OFFICIAL REPORT
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Education and Skills Committee

Wednesday 22 March 2017

Session 5

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Pàrlamaid na h-Alba

Wednesday 22 March 2017

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EDUCATION AND SKILLS COMMITTEE
9th Meeting 2017, Session 5

CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

DEPUTY CONVENER

*Johann Lamont (Glasgow) (Lab)

COMMITTEE MEMBERS

*Colin Beattie (Midlothian North and Musselburgh) (SNP)
*Ross Greer (West Scotland) (Green)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Richard Lochhead (Moray) (SNP)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Gillian Martin (Aberdeenshire East) (SNP)
*Tavish Scott (Shetland Islands) (LD)
*Liz Smith (Mid Scotland and Fife) (Con)
*Ross Thomson (North East Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Mark Allison (Livingstone Brown)
Morag Driscoll (Law Society of Scotland)

CLERK TO THE COMMITTEE

Roz Thomson

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Education and Skills Committee

Wednesday 22 March 2017

[The Convener opened the meeting at 10:01]

Children's Hearings (Reforms)

The Convener (James Dornan): I welcome everyone to the Education and Skills Committee's ninth meeting in 2017 and remind everyone present to turn their mobile phones and other devices to silent for the meeting.

The first item of business is on the children's hearings system. Last week, we held a round-table discussion on the system, in which one of the themes was the role of solicitors. The committee agreed that it wanted to hear more on that subject.

I am pleased to welcome to the meeting Morag Driscoll, convener of the family law sub-committee of the Law Society of Scotland, and Mark Allison, director of Livingstone Brown. I thank both of you for coming to the meeting at such short notice.

Among the main issues that we explored last week were the advantages and disadvantages of the Children's Hearings (Scotland) Act 2011 reforms and how they have affected the role of solicitors; the perception that introducing solicitors into the system has made the process more adversarial; and the training that is available to, and the registration process for, solicitors to be involved in the hearings system.

I will start with a general question on the advantages and disadvantages of the 2011 act reforms and how they have affected the role of solicitors. What have been the benefits and challenges of the changes to the solicitor's role in the children's hearings system since the 2011 act was implemented?

Morag Driscoll (Law Society of Scotland): I will start for the two of us. I have worked as a solicitor in hearings and I was a children's reporter for four years, so I have seen things from the other side. My colleague will talk more about current practice in hearings.

Part of the advantage of the 2011 act is that it clarified when solicitors should be present in hearings. They are certainly not required at every hearing—we are talking about a minimum number of hearings. The act also guarantees that the system complies with the United Nations Convention on the Rights of the Child and the European convention on human rights. We must not underestimate the importance of that.

Much of the stuff about solicitors that came into the act was the result of case law that had found that, when parents or children were not represented, their human rights were not being safeguarded. Therefore, the act has made our system more compliant without turning it into a formal courtroom adversarial system.

My colleague will talk more about current practice for solicitors and the active role that is being played.

Mark Allison (Livingstone Brown): Ultimately, the question is: what is the solicitor's role? The important point is that we are there to ensure that whoever we are representing participates effectively. The cases about which concern has been raised are a very small minority of cases—we are talking about contentious and adversarial cases. There is a perception that solicitors are making cases adversarial. To look at it another way, it might be that solicitors need to be involved to represent people in contentious cases.

In general, the people whom we represent are parents, children or carers. We do not represent just parents; we represent people who have decided that they need a solicitor to be able to participate. We do not appoint ourselves or tout to represent people; people make the choice that they cannot participate effectively without having a solicitor. We are there to ensure that that happens in a way that is consistent with the ethos. As Morag Driscoll has said, there is already regulation to ensure that that happens. We are also there to ensure that our client's rights are respected, whether that client be a parent, child or another person whom we are representing at the hearing.

The Convener: I know that my colleagues will ask a number of questions. Last week, it was said that 10 per cent of hearings involve solicitors—that was the figure that was mooted. I suspect that a smaller percentage of hearings than that are the contentious cases that were brought to our attention last week. However, the perception seemed to be that it was the world against the child in some cases, that the children's hearings system was not meant to be like that and that that was because of solicitors who were there with parents and others.

Morag Driscoll: I have sat through more than 1,000 hearings. Believe me when I say that they can be very contentious without anybody in the room—apart from me—having any legal qualifications whatever.

Children's legal aid is available in limited circumstances. Children get automatic legal aid only when they face severe interference with their lives, such as going into secure accommodation.

We would never put an adult in a situation where they were to be deprived of their liberty without having legal representation, so why would it be tolerable to do that to children?

First, when a child has been arrested or detained and is being kept in a police station or other place of safety, they must come to a hearing. If that were done to an adult, would we even contemplate denying them legal representation because it might make things contentious?

The Convener: I do not think that the committee is saying that there should not be legal representation in such circumstances.

Morag Driscoll: If you could let me finish, I was about to say that, in addition to that first situation, the only other instance in which legal aid is given automatically to the child is for the hearing on the second working day after a child protection order has been implemented. In almost every other case when legal aid is available, the Scottish Legal Aid Board's merits test must be passed, apart from a small number of cases where there is a means test.

The question whether it is justifiable to spend public funds on providing legal representation has been looked at. We have to be careful. People have a right to a representative, but that representative does not have to be a lawyer—it could be Auntie Jeanie or an advocacy worker. We have accepted that someone who is going to a hearing—whether it is about themselves or their child—should have someone there to back them up. The lawyer's role in the hearing is no different; it comes under the same definition, which is to assist the accompanied person to discuss issues that arise.

Some of those issues require legal tests to be applied. That can involve a legal discussion, but it does not mean saying things such as, "My lord, I put it to you." We are required to follow the ethos of the hearings. The Legal Aid Board requires lawyers who want to do such work to register, to have the competencies and to follow the ethos, and that is monitored.

In my experience, children's panel members do not tend to be pushovers or easily intimidated; they are very dedicated to their work. At a conference, Kenneth Norrie once said, "If the solicitor is getting a bit legal, tell him to shut up." Maybe training is needed to give panel members more confidence to say, "Calm down a bit—it's getting legal." However, all this stuff is already there, ladies and gentlemen.

The Convener: You mentioned discussions being adversarial. I do not want our session today to be adversarial—

Morag Driscoll: I am sorry—I am just passionate about the hearings system.

The Convener: In this session, the committee will ask questions about the benefits of the numbers of solicitors who seem to be appearing at children's hearings and whether there is a better way to operate—that is, without the child being seen not to be represented by a solicitor or anyone else who is as appropriate.

Daniel Johnson (Edinburgh Southern) (Lab): I will explore a couple of the words that both panellists have been using. The committee has a concern because the fundamental underlying ethos of children's hearings is that they are meant to be less intimidating; they are meant to bring out the voices of children especially but to some extent those of parents, too.

You have talked about the role of lawyers in enabling people to participate and in assisting those at hearings. It strikes me that the concept of representation does not always mean that; rather, it can mean that someone speaks in place of someone else. Is there a potential problem of lawyers' voices being heard rather than those of parents or children? Are there things that can—or should—be done to change that model? Perhaps advice could be provided to solicitors. Ultimately, how do we ensure that solicitors do not end up being proxies for the people who are at the hearing? The hearing is meant to enable people's voices to be heard, rather than having the voices of a proxy heard.

Mark Allison: On the role of solicitors, we have to remember that the people whom we represent are largely very vulnerable, and they already have limitations, which arise from their circumstances, on their ability to play this role themselves. I reiterate that we often come into a case because a person feels that they cannot play the role themselves and that they need the benefit of representation.

I should point out that we do not attend as substitutes. I attend many hearings at ground level, and I do not spend my time simply speaking for my client and not allowing them to speak. This is about their being able to say what they feel and their feeling empowered in that respect; our role is to fill in the blanks or gaps.

We have to remember that solicitors' work is not confined to the four walls of the children's hearings room. We do a great deal of work to assist our clients not only to participate effectively but to focus on what is in the child's best interests before they attend the hearing. Our clients receive large volumes of documents that many of them cannot digest properly, or they might want to raise particular issues that might or might not be central or relevant, so we have to spend a great deal of

time enabling them to participate when they get to a hearing, which is normally set for only a short 45 minutes.

It is worth bearing it in mind that the panel members at a hearing are informed of the circumstances as far as they can be before they arrive, but that information is based on a bundle of papers that largely consists of the procedural history and a social work report. The panel members do not know the details of a parent's position, whether there is a dispute or what the legal issues might be. It is difficult, but we have to ensure that those issues are raised when it is proper to do so in a way that does not prejudice the overall ethos.

In my view, the solicitor's role is central. The question is not whether we need solicitors but how to ensure that everyone participates in a collective way that is always welfare centric.

Daniel Johnson: Your last point is absolutely right, but do solicitors consistently take that approach or is there a need to ensure consistency?

You are also absolutely right to say that such people are vulnerable, but does filling a room with 20 professionals help vulnerable people who might find the process difficult or a courtroom intimidating? As well intended as it might be, does the sheer number of people in the room act against the drive to provide a context in which people's voices can be heard?

Mark Allison: On your first question, I hope that the view that I described is widely held, given that the Scottish Legal Aid Board registration criteria make it clear that everyone must sign up to and commit to it. Most such work is legal aided, which—without being pejorative—tells us something about the circumstances of the people who by and large require the benefit of such representation.

As I have said, I hope that everyone has signed up to the approach and, if there is a concern, it is probably more about training. However, the concern is not just about the training of solicitors; when solicitors represent parents, for example, there seems to be an assumed conflict between the child's interests on the one hand and the parents' interests on the other. That is fundamentally the wrong approach.

The 2011 act is a carefully constructed and comprehensive piece of legislation that sets out various legal principles, and the underlying principle is ensuring the child's welfare. The child's welfare is therefore not a separate concept. One arrives at a view of what is in the child's best interests when one goes through the proper process with everyone participating effectively, applying the correct legal test and reaching the best conclusion that one can.

If we simply took a subjective view of what is in a child's best interests, the problem is that I, Morag Driscoll and the convener might well have different views, and that is why the legislation is crafted in the way that it is. I am concerned by the suggestion that, if solicitors advocate a different position, they are inherently acting contrary to a child's welfare. In my respectful view, that is not the case. One should determine what is in a child's best interests at the end of the process.

That is all that I have to say on Daniel Johnson's first question. I do not know whether Morag Driscoll wants to respond to the second.

The Convener: Do you mind if I bring in someone else, and then you can respond?

Morag Driscoll: I was just going to deal with the question about the number of people in the room.

The Convener: Okay.

Morag Driscoll: The Scottish statutory instrument that sets out the rules of procedure is helpful on that point. According to rule 6, the chairing member has a duty to keep the number of people in the room at any one time to a minimum. That provision could be used more creatively to find out whether all the people in the room need to be there and whether we need, for example, three social workers—plus a lawyer for the social workers, which is becoming a slightly worrying trend.

That provision is already there. The act and the statutory instruments are something that we should all be slightly smug about in Scotland. They give us quite a good system.

10:15

Colin Beattie (Midlothian North and Musselburgh) (SNP): During the previous session of Parliament, we had some good sessions on the issue and took quite a bit of evidence, which seems to be fairly consistent. We spoke to young people who had been through the system and experienced hearings at which lawyers were present. Those young people felt that they were talked over and that their voice was not heard—100 per cent of them felt that. A number of people who served on panels raised concerns that a degree of intimidation resulted from lawyers being present. Those people felt that they did not have enough legal experience and that the whole thing ended up with the parents fighting over the child, while the child's rights were not considered adequately. What do you say to that?

Morag Driscoll: Part of the problem is that there is a general distrust of the legal profession, and perhaps a lack of understanding of what lawyers do. The report from the centre for excellence for looked after children in Scotland is quite helpful in some respects. Joint training between lawyers, social workers and panel members—all the participants—would be helpful. We are also looking at making advocacy for children much more widely available, and to a professional standard. Children do get talked over, but that happens in hearings with no lawyer present as well. The role of the advocacy worker in keeping the child informed, participating and not feeling like the bone between the dogs must not be underestimated.

Colin Beattie: Consistent evidence points to quite a number of the participants having concerns that lawyers being present ends up creating an adversarial situation in which the lawyers defend the parents' rights and the child is left swinging in the middle. How do we avoid that?

Mark Allison: I attend many hearings, and I have to say that that is not what I see. I wonder how many of the people who have given evidence actually attend hearings and see what happens at ground level. We know that the vast majority of hearings happen without a lawyer being present. We are the biggest providers of children's legal aid in Scotland—we represent not just parents but children—so I have a significant evidence base from which to comment, and the vast majority of hearings that we attend are not conducted in that way.

There may be a training issue, but I agree with Morag Driscoll that there is a distrust of the profession and perhaps a lack of mutual understanding among all the participants about the different roles that everyone plays. I am not sure that the solution to ensuring that a child is participating effectively in a process is to remove from someone else the right of effective participation. We need to make things work together in such a way that one does not inhibit the other.

Colin Beattie: The Law Society's submission contains the clear statement that

"The presence of solicitors does not create an adversarial forum."

However, evidence indicates that quite a number of people who participate in hearings, including children, feel otherwise.

Morag Driscoll: Do you not think, sir, that the role of the chairing member of the hearing is pivotal? The chairing member is given a considerable responsibility for running the hearing. If chairing members feel intimidated by people at hearings, perhaps there is a perception of difficulty, but perhaps the training of panel members could be improved to give them the courage to say to a lawyer, "Excuse me, Ms Driscoll—this is not an adversarial process. Could you back down a bit?"

Colin Beattie: I have one last question. In your submission, in answer to the final question,

"What is your view on the interaction between Children's Hearings and the courts? Can improvements be made in how they work together?",

you said,

"The Sub-committee is not in a position to respond".

Morag Driscoll: We are not in a position to go out and see how that is working—we do not have the resources to look at that. That is why we did not respond to the question. That is a matter for research and for people who have the skills to look at the issue.

If we are talking about how the interaction works from the profession's point of view, we have a good division of responsibility, in that we do not make hearings decide evidential issues or do their own appeals. On that, my colleague Mark Allison will be better prepared than me, because I no longer go into court these days.

The position is clear. We have sheriffs who are very much aware of and in support of the hearings system. They do not override hearings, but they will send cases back. To me, that works fairly well. At the Law Society of Scotland, we could not say to the question, "Yes, because X, Y and Z," so that is why we did not answer it—but Mark Allison is doing such work.

Mark Allison: There certainly needs to be a proper understanding of the different roles and a proper interrelationship—I do not know whether that is already there—because, from a child's point of view, this is all part of one process. Although children tend to attend only the children's hearings, they have the right to attend court if they wish, and they can be represented in that process. However, that is all part of one process and there are things that could be done to improve it.

For example, I practise principally in the Glasgow jurisdiction, where we have a dedicated court, which we call a children's referral court, so that solicitors who deal with that field build up specific experience in it. There is a practice note that contains rules. The number 1 rule that is set out in it says that the rest of the rules are, and have been set down, in accordance with what is considered to be in the child's best interests, so the focus is very much on that.

I cannot see anything wrong—I see only benefit—in that approach being taken on a wider basis. We chose to take such an approach in Glasgow because there is no specific provision for

it in the legislation. That is a way in which the system can assist. To have a proper understanding of whether a solicitor is assisting or hampering a children's hearing, one has to have a proper understanding of how such a hearing works and what happens in practice.

Liz Smith (Mid Scotland and Fife) (Con): As you know, the children's hearings system has been very much part of the deliberations of successive education committees in Parliament for the best part of 10 years. The challenge that we, as parliamentarians, have is to establish whether the 2011 legislation is fit for purpose. The general opinion and feedback is that it is, but I am interested to know whether you would confirm that view. Alternatively, would you like any changes to the legislation, have we got the guidance wrong or is there nothing wrong with either the legislation or the guidance but we have to do something, either through training, as you have just mentioned, or through other methods? The crucial challenge that we, as parliamentarians, face is to try to improve matters on behalf of those who seek assistance. I am very interested to hear your views on that.

Morag Driscoll: The 2011 act is very interesting and very complex. As one of the people who have been annotating it, I can say that it is an intricate and quite subtle piece of legislation. No piece of legislation is ever perfect from the day that it is passed; it does not last, in a state of admirable perfection, for ever, and tweakings and adjustments are always needed.

From the point of view of the child, one of the things that perhaps we need to do is to strengthen the guidance for panel chairs on keeping the numbers smaller. Sometimes we have a lot of professionals present, but do we need more than one representative from each field—for example, do we need three social workers and two teachers? Could we ask some people to leave the room for a bit? Can we perhaps look at that again? The act does not define "attendance" at a hearing as being in person.

Liz Smith: That was deliberate.

Morag Driscoll: The statutory instrument that allows a child to attend remotely allows that only if the child has been excused. Perhaps it is worth revisiting that, because, if a child would normally meet the criteria for being excused because of the distressing nature of the grounds, or because of fear, if it is a grounds hearing and they can understand the explanation, we make them go—they cannot be excused. Could we allow the child to attend that part of the grounds hearing remotely? Could we make better use of the provision? It is easier to ignore a child in a chair than one on a television screen; people are more aware of the person there on screen. In a Skype meeting, people watch the faces on the screens because they know that the person is not in the room.

Why do we make children who would normally be excused because they were so frightened of going attend grounds hearings? The kernel is there, so could we examine the option a bit more? The Scottish Children's Reporter Administration is very supportive of anything that will help the child to give a view. I assist an advocacy organisation that is looking at the possibility of the child making a recording of what they want to say at the hearing which could be played on a screen. Everybody would really have to listen.

There are things that we could do so that the child does not have to remember. Their mum or the lawyer could help them make a recording to be played at a hearing. We could make more use of the technology that we have. As Liz Smith said, we need to focus on what would help.

I do not think that a lot of legislative change is needed. We need guidance and an ethos of accepting that lawyers care about the system and want the best outcomes for children. People do not do this work unless they believe in the system.

The Convener: I am sure that that is the case: no one would doubt that.

Gillian Martin (Aberdeenshire East) (SNP): What additional training, if any, is required for solicitors who are getting into children's panel work? Is there any provision? Is all the training voluntary?

Mark Allison: There is a set of what are called competencies—criteria that must be met. The individual has to establish that they meet each and all of them. The Scottish Legal Aid Board is introducing a more extensive scheme in relation to satisfying the competencies, and there is an on-going review. There is a strict and rigid regime.

The discussion has been about training for solicitors, but the focus should be on multidisciplinary training for everyone. Just as there may in some cases be ignorance on the part of the solicitor about the approach that a social worker, child psychologist or another professional takes, there is sometimes ignorance, and almost hostility towards, the approach that the solicitor takes. I stress that I am talking about a small minority of cases in which there may be such concerns. We might get to the bottom of that through compulsory multidisciplinary training in which everyone gets a shared understanding of what people's roles in children's hearings are. That is missing and there is no requirement for it to take place.

Because I practise in the field as a solicitor, contrary to what other evidence may have suggested I have an understanding of the

consequences for children of emotional trauma and child protection issues, and of psychological issues that may develop. I deal with such work constantly. Colleagues who do not deal with such work frequently may not have that benefit, so there may be a lack of understanding. Equally, other disciplines require the same understanding of solicitors.

There are some very good panel members, social workers and third-party-agency representatives. We are focusing on the negatives to the exclusion of the positives. This is about achieving consistency: to ensure more consistency we need training across the board. The starting point is acceptance of and appreciation that the role of solicitors is a benefit. Once we have that, we can ensure that our participation guarantees maximum benefit for the child.

Gillian Martin: How is the review of the competencies done? What happens if a solicitor does not meet the competencies? How would that be reported?

Mark Allison: There are three elements to that. An individual must first make an application to the Scottish Legal Aid Board to be in the scheme. The board has to be persuaded that the individual meets the competencies, and they are put on the scheme only when they meet that test.

For ad hoc issues that might call into question whether the individual is continuing to fulfil the competencies, there is a complaints scheme; information is disseminated about that. Complaints should be the last port of call, but there is a scheme for more extreme cases where there is genuine concern.

10:30

The Scottish Legal Aid Board has introduced a regime of automatic checks. Every few years, it automatically reviews files through a process involving peer review, with someone coming in to ensure that people are continuing to meet the competencies. The board is at liberty to deregister a person whom it considers is not doing so. It might be the case that that process should be more structured. As I understand it, however, those steps are already being taken.

Legal aid cases make up the majority of the work that we are talking about, but the same regime is not available for non-legal-aid cases. Representation does not have to be through legal aid, although most of it is funded that way. Morag Driscoll might be able to talk about whether there is a gap and how it might be filled. Perhaps ensuring that an across-the-board approach is taken needs to be addressed.

Gillian Martin: Is my understanding correct, that a solicitor who is not taking the case through legal aid would not have to conform to the competencies?

Morag Driscoll: In the exceedingly rare situation in which the parent is paying the legal fees, it is likely that the solicitor who would be doing that work would also be registered with the Scottish Legal Aid Board. It would be unusual for a solicitor who normally does other work to suddenly pitch up at a children's hearing. Lawyers do not do work outside their area. A private client who did not qualify for legal aid based on their means would, anyway, get a solicitor who would be registered on the scheme.

If you wish to approach the Law Society—

Gillian Martin: The fact is—

Morag Driscoll: We would not want to end up with a double registration scheme, with people having to register with the Scottish Legal Aid Board and the Law Society of Scotland. Having two competing schemes would be unworkable.

The Convener: The issue is surely not whether lawyers are registered with the Law Society or the Legal Aid Board, but that they are registered in a way that ensures that they have the training and knowledge that make them capable of dealing with children's hearing cases. Surely the solution is training before a lawyer is allowed to represent a family at a hearing; the issue is not to do with which body the lawyer is registered with.

Mark Allison: The issue has not received a lot of focus because, as Morag Driscoll said, the occasions on which someone will be privately paying fees and be represented by a solicitor who is not already on the scheme are few and far between.

I make it quite clear to the committee that I, as a solicitor who practises almost exclusively in children's hearings work, do not want solicitors who deal with other types of work coming in and dealing with children's hearing cases. A solicitor who deals exclusively with criminal work should not come in and represent a parent, because they will not understand the ethos of the system, just as a criminal justice social worker should not turn up at a children's hearing and make recommendations about what is in the best interests of a child.

Of course, there has to be regulation. I think that Morag Driscoll is suggesting that we would have a concern about overregulation. Neither I nor other solicitors who actively deal with this type of work regularly have any concern or fear about proper regulation—we feel that we have that. However, if there were a more refined way to deal with matters, we would have no difficulty with that.

Morag Driscoll: The great advantage of having across-the-board training, with all the parties training together, is that everyone gets to know one another. You no longer fear the lawyer that you sat in training with, because you have seen them struggling to understand what you do and have listened while they explain what they do. There is an advantage to the social workers, the teachers, the health visitors and everyone else being trained together, because they get to know each other and end up seeing each other not as labels but as people.

The Convener: There was a lot of discussion about that at last week's meeting, and I think that most of the people around the table took the view that there would be benefits in that sort of multidisciplinary training.

Tavish Scott (Shetland Islands) (LD): Further to Gillian Martin's points, is it the case that it is not impossible for a solicitor with none of the training that you have described to attend a children's panel hearing? If I, as a parent, were to decide that I want my solicitor to represent my interests at a children's panel hearing, and he or she has no training of the sort that you have described, there is nothing that stops that happening, is there? I appreciate that there are few cases in which that happens.

Morag Driscoll: There is nothing that stops a criminal lawyer from doing conveyancing, for example, but they tend not to, because they value their insurance, their complaints history and their professional standing.

Tavish Scott: Yes, but just for the record, is there nothing that actually stops that happening? Do you recognise that there is also a geographical point here? I take the point about Glasgow and Edinburgh. Mark Allison has a practice in Glasgow that does the work, but in lots of parts of Scotland there will not be that expertise.

Morag Driscoll: Do not talk rural solicitors down. I was one.

Tavish Scott: I represent a rural constituency and have lots of constituents who are affected, and my mum used to be a reporter to the panel, so I know this stuff. I am just asking whether there is a difference between the kind of practice that Mark Allison is describing and what may happen in other parts of the country.

Mark Allison: I know that it is not a complete solution, but firms such as mine practise the length and breadth of Scotland, and not just in Glasgow, although I was using Glasgow as an example. There is a duty scheme for representation that comes through the children's hearings system, when someone is identified as requiring representation but does not have it. Ironically, most of the referrals that we get through that system are from more rural constituencies, rather than from Glasgow or Edinburgh. We get a lot of work referred to us from areas such as Dumfries and Galloway and from the Highlands and Islands. I do not think that it is a question about the training of the solicitors in those areas, but there may not be that specialism in those areas because we are talking about very small bars of solicitors. Again, that comes back to ensuring that there is proper representation and equal representation for everyone. It may be an issue that can be looked at, but I do not think that there is a problem with solicitors in such geographical locations being less qualified to do the work; it is simply that there are fewer of them, unfortunately.

Tavish Scott: I agree with that. You mentioned cases in which legal aid is applied for, or that are eligible for legal aid, in the 10 per cent of hearings at which solicitors are present. Do you have any numbers? Are 90 per cent of that 10 per cent legal aid cases, or is the percentage less? I think that you said that it was the majority in your practice.

Mark Allison: In our practice, the proportion of cases that are legal aided is in the region of 85 per cent to 90 per cent. However, as Morag Driscoll has pointed out, by the time we get to that funding we have already had to address a means test and a merits test to justify it.

Tavish Scott: I understand that. Your firm may be representing a child or a parent. Is it your experience that there are other solicitors at the hearing representing other parties in that hearing?

Mark Allison: There can be. The people who are predominantly represented by solicitors are the parents, and the next group would be the children. In Glasgow, we do directed option petitions rather than permanence orders with the authority to adopt, because that is the practice that the local authority follows, so when prospective adopters are referred to a solicitor, that solicitor will then attend every single children's hearing for the prospective adopters—sometimes, slightly unusually, without the prospective adopters even being there. There is a scheme for that.

I do not think that it is anything to fear, but one of the areas where I feel that the system may be lacking is in prioritisation of kinship placements. My concern, based on my practice, is that kinship is often viewed as a solution only when we have absolutely excluded rehabilitation. It is a long-term solution, but it can be thought of as a short-term solution while we are inquiring as to whether parents can care for their children appropriately or whether there are problems. I feel that that is missing from the system, and the only circumstances in which those relatives are able to participate is when they can show that they have, or have had, significant involvement in recent times. There is a small group of relatives, including

grandparents and others who offer to be the alternative carer, who are probably not represented as often as they should be, because they have a viable option. The legislation tells us—although it is not expressly set out; perhaps it should be—that before long-term foster care, the port of call should be kinship care. That is one area in which there is a lack of focus.

Tavish Scott: That is helpful in terms of things to take forward. On the point about a solicitor being present at a hearing to represent one party, is it your experience that that can lead to one of the other parties, such as the other set of parents or even the social work department, also having a solicitor present? In other words, is the number of solicitors who are going to hearings growing?

Mark Allison: The legislation sets out who has the right to be represented: relevant persons and the child.

I have had a handful of experiences in the Glasgow jurisdiction when the local council's solicitor has appeared to represent the social worker. I have expressed concern about that, because there is no automatic right for them to be represented. A social worker, for example, attends a hearing as an information source—they are there to equip the hearing to make a decision. However, a parent's involvement is slightly more complex, because they have their own rights, which may—or may not—be in conflict with the child's interests.

The situation is, as Morag Driscoll will be aware, more of an issue in Edinburgh because of a judgment that was issued arising from a finding of contempt against a social worker. There is now in that jurisdiction focus on and concern about that aspect—certainly in the City of Edinburgh Council in terms of ensuring that its social workers do not end up in that position again. It would be an unfortunate consequence if the system is being used to enable social workers to be represented because, as I say, they do not have a right to be represented at the hearing.

Tavish Scott: I do not want in any way to put words in your mouth, but is the small number of cases where more than one party is being represented legally growing or are the numbers stable?

Mark Allison: It is quite difficult to say. We are looking at the system as though the 2011 act introduced representation. It did not; it introduced funding for representation. There has always been representation. The issue was that there was not funding in every case, so representation was not consistent.

I am not well placed to comment on the issue because, historically, we used to represent clients whether or not there was funding because it was part of our overall work. It is probably the case in Glasgow that there can be a greater level of representation, but I stress that that is in cases in which the view is taken by a parent that they need representation, the solicitor considers that need to be justified and the Legal Aid Board confirms that the test for that representation has been met. One gets to that stage only when such numbers of people being there is justified.

The Convener: Tavish, we may be able to get figures from the Scottish Legal Aid Board to see whether there has been an increase in such representation over the past couple of years.

Tavish Scott: Indeed. I entirely take that point, convener.

Both panellists have made strong—and correct—arguments about chairing skills. Morag Driscoll has described that point well. In your experience, do panel chairs say, "We've had enough of this legal stuff. Stop"? Does that happen in practice, Mark?

Mark Allison: I stress, before I give examples, that we are talking about a minority of cases. I have attended hearings at which I have been told "You're not in the sheriff court." I was even at a hearing where a person set out what they thought was in the child's best interest and I pointed out what the test of that was and how a decision on that is arrived at. I was told "Well, I don't care about the law. The sheriff can fix that." Those are extreme examples. However, such extreme cases do not exist just because solicitors behave badly. Multidisciplinary collective training is the way forward. If we label one group as the problem, that will not do anything to foster or improve relations.

Those are rare examples. The vast majority of panels are first-rate and do their job well. We are talking about volunteers who give up their time and I have the utmost respect for them. Bear in mind that the system was designed with the Kilbrandon report largely for child offenders; the initial focus was not on care. Panel members are being put in an unenviable position because they have to deal with increasingly complex cases in the care sphere. That complexity is why solicitors are needed, and the increasing complexity also makes it difficult for them. There is no doubt that they would benefit from training. That is not to say that they are not doing the job properly, but who would say no to training that makes it easier for them to do their job?

Johann Lamont (Glasgow) (Lab): My understanding is that panel members already get first-class training. All the panel members who I know and who have spoken about going through the process have commented on how good the training is.

Mr Allison, you said that you represent a mix of people on panels. What proportion of those folk are parents?

Mark Allison: The majority of people who we represent are parents. Some dedicated firms largely represent only children—

Johann Lamont: Do solicitors in the panel system generally represent parents?

Mark Allison: That is a different question. The majority of people who my firm represents are parents, but a huge minority—perhaps 25 per cent—are children. In other firms, the splits will be different.

I am not sure that I have access to information about who is being represented across the board. I presume that representation is more frequent for parents than for children. However, that is an argument in favour of ensuring that children know that they have the right to be represented when they feel that they need to be represented rather than an argument that parents should not be represented.

One of my few concerns about how the 2011 act introduced funding is that it did not introduce automatic funding for children who have the competence to instruct a solicitor. We are generally talking about someone who is age 12 or above. If a view is taken that someone below that age has capacity, they can instruct a solicitor, but that is a value judgment. That is one tool that could be used to assist in dealing with the vexing issue of how we ensure that a child is not lost in a hearing, because we can ensure that they can participate effectively by not only being there but by having their say. It is not only about the children's hearings. With older children, we are talking about children who have the right to participate more fully than just by saying what they want to happen.

10:45

The Convener: The question was about the percentages.

Johann Lamont: That is maybe something that we can find out.

I attended a hearing recently and I was involved in the hearings system in a previous life. My sense is that having a lawyer speak for someone does not necessarily mean that they are actively participating; it might actually mean that they are quite passive in the process. Might youth workers and advocacy workers have skills that a solicitor might not have?

Morag Driscoll: The work that the Scottish Government is doing to introduce a standard for advocacy workers is already taking care of the issue. There are times when a child needs legal representation, but most children who are able to work with someone to express a view would probably benefit more from lay advocacy, because lay advocates have time that solicitors do not.

For most hearings, the children do not need legal knowledge; it is about understanding the process and taking time to go through the reports, the recommendations and the process of forming a view, which is what we want from children. My feeling is that the more children have advocacy support—which is already in process—to a good standard, the better. It does not matter if the mum is represented by my colleague; if the child has a good advocacy worker, they are on a level playing field.

Johann Lamont: I am not so sure about that, but that is an issue to look at.

I will return shortly to a point that Mark Allison made about vulnerability. Before I do so, I might be getting this completely wrong, but my sense is that a solicitor's job is to make the best case for their client and to make the best justification for the client of the circumstances that they are in, when in fact one of the strengths of the hearings system in the past was that a parent could even refer their child to it because they needed help and support. In those circumstances, they might legitimately say, "I have a problem and I'm uncomfortable with things that I've done, but I need help and support." From our discussions last week, my sense is that a solicitor would gently touch their client on the arm and say, "Don't say that." Am I wrong to suggest that?

Mark Allison: Respectfully, I think that that is wrong. It has to be remembered that solicitors generally become involved in cases where a divergence is already emerging between the care plan and what the parent wants. We will often not participate at a children's hearing when, for example, social work has become involved and there are issues that the parent accepts and can resolve. We do not take a combative approach to everything—far from it. One takes that approach only as the last resort. In effect, the starting point is to ensure—

Johann Lamont: But what is the last resort? Is it the possibility that the child will have compulsory measures of care, which the parent wants to resist?

Mark Allison: No. We are talking about a quasi-judicial panel. We cannot lose sight of the powers that hearings have and the decisions that they can make. Those include deciding that a child is to be removed from a parent's care against the parent's wishes—or, indeed, against the child's wishes—and also preventing any contact, albeit only for the

duration of the compulsory supervision order, but setting the child's care plan in a particular way.

By and large, the cases in which we become involved relate to scenarios where a care plan of care outwith the parent's care is being progressed. When we represent a parent, that is when the parent feels that they have tried to resolve the issues but have not done so to the satisfaction of social work or the professional agency. They feel that this or that has gone wrong, which is why they need representation. We are talking about a minority of cases.

To come back to your earlier point, I do not feel that a parent is inhibited from participating in a hearing because a solicitor is there. As I said, parents are still encouraged to speak, and a good-quality chairperson will want to hear from them directly. However, there is a difference between someone having their say—what you refer to as participation—and participating effectively. The latter concept is far wider, because we are talking about complex cases involving complex circumstances, in which a lot of work has to be done even before the parent gets to the door of the children's hearing.

Johann Lamont: So you think that, at the point at which a serious decision is going to be made, which is deemed by the panel to be in the interests of the child, it is necessary to involve a solicitor who will take a view on the basis of protecting the interests of their client, even if that is not in the interests of the child.

Mark Allison: Again, with respect, that misses the point of the legislation. In the legislation, the paramount consideration is what is in the best interests of the child, but that is not a tangible concept. In any case, there is not one answer to the question of what is in the child's best interests. The rules and the rigid regime that are set out in the legislation are aimed at guiding panel members to arrive at their decision on the basis of all the information that they get and everyone's contributions.

Johann Lamont: However, your professional motivation will, rightly, be to protect the interests of your client. If your client wants to keep the child with them but the hearings system is likely to say that that would not be in the best interests of the child, your job is to make the best case possible for that not to be agreed.

Mark Allison: I would hope that the decision would be made at the end of the hearing, once my client—a parent—had participated effectively. The starting point is not that the child's interests and the parent's interests are in conflict; that decision might be arrived at, but that must be decided only once everyone has been able to participate fully in the process. There may be cases in which I am instructed to advocate for something different, but it must be remembered that I am a professional, not a mouthpiece for my client.

Before I go into the hearing, I give my client advice. I digest the information for them and tell them what the issues are, and we see whether what they are looking for is feasible. I do not go into a children's hearing saying, for example, that, although my client has been found to have sexually abused a child, he must have care of the child. That is an extreme example, but it is not our job simply to advocate for the client's position at all costs, although that is our primary role.

It must be remembered that, at a children's hearing, solicitors are in a unique position because we are the only people who have to both represent our client—that is our primary duty—and act in accordance with the best interests of the child at all times. No one else has that dual obligation at a children's hearing.

Johann Lamont: It feels to me that there is a conflict there, and I am not sure how it can be resolved.

You said that all parents in the hearings system are vulnerable. Do you think that that is true?

Mark Allison: I do not think that I said that all parents are vulnerable, but many of the parents who find themselves in the system are vulnerable. I am using the term "vulnerable" in the broadest possible sense. Ultimately, in care cases, by their very nature, there is some perceived deficiency in the parent's ability to care for the child. There is a vulnerability or an issue that requires to be addressed.

Johann Lamont: Would you define a parent's neglect of their child as a vulnerability?

Mark Allison: It would depend on the cause of that neglect.

Johann Lamont: I understand that. I understand that some people are totally overwhelmed by their circumstances and are unable to look after their children. The hearings system is geared up for that. However, there seems to be a presumption in your mind that all parents are vulnerable. I will check the *Official Report*, but I heard you say that all parents are vulnerable, and all parents are clearly not vulnerable. There are perfectly competent, able and articulate people who are very neglectful of their children, and it is not in the interests of the children to be with them.

Mark Allison: Equally, I do not think that all parents are neglectful of their children.

Johann Lamont: Of course they are not.

Mark Allison: We are talking about children having been referred because there is an issue,

and the focus is very much on care grounds—a lack of parental care—or offence grounds. Remember that a child can be referred to the children's hearings system for all manner of reasons. The 2011 act sets out, quite properly, an increased number of grounds that are particularised to identify what the issues are.

My point is that the people who meet the test of representation—the Scottish Legal Aid Board's merits test—will largely be vulnerable. If I want to persuade the Scottish Legal Aid Board that my client's case necessitates representation, I have to answer four questions. I have to show, first, that the case is factually complex; secondly, that there are legal issues; thirdly, that there is an issue with my client's ability to understand and digest documents; and, fourthly, that there is an issue with their ability to put their point across. I have to address the very question that you are putting to me in order to justify being there in every case. Those issues are addressed.

I am concerned that there seems to be a presumption that solicitors going into hearings is a problem. Although the convener said that that is not the committee's view, I am concerned that that seems to be the focus. I think that the focus should very much be on accepting that there is a natural tension between parents' rights and children's rights and that we must ensure that we respect all those but prioritise the children's interests in a way that protects the different interests.

The Convener: I ask that answers be kept brief, as we are coming to the end of the evidence session.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Following on from Johann Lamont's line of questioning, do you accept that there are occasions when the presence of a lawyer can be an issue with regard to the ethos of children's hearings?

Morag Driscoll: Are you saying that, just by the nature of being a solicitor, they are a problem?

Fulton MacGregor: I am talking about a solicitor at a children's hearing. The point that I want to develop is that, for me, it depends on who the solicitor represents. You made a good case earlier with regard to a solicitor representing a child, which I have had experience of. It is fair enough for a solicitor to represent a child in a hearing, but it is a problem if a parent who has maybe been accused or convicted of an offence is represented by a solicitor in a hearing. Mark Allison referred to an example of serious allegations being made about a parent. The ethos of a hearing means that a child can hear, for example, a social worker, teacher or panel member saying that they are there to protect the child, but there could be another adult in the room who might seem to the child to be saying something different.

I, too, said on the record last week that I do not think that there are no circumstances in which parents should be represented legally. However, the question is where that representation should take place. To return to my question, do you think that there are circumstances where the ethos of a children's hearing is undermined by the presence of a lawyer?

Morag Driscoll: You are perhaps conflating two different things. If the presence of someone at a hearing is causing such distress to a child—for example, it might be a parent who has been convicted of some form of maltreatment, such as physical abuse or sexual abuse—there is provision for that person to be excluded for the part of the hearing involving the child. That person and/or their representative will therefore be told to leave. We call hearings where that happens split hearings, and they happen quite a lot. In such a hearing, the child can come in without a certain person being present and talk to the hearing, with or without the help of a representative, but we would hope that they would have an advocacy worker or another representative. The child can then be excused from the other part of the hearing, the problematic person can come back in and they will be told what happened in their absence.

We therefore have provision to reduce the number of people who have a right to be at the hearing and we also have provision to exclude a relevant person and their representative if their presence will make it impossible for the child to speak. We could make that a little easier to do because, at the moment, someone can be excluded only if their presence will make it impossible for the child to speak. We must remember that, by excluding someone, we are temporarily removing their right to be present in the hearing, so we must strike a balance in that regard.

However, a child does not have to be intimidated by being in a hearing with an abusive parent and their representative; the child can leave the room while they are present and can ask for them to be excluded when they go back in.

Fulton MacGregor: I accept that there is that provision and that it can work quite well. However, like you, I have sat through hundreds of hearings and my experience is that there are many instances when that provision is not used. For example, some things can develop during a hearing, particularly if it is an early hearing, and things can come out that nobody suspected. You have probably been in situations like that when the

reporter has had to intervene, but by that time it can be too late.

As I said, I do not dispute that parents should have legal advice when serious decisions are involved, but I have to agree with Johann Lamont's line of questioning. The children's hearings system is for the child, so I think that we need to find another way for parents to be represented legally that works.

Morag Driscoll: There might not always be a need for legal representation, but the advocacy services for parents across Scotland are inadequate.

11:00

Richard Lochhead (Moray) (SNP): Many of the questions that I was going to ask have been asked by other members. The only remaining one is to ask what forum exists where all the players can get together and tease out the issues that we have been discussing today. You have said that there could be improvements to increase the mutual understanding of different roles and so on. What forum exists to address those issues?

Mark Allison: The problem is that there are different representative bodies for the different participants, so there may not be such a forum at present. What is required is on-going dialogue—as part of the work that is being done—between the agencies, probably with a view to creating a forum to allow that to happen.

Richard Lochhead: Should there be some kind of forum?

Mark Allison: I hope that I have been clear that there should be interdisciplinary training, so that we all have a proper understanding. That might not solve every problem, but it will go some way towards solving some of the concerns. If it does not resolve things, it will at least shine some light on what the problem is. There is an element of ignorance about the different roles, and it is difficult to unpick that without there being at least an attempt to resolve it first.

Morag Driscoll: The children's hearings improvement partnership might be a good place to start.

The Convener: Is the Law Society represented on that?

Morag Driscoll: No.

The Convener: Maybe there is a wee bit of work to be done there, then. Sorry, Richard—do you want to come back in?

Richard Lochhead: No. That is fine.

The Convener: The last question is from Ross Thomson.

Ross Thomson (North East Scotland) (Con): You will be pleased to hear that it is a short question, convener. It follows on from my colleague Liz Smith's question about potential improvements. The Law Society's submission states:

"there are still barriers to participation which could be improved upon."

The final bullet point mentions

"Requiring those submitting reports ... to provide a simpler version for the child",

which would

"make it easier for children to understand the information being provided".

I am new to the Parliament in the current session, but I know that there have been discussions about that. Can you talk me through what is happening in relation to the reports? Are the issues to do with the language, the presentation or the volume? What needs to be done to improve the reports and what can the committee do to help with that?

Morag Driscoll: When I was a reporter, I would ask the professionals for reports for a hearing, and I would get a 36-page social background report from social work, which took them about 18 hours to prepare, poor things. I might also get a report from the school, one from the health visitor and another on mum's drug counselling or whatever. Those reports are written for the hearing—for the panel members—but copies are sent to the children from the age of 12.

Years ago, I suggested that each report writer be asked to do a simple summary of no more than one page for the child, covering what the report says and what the recommendations are. It could be as simple as, "Billy, we're very worried that your mum is having a hard time looking after you properly and we think you need extra help, so we're going to suggest that you live with your granny for a bit," or, "We think you should stay at home with mum." They would be very simple, and they would not cost anything, because the report writers are already doing the reports. The teachers would be fab at it.

I also suspect that, for many parents who have a learning difficulty or a problem with English, that would be the report that they would read. In that way, the child would get something for the hearing—we could send it to the younger ones—that would tell them quickly and simply what the report says. At present, the job of going through the reports with an adult client is tough, and going through them with a youngster is really hard.

Mark Allison: That would also protect the child from the content. When we prepare a report for the benefit of a panel, it contains all the

information, warts and all, and the grounds, which are the issues that led to the child coming before the children's hearing. There might be an issue about protecting children from that information. The reports are largely prepared on a rolling basis and part of them is a chronology, so every event goes into them, negative or otherwise. Often the events are negative, because the purpose of the reports is to highlight those things, and the child is exposed to that.

We have heard about 36-page reports, but in complex cases I have seen social work department reports of over 100 pages. How is a 12-year-old child supposed to digest that?

Ross Thomson: Are you saying that that could be done quite quickly without having to—

Morag Driscoll: It could be done immediately if we said that any report that is submitted should have a short age-appropriate version for the child, unless they are unable to understand even that.

Tavish Scott: That could apply to MSPs as well. [*Laughter*.]

Daniel Johnson: Speak for yourself.

The Convener: I will not comment on that.

That is the end of the session. It seems as if the witnesses have had a bit of an interrogation. We do not think that solicitors by their very presence are bad, but the committee's role is to look at whether there is anything in the children's hearings system that can be improved, and that is why we are asking the questions. Thank you very much for your evidence today. I close the public part of the meeting.

11:05

Meeting continued in private until 11:31.

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