perpetrators no longer have access to their children. However, with a temporary order, the balance of rights in this situation should come down on the side of safety.

Detective Superintendent McCreadie: The police are very mindful of the safety of children, but when a child is not a direct victim of the crime, we know that there is a debate about access and we have to be mindful of that. We have heard some conflicting opinions in the past. However, where there is concern for the immediate safety of the child, the police will impose bail conditions that reflect that, if that course of action is available to them as a result of a sufficiency of evidence.

Gillian Mawdsley: I echo the point about bail conditions. The additional bail conditions that can be imposed can specifically state the names of children. A general bail condition would also be that the person does not interfere with witnesses and, quite often in domestic abuse cases, it is the

children who have witnessed the abuse and may be required to give evidence.

Mairi Gougeon: I have a supplementary question about emergency barring orders, including those covering children, which Dr Scott touched on. Are there examples of such orders in other countries? If so, how are they operating? I wonder whether Professor Burton has any information on that.

Professor Burton: Austria is the European country that has had emergency barring orders for the longest time—it has had them since 1997. When the orders were introduced, they applied only to the adult victim and the place where she lived. However, more recently, they have been extended to places where the children go, such as childcare centres and kindergartens. That is a specific acknowledgement that it is not just where the adult victim lives and goes that needs to be covered; it is also where the children go and where the carers go to collect the children. There are models in Europe of orders covering both the adult victim and the child victims of abuse.

Mairi Gougeon: Thank you.

The Convener: Mary Fee has a supplementary question.

Mary Fee: I would like a brief clarification from DS McCreadie on the point that he made about the importance of protecting children. How do you determine the level of risk for a child who has not been directly subjected to some sort of violence? Do you carry out a risk assessment? How do you determine the level of risk that a child faces?

Detective Superintendent McCreadie: Police officers make a professional judgment. There is also a significant concern review. A report is submitted on the circumstances of every domestic abuse incident that the police attend, and that report is reviewed by professionals to assess the level of risk. If there is any immediate risk, the police will act at the time to mitigate that risk as best they can. Each incident that we attend is subject to subsequent scrutiny in which the wider circumstances of the case are considered.

Mary Fee: If there is no immediate risk to the child, how long will it take to review the report and make a further determination?

Detective Superintendent McCreadie: I would expect that to be done the next day.

Mary Fee: Thank you.

Liam McArthur: I want to pursue John Finnie's line of questioning. I think that I know the answer to this question, but I will ask it anyway. Realistically, could the powers that are currently available to the police and the criminal courts be amended to plug some of the gaps that have been identified?

Detective Superintendent McCreadie: We look to England and Wales, as we often do, where domestic violence prevention notices are implemented by a superintendent or above and are followed by domestic violence prevention orders. Nevertheless, Police Scotland welcomes the discussion, as we have concerns about the specific legislation involved. Although a victim's safety is critical, the legislation imposes a significant financial burden on the services in England and Wales—I am talking about a figure in the region of £1,000 per order. The timeframe in which a superintendent can authorise such action is also very short—it is 48 hours for a domestic violence protection notice—and that places a burden on the police.

If we were to go down the route of seeking to fill the gap through legislation, we would recommend that the financial impact be considered. I am talking not just about the process of going through the courts but about the administrative burden. We would probably need increased legal services.

Liam McArthur: I take it that, to your mind, a variant of a barring order is essential to plug an existing gap, albeit that you have concerns about how such an order would apply—the duration, the threshold and the cost that would be incurred.

Detective Superintendent McCreadie: As I have outlined, where we have a sufficiency of evidence, we currently have the necessary powers. However, where there is no sufficiency of evidence, the police find themselves working with third sector organisations to ensure the safety of the victim and mitigate risk, and, on a very small number of occasions, that may displace a victim from their home address. Whether there is a need to legislate is a matter for the committee. It is worth noting that there would be an administrative burden on the police, but the police may not be the only competent authority that the committee decides to authorise to seek an EBO if it is so minded.

Liam McArthur: Do other panel members have a view on that?

Dr Scott: Our concern is that all the existing mechanisms depend on women or on victims to carry the burden of establishing whatever the mechanism is for protection. Sometimes there is a financial cost to them, and we have libraries of evidence that the existing provisions are not used, for a variety of reasons. Trying to fix something that is not working in the first place is possibly not the best route forward. What we are looking for is a mechanism that would be significantly different, in the sense that women would be offered the opportunity to say yea or nay but would not be

responsible for making it happen in an emergency situation, as they are under the existing provisions.

Liam McArthur: You have argued for having a suite of measures, and Professor Burton has talked about the lower threshold that allows EBOs to apply in circumstances that do not apply in relation to the current powers. However, there have been examples of EBOs being operated in such a way that the victim does not have a great deal of control over how the EBO is applied, which would to some extent counter what you have said about the advantage of an EBO being that it takes some of the pressure off the woman or the victim.

Dr Scott: We come down on the side of asking women's permission. That is because there is a fair amount of evidence—Professor Burton can probably give you the citations for this—that women are the best predictors of further harm. They are not good at predicting their own murder but, short of that, they can predict further harm. For perpetrators who are not likely to abide by the law, investing in a measure that requires them to do so is, in some victims' minds, a waste, and it makes other people think that they are safe when they know that they are not, so we think that it is an important mechanism that needs to be in place. However, I am also mindful that there is a broad discussion about EBOs and that, of the EBOs that exist across Europe, some require women's consent and some do not.

Professor Burton: Many EBOs do not require victims' consent, and leave it to the police to consult victims but to have their views as non-binding, because there may be some instances where the competent authority takes the view that it is in the interests of the victim for an order to be made, even though it is not what they express their view to be. However, there is a great difficulty with the enforcement of emergency barring orders if they are made without the victim's consent, because in order to enforce an order you would normally need evidence of a breach, and you will not get evidence of a breach unless a victim comes forward, unless you have some other proactive way of monitoring compliance, such as electronic tagging of the perpetrator. In practice, although many European countries do not require the consent of the victim for the making of an order, in reality the co-operation of the victim is required to enforce it.

Liam McArthur: That is not inconsistent with the bill as a whole, where it is recognised that simply waiting for a complaint from the victim before acting needs the necessary trigger and that, in some instances, the victim will be almost the last person to acknowledge that there is a problem that needs to be addressed. In that respect, those shortcomings of the EBO are not inconsistent with other aspects of the bill.

Professor Burton: The EBO has a significant advantage in that it does not rely on the victim having the financial or other resources to seek protection on their own behalf. Of course, there are resource implications and the resource issue shifts around the system. It shifts to the police, who then have the administrative burden of doing it, but the victim does not have to have the financial or other resources to get the protection.

Liam McArthur: As well as responding on that issue, will the panel address the concern that EBOs might be abused? Is that a risk that you recognise? If so, what would the risks be?

11:45

Gillian Mawdsley: Taking it one step back, I endorse what Detective Superintendent McCreadie said. If there is a gap, it is clearly a matter for the committee to decide how to address that. There could be a gap where there is an insufficiency of evidence. That is all that I would say on that issue.

Criminal justice is about to change with the provisions that will come into force in January. They will give the police additional powers of investigative liberation, which Detective Superintendent McCreadie has spoken about. I am not sure what the implications of that could be seen to be in the complex landscape of dealing with domestic abuse.

If the committee is minded to introduce some kind of order, we stress the importance of a determination as to whether it goes down a criminal or a civil route. Looking at the issue from the point of view of immediacy, we have a concern about the period of time before there could be a judicial or independent review of any measure or power that came into force. If a power came into force such that a perpetrator was prevented from going back, how soon would that be subject to an independent review by a judge or a court measure?

One thing that I propose is that, where sheriffs are on call to deal with warrant applications over weekends and other periods, a court process be devised for situations where there is insufficient evidence to proceed or there is an imminency of risk.

Related to that is the question of technology and the administration of whatever online procedures are made available. I do not know what the risk is of those being abused. Clearly, we have problems with bail conditions at the moment. Even where they have been imposed, I am aware of circumstances where the person has been allowed back in breach of them.

That is really all that I can say. I will be happy to supply further information, but I am not sure that we are in the best position to give information about likely abuse, other than to say that we are aware that people can change their minds. Indeed, people can be back together again before the police can even go and tell them about the bail conditions. However, Detective Superintendent McCreadie might be in the best position to comment on that.

Detective Superintendent McCreadie: On people abusing conditions, we have to acknowledge that domestic abuse is a complex circumstance that involves controlling behaviours. Many members of the public would accept they do not understand the complexities, but we see them regularly in the service. We look to the third sector to support victims over the longer period—to inform them of their rights and the fact that they are subject to domestic abuse, and to support people in changing their mindsets if they are in fact victims.

Liam McArthur: It was more about the misuse of EBOs, rather than the abuse of the terms either of bail conditions or of EBOs.

Is 48 hours a reasonable length of time before there has to be court oversight of EBOs, or should we be looking at something significantly longer than that?

Detective Superintendent McCreadie: Domestic abuse already takes up at least 20 per cent of our operational policing time, so it is a significant commitment. We attend a domestic incident every nine minutes. The bill is likely to increase the powers that are available to the police and the offences that are available for charge, so that burden is likely to increase.

If the committee is minded to legislate on the matter, we would ask that any administrative burden be as light as possible. I acknowledge the suggestion about the use of an on-call sheriff, which is not dissimilar to what we do for urgent warrant applications. However, I guess that that is for the committee to consider.

Professor Burton: The evidence is that 48 hours is not enough. England and Wales have one of the shortest durations of police-issued orders, and those are between a week and one month.

Liam McArthur: Is that in situations where the police are making the initial decision?

Professor Burton: Yes, that is when police are making the order. The pilot study of emergency barring orders in England and Wales suggested that the reason why the longer orders were not being applied for was that the police found the process too bureaucratic and the time constraints were too great. It was recommended for England and Wales that the period of the police-issued order be extended to four to seven days, because 48 hours is not enough.

Dr Scott: On the question about where EBOs are abused, as far as I know—after I did a little check with our academic expert, Professor Burton—we have no evidence of significant or systematic abuse of EBOs. It is important for us to put that issue to the side.

It is also really important that we think of EBOs as something that constrains the behaviour of perpetrators or accused and abandon the notion that victims should be somehow held responsible for allowing or not allowing perpetrators back in.

The complexity of decisions about the safety of women and children and of their responses to perpetrators is often not visible on the surface. However, the qualitative evidence on how women make decisions about whether to take a man back shows that those decisions are very often based on an assessment that the rest of the community will not protect the woman.

John Finnie: Detective Superintendent McCreadie, I was a bit concerned that you used the word “burden” in your contribution. I know that Police Scotland takes a very robust approach to domestic violence and that it has changed considerably over the years. However, reticence about additional power is not normally what we hear from the police service.

If there were powers that were better able to control offenders and that would reduce the likelihood of the repetition of offences—clearly, as part of a wider education programme—would you see a benefit connected with having those powers?

Detective Superintendent McCreadie: Whether orders limit recidivism has been a matter of limited scrutiny in England and Wales and possibly beyond in Europe. However, I am probably not the best person to comment on that point.

In respect of your comments about burden, you are absolutely right. For clarity, we are talking about that in an administrative and financial sense. Police Scotland absolutely welcomes the discussion on victims’ safety. We already work very closely with partner organisations to reduce the harm that is caused by domestic abuse.

John Finnie: But surely a preventative approach—and you could view some of these measures as a preventative approach—will ultimately reduce the administrative and financial burden, as you describe it, in the future.

Detective Superintendent McCreadie: Yes, but the EBOs would fall under the category of secondary prevention, because in all likelihood we

would use them when we knew that an offence either was escalating or had been committed. Ideally, as a community, we would want to focus on primary prevention but, as a service, when we become involved, we need the powers that are necessary to protect the public.

Currently, where there is a sufficiency of evidence, we believe that we have those powers. We recognise that, where there is an insufficiency of evidence, we have no power to exclude a person from their home.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Before I ask my main question, I want to pick up on points that Mairi Gougeon and Mary Fee mentioned earlier and to get a bit of clarity from DS McCreadie.

When there is a charge of domestic violence against a perpetrator and a child is involved, is it your understanding that the child is referred to social work and the children's reporter as a matter of course?

Detective Superintendent McCreadie: Reports will be submitted and shared with appropriate services, including social work, when children are present.

Fulton MacGregor: Is it also the usual standard to refer such an instance straight to the children's reporter?

Detective Superintendent McCreadie: In fairness, I will have to check the current process and come back to you on that question.

Fulton MacGregor: Thanks. My understanding is that that is the case, but I thought that it would be useful to get it on the record.

I will ask my main question. Might the introduction of EBOs remove in any way the focus from pursuing prosecution of domestic abuse? Panellists can give a quick answer if they want.

Detective Superintendent McCreadie: Police Scotland is committed to enforcement and trying to reduce the harm that domestic abuse causes. We have a tiered structure in local policing, with an escalation to divisionally based domestic abuse investigation units. The top tier of our response is the domestic abuse task force, which we commonly describe as dealing with the worst of the worst. We are committed to enforcement and that has been outlined since the inception of Police Scotland. I for one do not see that changing.

Dr Scott: Our caveat around our obvious general support for EBOs is that it is very important that we learn from the not very positive experience of the current response that many of our services in England and Wales have had. The feedback that we are getting is that police and other actors in the community see the presence of a protection order as meaning that the job is done. As you are alluding to, that might in fact dilute the robustness of the criminal justice response, so we are very clear that we would not see the presence of such a protection order as intending to inhibit in any way the gathering of evidence, the putting of cases to the Crown Office or prosecution.

In fact, if we have another mechanism for allowing other actors in the community to help provide a plan and safety, the evidence that would be gathered in an appropriate context would be more helpful to a prosecution case. I think that there is some evidence on that in the research that Professor Burton did.

Professor Burton: Yes. It is very clear that emergency barring orders are meant to supplement rather than replace criminal law, but there is concern that they might be used as a replacement.

In Germany, which, being a federal state, has various models, there is some suggestion that, after the introduction of emergency barring orders, the criminal justice response became less robust and cases were not built as strongly. There needs to be monitoring when emergency barring orders are introduced, to ensure that they are used as a supplement rather than a replacement.

There is not that much evidence yet from England and Wales. When the evaluation was carried out, it was only of a short period. We do not know whether protection orders are being used as a replacement rather than a supplement, but that is certainly a concern that ought to be taken into account.

Gillian Mawdsley: The point to stress is that if a crime has been committed, however that crime is defined in the bill, and there is sufficient evidence, the criminal justice system will proceed on the basis that it does at the moment. There are safeguards in respect of bail conditions that can be applied. Emergency barring orders come in when that position cannot be achieved: when there is not sufficient evidence by corroboration or sufficient evidence to constitute a crime. Emergency barring orders would be a route or a measure to deal with such gaps.

Remember that, as has been alluded to, there other existing civil measures, regardless of how effective they are. Interdict and the non-harassment orders exist in parallel to the criminal law system, and they do not diminish the domestic abuse prosecutions that take place at the moment.

Fulton MacGregor: Those were quite useful responses.

Finally, does the panel have any thoughts on how EBOs might be used in situations where a

person is not being investigated or prosecuted for domestic abuse?

Dr Scott: I do not think that I got the whole question.

Fulton MacGregor: How might EBOs be used when a person has not been prosecuted for domestic abuse? I suppose that that is the reverse of my previous question. The evidence might not be sufficient to prosecute, but it might be sufficient for an EBO. The person might not be being prosecuted for domestic abuse, but the agencies, such as Women's Aid and social work, might say through multi-agency planning that there is concern.

12:00

Dr Scott: If EBOs can be made in the context of risk and not just following the commission of a crime, a compelling reason to consider them is that they may serve as a deterrent, particularly if they are of sufficient length for a safety network to be put in place. That goes back to my earlier response. For those accused people or perpetrators who will abide by the law, an EBO may be a deterrent of some strength. At the moment, we rely on a crime having been committed and sufficiency of evidence, but an EBO can be a broader and more preventative mechanism.

Professor Burton: An EBO may be more effective at getting victims to engage with support services, particularly if the process of making an emergency barring order includes a referral to support agencies that the victim would not have contacted otherwise.

Maurice Corry: Do you support the inclusion of EBOs in existing civil court orders?

Gillian Mawdsley: If there is a perceived gap, emergency barring orders in some shape or form can be useful. I stress again that the choice of sanction—whether civil or criminal—is for the committee to think about. My slight concern is about the complexity and the interaction with other forthcoming changes in the legislative process of which the committee is fully aware.

I also draw your attention to article 57 of the Istanbul convention, which relates to the provision of the legal representation and advice that would be required for both parties.

Detective Superintendent McCreadie: The police welcome the discussion. I have concerns about the pace at which the issue may need to be progressed in order for it to be included in the Domestic Abuse (Scotland) Bill, given that there is no recognised model that would fit naturally with Scots law. It would be subject to lengthy discussion, as it would be important to get it right in the first instance.

Dr Scott: I am a fan of getting it right the first time, but I know that Scottish Women's Aid and our allies in the domestic abuse world have been calling for such measures for more than five years. I am concerned that the window of opportunity that the bill provides will close and that we will spend another five years debating how to get it exactly right. I agree with Detective Superintendent McCreadie that there is strong evidence about how we might get it wrong, which we must pay attention to. However, women and children would urge you to take this opportunity.

Professor Burton: From an academic perspective, I consider purely the research evidence from other countries. No one model can be transported to any other jurisdiction, but there is enough evidence from European countries, including research from England and Wales, to show that EBOs can be effective. If you get the process around them right, they can be a useful supplement to the existing criminal and civil justice responses.

Mairi Gougeon: I want to pick up on Marsha Scott's point. Everybody around the table recognises that we have an opportunity; we want to take more evidence, as we think that it is a vital issue that we should consider.

I also want to touch on Professor Burton's point about there being not just one transferable model that we can pick up and implement. I read her submission with great interest, as it is really interesting to see how models in other countries work. If the committee decides to take the matter forward, we will have to look at what model we would like and where we will go next. Even though there might not be one automatically transferable model, is there a particular model that we should aspire to and aim for in Scotland?

Professor Burton: I do not think that there is any one model to aim for. You can pick elements from different models and learn lessons in that way about, for example, what the duration of the order should be, what the level of authority for making an order should be and what the time length of the order should be.

No country gets all the elements right, although Austria is often held up as a particularly good example. In Austria, the duration of orders is two weeks and they can be extended to up to four weeks if the victim applies for a longer order under the civil law, like an interdict in Scotland, for example.

Another feature of the Austrian model is that there is funding for referral to support services, which enables the victim to get the support that they need to apply for the longer-term protection.

However, we should not see emergency barring orders as a complete solution, as the victim might still need additional help to navigate the civil or criminal justice system.

The level of authorisation should not be set too high. Although we have to acknowledge perpetrators' rights and interests, the overriding feature of emergency barring orders is protection of the victims, including children who are victims of domestic violence. The right to life and the right to be free from inhuman and degrading treatment are more important than, or are superior to, the right to property. Emergency barring orders are anyway only a temporary interference with property rights.

If we are looking to take forward such a provision in Scotland, although there is no one model to aim for, we can look at the issues that arise from how the orders operate in other countries and address those points.

Mairi Gougeon: Absolutely. One of the benefits of addressing the issue now in Scotland is that there are other models to look at. We can see what the best operating elements of those are and implement them here.

Dr Scott: I have a list of critical features, many of which I have already touched on.

We like the Austrian model and think that orders need to last for at least two weeks. That view is partly based on research that we are aware of concerning how long it takes for a victim to take up services, for those services to respond appropriately and for everybody in the system to have a better sense of what the next steps should look like.

This has not been mentioned yet, but it is absolutely critical that there be no discrimination in eligibility for the order, so it should not be based on immigration status. We are well aware that victims who are without secure immigration status, who are here on a spousal visa or who have any of the possible permutations of migration status are even more in need of protection than other victims.

There needs to be a clear commitment and systematic referral to support services—I am thinking of Women's Aid services in particular. We know that, if that referral happens within 24 hours, it enormously increases the likelihood of service uptake. I had personal experience of that when we put in place an opt-out rather than an opt-in arrangement with police in West Lothian and the take-up of services went from 40-something per cent to 90 per cent. There is also lots of evidence from other places that that is a critical element.

We want to make sure that the process is free for the victim and—the obvious lesson from England and Wales—that it is free for the police. We cannot create a disincentive for our closest partners to help women and children to find safety by taking the cost of the process out of their budget.

My final point is that breach of the order needs to be a criminal offence.

Professor Burton: In Austria, there is a €500 fine for breach of an order but it is not a criminal offence, which is perhaps the only weakness in the Austrian model. In England and Wales, too, breach of a domestic violence prevention order is not a criminal offence, although the evaluation of the order suggested that consideration should perhaps be given to criminalising any breach. There are potential disadvantages in criminalising breaches of civil orders, but consideration needs to be given to the potential strength of criminalising breaches, because that would make enforcement stronger.

Mairi Gougeon: How do the penalties vary between different countries? Are there lower penalties compared to other sanctions that can be put in place?

Professor Burton: In some countries, such as Austria, there is a fine. In England and Wales, there can be a fine or a charge of contempt of court, which can lead to up to two years of imprisonment. However, in some countries, a breach is a criminal offence that can lead to immediate imprisonment.

Mairi Gougeon: The final point that I want to touch on, which was raised by DS McCreadie and is mentioned in Professor Burton's written evidence, is about the effectiveness of EBOs in reducing repeat victimisation. Am I right in saying that you have been able to get figures on that only from the Home Office?

Professor Burton: Yes. Unfortunately, there is a very limited evidence base in that regard. None of the countries in Europe has evaluated the effect of emergency barring orders on long-term recidivism. The pilot study in England and Wales was the only one to look at recidivism and the impact of emergency barring orders. However, there were methodological difficulties in trying to find out whether emergency barring orders reduce repeat victimisation.

The measure that was used was the number of repeat call-outs that were made to the police after an emergency barring order had been made, which was compared to situations in which there were no emergency barring orders. In the 19-month follow-up period, it was found that, when an emergency barring order had been made, there was a reduced number of repeat calls to the police in relation to domestic violence, particularly in chronic cases in which three or more calls had been made to the police prior to the making of the

emergency barring order. The making of the order seemed to have the greatest effect in reducing the number of repeat calls to the police.

Nevertheless, we must be careful when using the number of repeat calls to the police as a measure of recidivism, because victims might have been put off calling the police again if they were unhappy with a previous response. In England and Wales, researchers talked to some victims about how they felt about emergency barring orders, and they were mainly supportive of their use. That led the researchers to conclude that the victims were not being put off calling the police again because they were unhappy that a barring order had been made.

The evidence base is not great, but what evidence there is suggests that emergency barring orders might have some effect on repeat violence for up to 18 months, at least.

Dr Scott: It is also important to think beyond recidivism and about the prevention of homelessness. As many of you will be aware, we did a piece of work with a team of community researchers in Fife and the ensuing report—"Change, Justice, Fairness: 'Why should we have to move everywhere and everything because of him?'"—pointed out that, in Scotland, in order for women to be assured that they are safe and for the system to respond to their needs, they often have to declare themselves homeless. One of the reasons for that is the failure to have a mechanism in place that allows systems to coalesce around a family in their own home. Hence, 40 per cent of the women in the Fife research survey had been made homeless more than once.

We are convinced that other costs in the system will reduce as a result of such homelessness being prevented and that an overwhelming amount of harm will be reduced through homelessness of women and children being avoided in the context of domestic abuse. There is a huge argument for that approach, which would deliver a fabulous payback in other parts of the system although not necessarily for the police.

12:15

Liam McArthur: Mandy Burton has talked about extending the duration of the barring order to between four and seven days, and Dr Scott talked about two weeks being the optimum duration. It strikes me that there may be a balance to be struck in setting a longer duration with perhaps a higher threshold. If the duration was two weeks, for example, might there be a risk that the disruption that that would cause could put people off applying for barring orders? Although we might want to allow as much time as possible, setting the duration of an order closer to between four and seven days might ensure that barring orders are applied as rigorously as we want them to be.

Dr Scott: The very real problem that you have identified is the capacity of the system to understand domestic abuse. If there is a reluctance to use an EBO because of the risk threshold, that is a training indicator rather than a reason not to allow a longer time for the services to take action and the victims to become confident that they can be safe. We might well find evidence that there is a reluctance within the system to use EBOs, but that would be the result of a long history of privileging the right to property over the human right to safety.

Liam McArthur: Was there any reason why Mandy Burton opted for a duration of between four and seven days as opposed to a duration of two weeks?

Professor Burton: I did not opt for a duration of between four and seven days. The researchers who carried out the Home Office-funded evaluation recommended that consideration be given to extending the domestic violence prevention notice to between four and seven days because they found that fewer domestic violence prevention orders were being applied for than had been anticipated. The researchers asked the police why that was, and their reply was that the bureaucratic burden was putting them off—they did not have sufficient time to get together a case to apply for a longer domestic violence prevention order.

I think that, in my written evidence to the committee, I said that consideration should be given to making the duration at least one week. That seems to be a reasonable length of time to interfere with the perpetrator's rights before the matter is considered by a judicial authority.

Liam McArthur: Does DS McCreadie share that view?

Detective Superintendent McCreadie: Let me clarify what we are talking about here. The domestic violence protection notice that is issued by the police—by a superintendent or above—lasts for 48 hours. If I have interpreted it correctly, the suggestion is that that period could be extended by the police, without judicial review, to between four and seven days. Thereafter, an extension of it up to something in the order of 28 days would still be subject to a court order; so, in effect, the process could still cover four weeks.

Rona Mackay: Does the panel have a view on what tests should be met before an EBO is imposed? Does that bring us back to the original question of risk assessment, and is there a danger of the threshold being set too high or too low?

Detective Superintendent McCreadie: I come back to the policing perspective on the risk assessment: the domestic abuse questions, which I mentioned at the start of the evidence session. That is the basis on which the orders appear to be applied in England and Wales. There is a different terminology for the risk assessment but, in essence, it is the same model.

I will defer to academia on this but, in England and Wales, the test or requirement that appears to be applied is that of any heightened risk. I suggest that, if the committee is agreeable, that is a fair and transparent process. There has to be professional judgment. We know as a service—it is part of our training—that the recognition of someone as a victim, by the nature of what they are reporting, can minimise the perpetrator's behaviours, so they may score very low on the risk assessment. However, if the gut instinct of an officer or another partner suggests that there is a heightened risk, we can escalate the situation, even though it may not meet the threshold.

Rona Mackay: Can you give an example of what heightened risk might be?

Detective Superintendent McCreadie: Each question carries a score. A total of 14 or above would indicate heightened risk and we would refer that for multi-agency risk assessment. In addition, if someone scores three because they are not engaging with us—they are not telling us the truth but we can see other evidence or have heard other accounts from neighbours to say that incidents are occurring every week and they have seen the person with injuries—we can apply our professional judgment, which overrides the score. That is also done by partners.

Rona Mackay: Would previous offending come into that?

Detective Superintendent McCreadie: It is a risk assessment around the victim and their perception. However, the police will take into account the whole circumstances of the report that they are dealing with.

Professor Burton: It is important that the threshold for making the orders is not set too high. If one of the reasons for having emergency barring orders is to plug gaps in the criminal law, it would be counterproductive to make the threshold for making an EBO too high.

In England and Wales, it is not necessary for actual violence to have been used in order for an order to be made; the officer has to have a reasonable belief that violence has been used or threatened and that an order is necessary to protect the victim from violence or a threat of violence. The level of violence that has to be used or threatened for an EBO to be made in other European countries varies enormously. In some countries, violence must have been used before an order can be made, but in many countries psychological and emotional abuse or a threat of violence are sufficient for the making of an order. The evidence is that the latter approach is more effective in plugging gaps in criminal law.

Rona Mackay: Would it heighten the risk if children were present?

Professor Burton: Whenever children are present, they are the indirect, if not the direct, victims of domestic abuse, so that should come into the assessment. If violence is being threatened towards the adult victim of domestic abuse and if children witness that, it is likely that they are also being harmed.

Mary Fee: I want to look at who should be covered by an EBO and how widespread it should be. I want to pose a scenario to the panel and hear your views. Say that we have a woman who is a victim of domestic abuse and is deemed to be at significant risk and has children who are also deemed to be at significant risk, so an EBO is issued. If that woman and her children have a set pattern of behaviour over the course of a week during which that EBO could operate, should the school and clubs that the children attend and the family visits that the woman makes—all of which will be known to the perpetrator—be included in the order? We could argue that, if those are not included, we are further victimising the victim of a crime.

Dr Scott: We have made our position clear. Any of the customary spaces that the woman or children are likely to be in should be covered, because it is not about the place but about the protection around those people in their daily lives. I understand that there are complexities in enforcing that. However, at the end of the day, we need to keep our eyes on the prize of safety. The order should be associated not with the property but with the autonomy and personal safety of the family.

Professor Burton: Historically, we had a similar debate around bail conditions and a phrase was coined: "Where she works, rests and plays." The same applies to emergency barring orders—they should apply where the primary victim and the children work, rest and play.

Mary Fee: That is helpful.

Detective Superintendent McCreadie: Every case would be considered on its merits. If the committee felt that it was necessary to legislate, the applicant would have to offer justification for bringing that under consideration. The justification for inclusion or exclusion would be scrutinised by the authorising authority, whether that be a senior police officer or the judicial review. It should definitely be in the guidance.

Mary Fee: Okay. I am just a bit concerned about the use of the word "justification". It almost implies that the victim has to make a case to justify her or her children going about their daily lives.

Detective Superintendent McCreadie: In my opinion, the justification refers to the police applying to prohibit somebody's movements or exclude them from certain areas. In some cases, that may not be to the children's benefit—it would depend entirely on the circumstances. I return to the point that I made at the outset: this is about victim safety, and that is our focus and that of our partners. Our position is that the matter would be considered on a case-by-case basis, as opposed to all orders in every instance excluding a person from school or other premises.

Mary Fee: I am sorry to be pedantic but, when you say that it may not be in the children's interests, are you saying that the police could, in theory, decide that it would be in a child's best interests not to go somewhere, or have I misunderstood what you are trying to explain?

Detective Superintendent McCreadie: I am trying to say that we would not want to take a carte blanche approach to the matter. We would not want to say that, in every instance, in every EBO, we will exclude or include certain factors. Every case should be considered on its merits.

Gillian Mawdsley: Mary Fee referred to a particular scenario. To go back to what I said earlier, the risk that you are talking about would normally be covered by the not-to-contact approach. I support what Dr Scott said about it being about the person rather than the place, because such an approach would cover school, granny's house or wherever the child might be. That echoes the words in article 52 of the Istanbul convention, which talks about not contacting the victim or person at risk. If you include children in that category, that would cover it.

Mary Fee: That would be a belt-and-braces approach.

Gillian Mawdsley: Yes.

I completely endorse what was said that, if you are minded to introduce emergency barring orders, there is a need to look at various aspects. If it was for the police to impose such orders, I stress again that there would need to be consideration of the nature of the offending conduct against the provisions of exclusion from the house. I return to the comments that I made about independent judicial review at the soonest opportunity being proportionate, in the sense that it would provide equality of arms and ensure that all the implications for both sides would be heard. If you were minded to pursue this route, I would want you to be clear about the process of appeal and for there to be that review mechanism, as that would ensure the safety and fairness that people would expect to be inherent in the Scottish system. That is all that I would say with regard to any period that an order would apply for.

Mary Fee: That is helpful. In an earlier answer, Gillian Mawdsley said that electronic communication should be included as a form of contact. I am interested in whether the other panel members agree with that view.

Detective Superintendent McCreadie: Yes. The joint protocol between the Crown Office and Procurator Fiscal Service and Police Scotland clearly indicates that domestic abuse can occur anywhere, including online, so we would support that view.

Professor Burton: I agree.

Dr Scott: Yes.

Mary Fee: Thank you.

The Convener: The issue of support services has been covered to an extent, but I wonder whether there are any drawbacks to integrating the support services into the system of EBOs. If there are no drawbacks and only benefits, should there be automatic referrals for victims? Professor Burton has done quite a lot of work on the issue.

Professor Burton: Yes. The drawback is that the services must have sufficient funding to meet the need. If you make referral by the police mandatory on the making of an emergency barring order, that is likely to increase the demand for support services and they will have to try to meet that demand out of their existing budgets.

In other jurisdictions, the legislation includes provision for funded intervention centres. For example, the Netherlands, the Czech Republic and Austria all have funded intervention centres to make automatic referral work. The only potential drawback here is that there will not be enough money for the support services to respond effectively to the demand that is created.

In Germany, where referral to support services is discretionary rather than mandatory, it has been found that the victim is more likely to take up the services when the police make a referral. There is pretty reliable evidence that the most effective way to implement barring orders is if there is referral to support services and it is a multi-agency response.

The Convener: Are there any differing views? No—it looks as though everyone is in agreement with that. There are no further questions so I thank the witnesses very much for this useful and helpful evidence session.

Justice Sub-Committee on Policing (Report Back)

12:30

The Convener: Agenda item 4 is feedback from the Justice Sub-Committee on Policing meeting on 26 October 2017. I refer members to paper 9, which is a note by the clerk, and I invite Mary Fee to provide feedback.

Mary Fee: The Justice Sub-Committee on Policing met on 26 October, when it held a round-table evidence session on Police Scotland's engagement with black and minority ethnic communities.

It was the sub-committee's first consideration of the issue and it was very informative. We heard about many of the challenges facing BME communities and the police service. I will not cover them all today, as we do not have time. In summary, more work needs to be done on building trust; on the police service finding ways to engage with all parts of the BME communities to increase understanding and awareness of the issues that they face, not just their representatives; and on providing on-going diversity training for police officers, in particular new recruits, so that they can interact positively with BME communities. Finally, we discussed the negative impact on relationships due to the role of Police Scotland in Home Office dawn raids on houses and business premises to apprehend people suspected of being in Scotland illegally.

The sub-committee heard of the challenges that all public bodies face in relation to employing and retaining a diverse workforce. We were therefore pleased to hear about the work of Police Scotland's positive action team to increase the number of minority ethnic entrants to the police workforce, and we look forward to seeing the evaluation of that initiative in due course.

The sub-committee is exploring how to take forward the suggestion from the Scottish Refugee Council that there should be a review of how Police Scotland and the Crown Office are working with the migrant community in Scotland.

The next meeting of the sub-committee is scheduled for Thursday 9 November, when it will take evidence on the police service's budget planning for the next financial year. I am happy to answer any questions.

The Convener: Do members have any questions or comments?

Liam McArthur: Not in relation to this—I have another point that I want to raise before we go into private session, if that is possible.

The Convener: Yes, certainly.

Liam McArthur: It is about the Scottish Youth Parliament, which met last Friday and Saturday. Maurice Corry and I met members of the justice committee of the Scottish Youth Parliament; it was a very useful session. There was a lot of discussion about the issues that they are prioritising alongside the issues that we have been working on and the legislation that we have been scrutinising. A number of ideas emerged from that.

There was encouragement for members of the Scottish Youth Parliament to contact their MSPs and develop the relationship that way. The convener of the SYP justice committee is a constituent of Rona Mackay's, so there is a link there, but we suggested that we might consider periodic meetings between the convener and the vice convener of that committee and this committee. Certainly, we could share our work programme with them so that they are sighted on what we are looking to do over the next four to six months. I made the offer—I hope not prematurely—that we would ensure that they are sighted on requests for evidence that we put out.

Colleagues may have other ideas, but I suggest those as a bare minimum for trying to enhance the way in which we work alongside the Scottish Youth Parliament.

The Convener: I love the whole attitude of that, but it should be something that we discuss under our work programme and, as members all know, this committee, more than most, is under huge pressure to scrutinise bills—we have three on the go and a fourth on the way. There are real concerns about our ability to do that. However, it is an interesting suggestion and we will explore it further when we move into private session.

Our next meeting will be on Tuesday 7 November 2017, when our main business will be further consideration of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill.

12:34

Meeting continued in private until 12:44.

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