**Changing the court processes in England and Wales**

Webinar held on 21st September 2022

IAN MAXWELL:

Our international tour starts very close to home as we are looking at current proposals for changing the family courts in England and Wales.

In subsequent sessions, we will travel to Sweden, the Netherlands, Israel, Canada and the United States to hear about changes that have been introduced in these countries and consider whether they could work in Scotland.

We're very grateful to the Scottish law firm Harper MacLeod who have sponsored the series on the basis that it will be invaluable for all practitioners in the field of family law to understand what other jurisdictions are doing to improve and protect the well-being of children and parents living as separated families.

We have Amanda Masson from Harper MacLeod to respond to the presentation from Helen Adam.

At Shared Parenting Scotland, we're doing two main things.

Our helpline. local group meetings, website, publications, WhatsApp groups and training programme are all intended to support the many separated fathers, mothers and other family members who contact us.

Our other objective is to campaign for better support for separating parents and their children to help them deal with the consequences of separation and to keep both parents fully involved with their children wherever that's possible.

The Children (Scotland) Act 2020 and the Family Justice Modernisation strategy, once they are actually implemented, will make some positive changes in Scotland.

But Shared Parenting Scotland believes that a far more fundamental transformation is needed to take much of the dispute resolution out of the courts and provide support more quickly and less expensively and above all to put the interests and the needs of children uppermost.

Most of today's audience are family lawyers so I want to reassure you that we're not trying to destroy your jobs. We're suggesting that the emphasis should shift from adversarial court action to supporting your clients through a decision making and dispute resolution process that will be far less damaging both to them and to their children.

Our main speaker today is **Helen Adam**, who started as a family lawyer and is now a senior mediator and one of the foundation trainers for the Family Mediators Association in England and Wales. She lectures regularly on family mediation, including training new family court judges at the Judicial College.

She will be talking about what has been happening recently south of the border in response to the “What About Me” report, which was published in November 2020 by the Family Solutions Group.

Helen chaired that multidisciplinary group of professionals, which was set up by Sir Stephen Cobb in 2020 to consider what can be done to improve the experience of children and families before any application is made to the family court.

So let's now move to Helen, who will tell us what is happening as a result of that work.

HELEN ADAM

Thank you for inviting me to come and launch this series World Series - it sounds terribly grand. It's lovely to be doing something in Scotland professionally for the first time ever.

This session is called "Changing the court processes in England and Wales". The focus is actually how to change the process as people come towards court, rather than once they get into court.

There is a general consensus here that too many parents are ending up in court with problems that needn’t be in court. And so the focus of the Family Solutions Group, and the work that I've been involved in, is in how to come alongside families and respond to their needs with the right support.

Clearly there are going to be cases where there are safeguarding issues or other vulnerabilities who need the court process and should be there.

But this is largely addressed at those families who have fallen out and for one reason or another end up in court.

REFRAMING SUPPORT FOR FAMILIES

How can our systems operate better so that those families get the support they need, without making things worth worse with hostile court proceedings?

The reforms have a starting point in 2018, when the President of the Family Division set up the private law working group to review the child arrangements programme, which is the terminology that we use for any application in England and Wales concerning the arrangements for a child.

They published their report in May 2019, there was a consultation period through 2019 and then the final report was published in April 2020.

Sir Stephen Cobb, who chaired the Private Law Working Group, called the report: *“The time for change. The need for change. The case for change.”[[1]](#footnote-1),* the title of which speaks for itself.

I was the mediator member of that working group amongst a very impressive array of judges, civil servants, academics, all of whom have a full lifetime experience of professional work in the court system.

I said to Stephen that if the idea was to catch families before they ended up in court, then there needed to be a different group of professionals around the table who have experience of working with families outside of the actual court process, to understand their needs.

So we pulled together a multidisciplinary group, called the Family Solutions Group and we worked throughout 2020 to come up with our report, which we called “What about me”[[2]](#footnote-2), with a picture of a child on the front.

It was about reframing support for families following separation. Before we came up with our report, though, the Ministry Of Justice published a report which had been some time in the making, the “Risk of Harm Panel report”[[3]](#footnote-3) addressing the concerns highlighted by an awful case, about the failings in the system for victims of domestic abuse and the changes that were needed.

This reportadded to the strong calls for change. Victims of abuse were not being safely managed, the system was broken and putting them at further risk of abuse through the court system, the different professionals involved with families were all working in silos, there was no integration, there was no coordination, it was very confusing and the system that was set up to try and direct families towards mediation was not working.

MEDIATION AND MIAMS

We have here in England and Wales a system in which when somebody wants to make an application to court, they are expected to attend a MIAM (Mediation Information and Assessment Meeting). This is a one-to-one meeting with a mediator.

The idea is that instead of just issuing a court application, you go and see a mediator, you talk through your issues in confidence and your needs are assessed. If mediation is suitable then the other person is invited along. Then you both mediate, and the case is diverted from court.

In practice, the system did not work for a number of reasons, a key one being that mediators can’t get mediation off the ground if they only ever see one person. Many of the ‘other’ person in the issue to be resolved wouldn't come.

So the narrative was MIAMS don't work, mediation doesn't work and we need to have a radical rethink.

So what has been the response to all these various calls for change?

PATHFINDER APPROACH

First of all, the Ministry of Justice set up some Pathfinder pilots. They established a reform group in 2020 and they worked over quite an extended period, a year and a half, to put together a pilot which would offer an integrated approach with information sharing between agencies, and with a greater emphasis on investigation rather than confrontation. The idea would be for it to be much less adversarial, to use different language and to be more problem solving with all the professionals working together.

There was a really inspirational person from the Nuffield Family Justice Observatory on this group, constantly calling for the voice of the child to be embedded at every stage.

So there is an emphasis on getting the children consulted and their views taken into account in the process. The MOJ have worked for some time to organise these pilots, one in Bournemouth, the other in North Wales. . They were launched in March 2022 and the plan was to roll them out across the country but they're waiting to see how they go

The aim I think, subject to the data, is to make all family courts modelled on the Pathfinder model of a more investigative and less adversarial process.

BEFORE COURT

The point that was important for us on Family Solutions Group was that these pilots make no provision for anything upstream of an application to court.

The MoJ responsibility starts at the point that an application is made. And so there was nothing built into the budget or the planning or anything to reach families with information or guidance or signposting before that application to court.

So we wait to see how the Pathfinders develop but it's not catching people before the initial application to court.

MEDIATION VOUCHERS

However, following the pandemic, and with a real crisis in the numbers turning court and a growing backlog the then Lord Chancellor Sir Robert Buckland introduced the mediation voucher scheme in 2021.

This is a non means-tested automatic contribution of £500 towards mediation costs if any issue concerning a child is discussed. It was launched with the idea of it just going for a short time and then being reviewed, but it has continually been extended, and there have been over 10,000 mediation vouchers issued.

The findings are that around 75% of cases are having all either all or partial issues resolved.

The data suggests that around 50% of those who go to mediation and use the voucher say they would not have opted for mediation had there not been the voucher scheme in place.

So it is definitely working in the sense of diverting some families into mediation. The scheme is now going out to tender as of March 2023, and we take that as quite an encouraging sign that it is likely to be continued.

PRIVATE LAW WORKING GROUP

The other very recent change is that the Government put together a small group called the Private Family Law Early Response Working Group formed in August 2022 with the focus on reviewing MIAMs and revising the exemptions for MIAMs, so that more cases would be able to go to mediation. They are looking at the dynamics of why families opt in and opt out and how the exemptions work. So that has been helpful.

SETTING MEDIATION STANDARDS

The Family Mediation Council also addressed some concerns that the Private Law Working Group raised. I don't know if you have a similar issues in Scotland, but there were concerns that there aren't enough mediators, there were concerns about different mediation governing bodies dealing with complaints differently, but also that there weren't established MIAM standards.

The FMC have now issued their standards and now deal with all complaints as the overarching governing body.They have also reassured the MoJ that there are enough mediators.

CHILD INCLUSIVE MEDIATION

We are really trying to push child inclusive mediation following some good research[[4]](#footnote-4) that came out from University of Exeter earlier this year.

But here, I'm slightly ashamed to say that as yet we do not have public funding for young people to be consulted in mediation, and it's something that we in the mediation community are longing to see.

Looking forwards

All of this makes encouraging noises about finding ways to ensure that those cases which are suitable for resolution outside of the court process are getting there.

There's a shift in narrative when I think of what was going on in the private law working group. We have the English Justice Minister delivering a speech at our annual conference on ***“The government's initiatives to promote family mediation”.***

The President of the Family Division is also giving a speech next week, and he's called his speech “***Relaunching family mediation***”.

So there's been a lot of energy and effort to do what can be done to ensure that those cases suitable for mediation get there.

IS MEDIATION THE ANSWER?

Even though I'm a mediator myself I would question whether mediation is the complete answer”

Although it’s great to see mediation promoted, for some it is quite clearly not going to be suitable.

What other initiatives are needed?

The Family Solutions Group came up with a whole load of recommendations - far too many really. I'm just going to give you an overview of the other areas that we are pushing for in England and Wales.

We published our report in November 2020 and the President of the Family Division, said it was the most exciting thing that had happened in family law for a very long time.

For the first time we were looking at the needs of children, young people and their parents outside of the context of law and justice, but in terms of what do they need following separation.

So we had various key headings. We call for political oversight and co-ordination. We badly lack that here, we have a minister for children who sits within the Department for Education. But there's a long list of responsibilities which does not include the needs of children from parents who live apart, there is no co-ordination to ensure that those needs are met.

They fall between the ministries of justice, education, health and social care. The one department that is actually doing some really good workis the Department for Work and Pensions with the Reducing Parental Conflict programme[[5]](#footnote-5).

But otherwise, there is no specific place within government to address the needs of families following separation and so if the only provision is the open door of court, that’s where families turn to.

We call for public education. There are terrible misunderstanding about how the law operates here and what the law expects when families separate.

We still regularly hear the term custody, which went out for us with the Children Act in 1991. And yet, ‘custody battles’ are still very much in the cultural language,

We say there should be a very early assessment of needs so that family needs can be triaged and they can end up with signposting to the right support that they need. Those support services must include direct access support for children and young people. At the moment, we have none.

We also need access to separated parenting programmes. It's something which is mandatory in many jurisdictions around the world. But not only is it not mandatory here, it is little known.

As a mediation practice, we have our own separated parenting workshops, we find it really difficult to get our clients to sign up, it's not something that's known or understood.

A national database of programmes for separating parents that are accredited to established standards would be really helpful.

We need appropriate language throughout the system and we need holistic working practices.

We don't want everybody working in silos. Our clients have multiple needs and many of them need legal advice, and we need our lawyers to be giving them that advice, but also recognising the other needs that they have and the need for child consultation where there are teenagers.

You know, I think there's an industry of divorce coaches that are growing up here and I'm assuming it's the same north of the border. There’s often a need for psychological support, the need for some parenting support. There's a range of other needs.

TRAINING IN FAMILY ISSUES FOR LAWYERS

These are not just legal issues and we need holistic working practices. I wanted to mention, new training has just been launched.

It's called ReFLEx Training[[6]](#footnote-6) ***(Relationships : Family Law : Excellence)***. It's essential skills training for family lawyers of all levels from a high court judge, all the way through the bar, solicitors, legal executives, all those that work as legal professionals who will have had exemplary legal training. It aims to give some complementary skills.

Lawyers in Scotland are just as welcome to sign up as in England and Wales, because there's no law involved. It covers things like essential listening skills, and the psychological impact of separation, the Kubler Ross journey of loss and grief, the different stages of development of children. It covers a range of skills that, frankly, are helpful for family lawyers to have, but aren't part of our formal legal training.

When I qualified as a solicitor in the early 90s I practised for about 10 years until I took a career break when I had children. Then someone asked me if I could go along and help with legal issues on a recovering from divorce and separation course that they were running.

I sat silently as a member of a small group as people shared their experiences and I carried on being involved in that course. I would say that I learned more then that's been useful for me in this work, sitting in that room, week by week, and listening to those stories than I ever did with my legal training. There was so much going on that wasn't about law.

So I think the ReFLEx training is a really exciting development and it comes straight out of one of the recommendations of the Family Solutions Group about the kind of broader expertise that all of us need to have.

We can't be experts in everything, but we need to have enough understanding of these other fields so that we can support our clients in a way that they need.

LANGUAGE

The other thing I wanted to mention is language. As well as custody battles, we have an archaic system which is based back in historical days, when spouses litigated against each other. The court headings and law reports still show this as *Smith versus Smith*.

We have language which is unintelligible and which serves the vested interest of those in the system but does not serve the needs of those who are vulnerable and who turned to the system for help.

So the President of the Family Division is terribly keen for the language to be revisited and asked us for a paper which is due to be published very, very soon.

THE FIVE “Ps”

We've come up with five Ps, which I think can apply to any legal system, where we're dealing with families who are separated, who live apart.

First of all, any language should be based in **Plain English**, so it is understandable.

Secondly, it needs to be **Personal.** It needs to talk about names of people rather than attribute them legal labels.

Thirdly, we say it needs to be **Proportionate**. It needs to be proportionate to the seriousness of the issues that are being considered.

Clearly, in a domestic abuse case there is a need for a certain formality and boundaries within the legal process which create a safe system.

Whereas if this is two parents who have just had a difficult falling out and can't agree about who's having Jimmy on a Saturday afternoon, we don't need such formality, the manner and the process needs to be proportionate to the issues being discussed.

Fourthly, and very importantly, we need a **Problem Solving Approach**. It's the aim of the Pathfinder pilots to move away from a combative approach to a collaborative approach that reflects the need to focus on parental responsibilities and away from parental rights.

Within that frame of shared parental responsibility it stops being a tug of war, and can take a shared problem solving approach. I think that's really critical.

And finally, instead of retrospective blaming about who did what when, we need to have language that is based around the **Positive Futures** for this family.

Ultimately, our law exists to promote positive outcomes for every family member. We want children to thrive in childhood following separation so the language needs to point families forwards, rather than to the many recriminations with a retrospective language.

We're not quite sure what the President will do next with it. But he is very keen to have this debate and in fact, he spoke about it on Broadcasting House recently

NEXT STEPS

So that's what we've asked for, but who takes responsibility?

Well, not the Family Solutions Group. We are a think tank that can say what's needed but we have no resources and no power.

There are many supporters for change though, including the President of the Family Division and many members of parliament. In fact, the outgoing Lord Chancellor Dominic Raab was very keen to see change introduced.

I'm going to finish with this slide, which says there is hope, because I think we always need to end on something positive.

WHERE IS THE HOPE?

Well, the good news is that there are now cross-departmental discussions going on between the various departments. The needs of families outside of the judicial system has been highlighted and there's greater awareness

No single department is willing to pick them up. The job is too big. But there are cross-departmental discussions with the idea of embedding more of this in local government.

We held an event in March called **“Taking The Fight Out Of Family Separation”** and various key people attended. The President of the Family Division’s key phrase was ***“There has to be a better way”***. He is heavily pushing for support for families before they turn to court.

The new Home Secretary Suella Braverman, who was then the Attorney General also spoke and said, ***We don't want families to end up at war***.”

She was very clear about that and she also committed to convene an event on better co-ordination of provision for separating families between government departments.

Since then, she's had a fairly busy time, she's no longer Attorney General, she ran for leader of the Conservative party and didn't get it, but she's now the new Home Secretary. We need to follow that up with her.

Meanwhile, we have a new Lord Chancellor Brandon Lewis, and we are waiting for him to find his feet and hear whether he intends to continue the initiatives from his predecessor, to push through some of these moves.

CHILDRENS VOICES

In a talk like this we need to ensure that the voice of the child is heard. I will finish by giving you a link to a short YouTube film with some direct quotes read by children. It's very powerful.

[**https://www.youtube.com/watch?v=8jYYCExGezQ**](https://www.youtube.com/watch?v=8jYYCExGezQ)

IAN MAXWELL

Thank you very much Helen for this account of what is happening in England and Wales.

We are a separate country and a lot of the things you've talked about are different in Scotland.

But the question that you posed: “Who takes responsibility for the needs of the separating family outside of the justice system?” is just as relevant to us even although the key players are different in Scotland.

I now want to introduce **Amanda Masson**, who is the partner and head of the family law team at Harper MacLeod.

She has specialised in family law for the majority of her career. She is accredited by the Law Society of Scotland in family law, child law and family mediation, and she's a regular speaker at professional conferences.

Last time we invited Amanda to speak for us was at the launch of our new name, Shared Parenting Scotland, in January 2020.

The main speaker that event was meant to be Sir James Munby, who was the former head of the family division in England and Wales. His train journey was blocked by bad weather and Amanda had to fill in for his headline slot at very short notice. Thankfully we have got all our speakers in place today.

So can I ask Amanda to put the Scottish perspective in response to what Helen has just told us.

AMANDA MASSON

It's always a real privilege for me to hear what other people are doing and to have a chance to talk about something that I am very enthusiastic about.

I became a family lawyer because I wanted to help families and in particular children. So much for Helen had to say chimes with our experience in Scotland.

All I want to do today in response is just give some thoughts from a practitioners’ perspective about some of the themes which Helen has raised and just talk a wee bit about what we are doing in Scotland.

Helen you talked about language, and I had a flashback of court 20 years ago now, believe it or not, when a well-known Glasgow family law sheriff had said in the context of a hearing about what we would now term shared care, “I think we need a new lexicon”.

We are now 20 years on and I am ashamed to say that not a huge amount has changed, we still don't have our new lexicon.

But what I think we can do as family lawyers is be very, very mindful of our own language and create the lexicon that will help families.

Helen, I was nodding vigorously as well, when you talked about an integrated approach, I would say in Scotland, sadly, our approach is not integrated. For many of the same reasons you identify, we have lots of very well meaning organisations, we have lots of sheriffs who really care about family law, really care about the voice of the child.

But someone I think needs to take responsibility for that huge job and bring everyone together.

I was interested in hearing about the mediation voucher scheme - it's not something we have in Scotland. The main mediation organisation for solicitor mediators, CALM, have been looking at pilot schemes in the local sheriff courts, we've been talking a lot about what we can do to increase participation in mediation, the debate about whether mediation should be effectively compulsory or not, has been raging for well over a decade.

And again, I think the issue that we have in Scotland is just bringing together the people who have the time and the power and the resources to try to just affect meaningful change. Private Mediation is quite hard, I think to, dare I say it, sell to other solicitors, possibly because they perceive that it is effectively giving away work.

And what I would invite people to do though, is just think a wee bit more holistically - we are in this to do a good job for clients. And if that means that we direct clients towards a more appropriate method of dispute resolution, financial karma dictates that things will come right in the end.

That's a far bigger debate about the economics of family law, but as practitioners, I wonder if the way to think about this is perhaps in terms of corporate social responsibility, as well as the obligations that we have towards the courts, towards our clients, but also towards the children whose lives and futures we are effectively entrusted with, albeit in what seems to us lawyers as a fairly minor context.

That's really not a minor context. I know that in my child welfare report work more and more, I'm asked to talk to children to take their views to feedback to the court about how children feel. And their words are stark, they are direct, they have clear views.

And my experience has been that those views often depart from the views that parents think their children have.

I would invite our family law community to just think about that and think about how best to have the child's voice heard. If there needs to be greater investment and thoughts around child inclusive mediation, good.

It's not something that should scare us. There are mediators in Scotland who are qualified to offer child inclusive mediation, and it's something that we should really, really think about as family practitioners.

Who takes responsibility for the needs of separating families outside the justice system?

I would say nobody at the moment, that's a personal and possibly slightly controversial view.

But again, I would invite family lawyers to just think about their role, we can take some responsibility for outcomes for families.

We can talk to clients about the dispute resolution spectrum, we are obliged now in terms of Law Society rules to talk to clients about mediation. And our obligation goes no higher than that. Sometimes in talking to clients about mediation as a possibility, we can really open client minds to positive possibilities, rather than the adversarial and confrontational system which so many of us get bogged down in.

I wanted to highlight a commitment or pledge that we have in Scotland known as “The Promise”[[7]](#footnote-7). I'm not sure how many people will have heard about The Promise. I actually heard about it from my sister who works with Children First.

The Promise was established to try to bring together the organisations who have an interest in improving outcomes for children.

Over 100 organisations, including Children First and some local authorities, have signed up to the Promise. The Promise that we are making is that they are entitled to grow up feeling loved, safe and respected, and able to realise their full potential. It is a laudable aim.

The Promise is not specifically aimed at working with families who are facing separation, but many of the themes and the pledges I think are really relevant to the work that we're doing.

And really the Promise promises to give children the right to a childhood. it links in beautifully with some of the aims of the UN Convention on the Rights of the Child to be heard, to feel safe and really to have a childhood that is not marred by conflict.

The Promise is responsible for driving the work of change demanded by the findings of the Independent Care Review[[8]](#footnote-8).

I think there's an awful lot that family lawyers can learn from The Promise. It might be something that law firms want to sign up to, that I don't know.

But it's something that I would ask people to think about. It was launched in March 2021. It's a great thing to think about, if we're trying to think about key aims and themes - why are we doing this job?

We're not just doing it to make money for ourselves, to make money for our firms. We are doing it because it is vocational. What we do is vocational and we wouldn't be in it otherwise. it's a stressful, it's a difficult job, and has to be something good.

I wanted to just say a few words about the new Children (Scotland) Act[[9]](#footnote-9).

I think, personally, it was just a huge missed opportunity. The consultation period was very thorough. It was lengthy. It was so comprehensive. I think many of us really thought this will be a chance for Scotland to really change the system of child law.

It didn't go far enough in my view. I want talk about where the opportunities were and where they still are.

Because although I do believe the Act didn't quite go far enough, there is some good stuff in there.

So we in Scotland wanted to respond and develop a family modernization strategy for the justice system. We wanted to overhaul things.

Scotland was also keen to incorporate the UNCRC into domestic law. The United Nations Convention on the Rights of the Child was technically incorporated into Scots law on the 16th of March last year.

But as many of us will know, the Supreme Court was then asked to consider whether the Scottish Government had acted outwith its competence.

In October last year, the Supreme Court unanimously held that certain sections of the UNCRC Bill did breach the limitations imposed on Scottish Government in terms of Scotland Act and the Scottish Government have been asked to reconsider.

The aims set out were clear, and the intention was to improve family law on how the child's voice is heard, but also to ensure that the child’s interests were at the heart of the system.

The consultation around the new Act was very wide ranging. It covered obtaining children's views, commission and diligence, contact, cross-border cases, whether or not there should be a protocol between Scottish and English courts, domestic abuse court procedure and alternatives to court.

The analysis of the consultation responses is well worth a read. It was published in May 2019[[10]](#footnote-10) and really is worth read - some of the results are actually quite surprising.

For example, only 50% of respondents, probably the lawyers, thought that there should be a presumption that a child benefits from both parents being equally involved in her or his life.

Only 56% of respondents thought that the Scottish Government should take action to try to stop children being put under pressure by one parent to effectively reject the other parent.

The more positive responses were around regulation of contact centres and sibling contact.

Really what the legislature came up with was something that I would say is not representative of a wholesale change, but rather tinkering around the edges.

The children (Scotland) Act 2020 provides additional safeguards for vulnerable parties, including children. It sets out an expectation of increased training and regulation of court appointed reporters and curators ad litem. The welfare test has been reworked. It hasn't changed hugely.

Those of us who trained in my era might remember being taught the child law mantra, which was formulated by Elaine Sutherland quite some time ago. The mantra requires that the welfare of the child is paramount, we have the No Order Principle. Orders should only be made if they are needed.

The child should have an opportunity to express a view to which the court shall have regard.

Now if you look at the new Act, it's horribly cumbersome, it really is almost nightmarish to try to sort of understand how the subsections and the new additions fit.

I have a very lengthy transcript which I'm happy to share with anyone who wants it, that just tries to make sense of the old law and the new law.

However, in summary, I would say that the new law does not necessarily represent a significant departure from existing practice as it was before the Act came into force.

There are an awful lot of things that still need to be worked out in Scotland. I have heard nothing about, for example, the regime for regulation of contact centres or the training for child welfare reporters.

There was nothing done about trying to increase participation in mediation [apart from the trial of dispute resolution information sessions included in the Children (Scotland) Act 2020]. There was nothing really done about trying to promote the idea of shared parenting.

I just want to finish where I started. We as family lawyers do arguably have a huge amount of responsibility. But we also really do have an opportunity to affect outcomes.

And again, I would just like to reiterate the invitation to my colleagues to really think about what we're doing, and how we can, by the use of, for example, highlighting alternative dispute resolution strategies, the use of Parenting Apart[[11]](#footnote-11) classes and access to resources such as divorce coaches, really try to take a more holistic view for clients.

Clients almost have been conditioned into assuming that separation has to be adversarial.

**It doesn't.**

IAN MAXWELL

Let me just give a couple of points adding to what has just been said. We had a meeting with the family law and children and families civil servants this morning.

They explained staffing within family justice has been lower than it should have been over the last two years. This means that they are still working on the implementation of various parts of the Children (Scotland) Act 2020.

So implementation work is taking place but they're still quite a long way from bringing in key parts of the Act.

They were talking this morning about possibly implementing some bits of the Act separate from the major changes and they also talked about having an update to the Family Justice Modernisation Strategy, possibly by the end of this year.

So we live in hope.

But we are very critical of the fact that we will put all this effort into lobbying on a family law, we did get one in 2020 but the changes it made are only being implemented very slowly.

Shared Parenting Scotland would like to see much more happening than the changes in the 2020 Act.

Helen mentioned integration between professionals and a couple of the talks we've got later in the series will mention what has happened in other countries. For instance, Phillip Marcus, a retired family judge from Israel will talk about how they brought social work professionals right into the start of the process in court. Celia Lillo from Canada will talk about how they've brought the social workers, the lawyers, therapists, the mediators and the judges working together in Montreal, particularly on the very high conflict cases, in which children refuse to see one parent.

QUESTION

***Are there any areas of the English family law system that we should campaign to bring to Scotland?***

HELEN

It's a really interesting question because it asks what are the good things in English family law. I have spent most of the last 10 years trying to change the way in which family law operates in England.

But where are the positives?

I think that the MIAM system is good if it works properly, if it's set up properly. it wasn't set up properly at the beginning, because it was drafted in a rush by people at the MOJ who were not practising mediators.

And so some of the pitfalls weren't spotted. And it hasn't worked well.

But I think if it can be set up as a system where the MIAM operates to safe standards, and where there is an expectation that both of the couple will come to see the mediator separately and have that discussion, then I think that's valuable.

I think that is a valuable system, because I think most people don't know what the options are for resolving their issues away from court. I'm not in favour of it being called a MIAM. I think that's a mistake because just calling it Mediation Information Assessment Meeting presupposes that we're sending everybody to mediation.

What it really should be is an information and assessment meeting where mediation is discussed alongside other options for resolving issues. So it is that triage that we think is badly needed.

So I think you should take the MIAM system, remove the term mediation and just call it information and assessment, where both ex-partners will meet the mediator before a court proceeding starts.

***[The Scottish trial mentioned noted earlier is explicitly an information session, and is about dispute resolution, not just mediation.]***

The other thing, which has been fantastic, is the mediation voucher scheme. It has cost some money, but when you think of the amount that's spent for every single case that ends up in court, I think there's a saving. Half of the people wouldn't have even tried mediation, had it not been for the voucher scheme, and 75% are seeing their issues resolved.

So if you do the numbers, you know, it's saving money. So I think the mediation voucher scheme is a resounding success.

But I think that's more about a political thing rather than law. That's not about a change in family law. It was introduced by the Ministry of Justice.

QUESTION

***In my personal view, the issue of the legal funding of child law cases in Scotland has a huge impact on the way child issues was dealt with.***

***Those who can obtain legal aid funding are given very few alternative to litigation, and thus are almost forced into court.***

***Those who cannot obtain legal aid funding have the opposite, as they're almost prevented from accessing the court system, although they're*** ***still not migrating towards mediation in their droves.***

IAN MAXWELL

This question points out that there are differences with legal aid funding between England/Wales and Scotland.

Legal aid funding in England was largely withdrawn apart from domestic abuse cases in 2012. and that had had a catastrophic effect in the courts, because there are lots of unrepresented litigants in the English and Welsh courts.

Scotland still has legal aid, but it has both a means test and also a prospects of success test to it.

So you've got a slightly different atmosphere in the English court system, but you still have these problems with people either not being able to afford to go to court or not understanding the system.

HELEN ADAM

You're absolutely right in when you say that what happened was that people turn up in court unrepresented.

What was happening when we still had legal aid was that people would meet a solicitor. The solicitor would say that this isn't really a case that should be going to court. You need other support, may I suggest mediation.

And of course, if the solicitor suggests mediation the client takes it seriously and lots of cases will go to mediation.

So you remove that conversation with a solicitor. And we had about half the mediation services under legal aid contracts go out of business after LASPO when the legal aid vanished.

So it was an unthought through and an unforeseen consequence and the numbers of mediations that were legally aided dropped off a cliff.

Obviously privately-funded mediation was not affected by it in the same way. But then what happened was that parents had nowhere to turn, they can't go to a lawyer. They don't know about mediation.

The court application is only £215, cheaper than anything else. So they go to court, unrepresented.

So then we have the Judicial College having to do emergency intensive training for all judges about how to deal fairly with litigants in person using different language and explaining things. Each case takes longer.

So the volume of cases going to court increased and the length of time taken for each court case increased, ultimately using these judges as sort of semi-mediators for all these unrepresented people,

So the cut to legal aid backfired massively.

That is one of the reasons why I think the MOJ is now looking at other ways.

But there is this problem, and I don't know if you have it in Scotland, which is this absolute inability of a ministry responsible for justice to make provision for anything that happens before an application to court is made.

So if you take away Legal Aid, you got to put something in its place, you got to have some clear information and signposting. We will be really keen for the initial green form advice, that initial conversation, to be funded without having to establish domestic abuse.

The other thing is that it places such a terrible emphasis on the power dynamic where there is domestic abuse. Clearly those who are victims of domestic abuse need Legal Aid protection.

But it creates a power dynamic and the wrong type of litigant will try and get over the line for the domestic abuse because it opens up the legal representation and that creates a very unhealthy dynamic as well.

So it's been an unmitigated disaster, in my view.

We had the voice of the child report come out in 2015, with very clear recommendations, but the other disaster is the refusal to fund child consultation, notwithstanding the improved outcomes on mediation and on families that is established by child-inclusive mediation.

So not to fund it is counterproductive, I don't understand why. So I think it all perhaps falls into these silos where you've got civil servants who aren't talking to mediators enough and who aren't talking to judges enough and too many people operating in silos and no kind of united thinking.

But that's where it's been different over the last couple of years is that these groups have got together to have kind of shared think tanks and I think that we are seeing some benefits. It's desperately slow, though.

IAN MAXWELL

Our legal aid has two different types. There's advice and assistance and then support for representation.

There was a consultation issued by the Scottish Legal Aid Board very recently about whether they should put a lot more things into the standard procedures for legal aid rather than being considered as extraordinary items like mediation and supervised contact that need special permission.

We would also suggest parent training and family therapy should be included into the standard items that legal aid can cover. We would far rather see a lot of legal aid money being put into this pre-court support rather than going towards the court process.

AMANDA MASSON

I really would agree with all these comments.

I think the legal system does not help what we're trying to do. I can think of so many cases where one party has legal aid and one doesn't.

It just creates a problem in terms of having children heard when it comes to child welfare reports and also mediation, if the other parent just can't secure the funding for it,

I have done some mediation under the legal aid scheme, and quite often end up saying I will just continue for free because there is no proper funding in place.

I know that the mechanism for trying to get increases or secure more than the template sanction can be awfully cumbersome for agents, the system just seems to be broken.

When it comes to children's views, we also have that mismatch because if one parent is privately funding, they are very, very conscious of how the child's view will be taken. If the other person is on legal aid again, agents have a huge fight on their hands with SLAB when it comes to securing sanction for reports.

My experience here certainly has been different sheriffs do things very, very differently. There was a period where sheriffs would specifically ask Child Welfare Reporters to only take children’s views. because there was a recognition that having reports that narrated parental views might just exacerbate conflict.

But we seem to be back into the era of very comprehensive Child Welfare Reports where every member of the family is spoken to, including the child and there is a funding issue to pay for this, it just doesn't seem to work.

My only potential solution would be that somebody takes the whole system by the scruff of the neck and really think it through.

HELEN ADAM

Can I ask another question related to child consultation. We are all very aware of the need for children or young people to be consulted when their parents are engaged in mediation, and indeed, in any court process.

But there are many cases which are resolved through the private funding of two solicitors and they may be handling finance cases, or they may be helping their clients to agree arrangements for their children.

What systems do you have for young people whose parents are using privately funded solicitors to be consulted and for their views to feed into that process.

That’s something we haven't yet got off the ground in England and Wales, but it's a large number, a large cohort of families who don't go to court, but who have private legal assistance. Their children are routinely not consulted, and it doesn't even occur to anyone that this should happen.

IAN MAXWELL

Some of the family mediation organisations in Scotland, particularly Avenue in Aberdeen some of the others, will do child consultation as well as family mediation.

Avenue have led the way in developing this process and I think the courts in Aberdeen and Aberdeenshire will tend to ask Avenue to do this rather than going for a child welfare reporter.

HELEN ADAM

It will be good for all of us who work in the fields of family separation for it just to be routinely expected that whatever the context of the family you're working in, be it mediation be it court proceedings or negotiations between solicitors, there is just an automatic expectation that any child over the age of 10 will be consulted and their views taken into account in that process.

It should be as normal as seat belt wearing. We get into a car, we wear a seatbelt and actually a lot of our cars beep at us if we don't.

We need a kind of file beep that alerts us - has this child being consulted?

Oh, I need to ring a local mediation service and get one of their child consultants to hear the voice of the child and then feed it in so that we the solicitors can take it into account in the work that we're doing with their parents.

It seems such a no brainer. But you know, it’s not where we are in England and Wales.

IAN MAXWELL

If the UN Convention on the Rights of the Child is fully implemented in Scotland that in turn would put a lot of obligations on public authorities to do such things.

QUESTION

***Are there any organisations that provide shared parenting courses in Wales to guide and help parents on the way forward after separation and divorce?***

IAN MAXWELL

Amanda has also already mentioned Parenting Apart, which is offered by quite a lot of the local mediation organisations in Scotland

Shared Parenting Scotland has been piloting a different course, which originated in America, called New Ways For Families®.

That is a training programme which we're going to be making widely available in Scotland next year, to help parents to understand how to develop better communication skills, and to help them interact both with their ex-partner and with their children. There will be a webinar on that training later in the series.

Maybe we can make it available in Wales once it has been established in Scotland.

HELEN ADAM

I can't speak about any face-to-face courses that I'm aware of in Wales. But what I can say is that there are lots of parenting courses.

Since the pandemic, many of them are available online, there is a fabulous resource called “What about Aruna[[12]](#footnote-12)” run by OnlyMums and OnlyDads.

There is “The Co-Parent Way[[13]](#footnote-13)” which was launched by the Marcie Shaoul of Co-Parenting Way as an online course. There's the Co- Parenting Clinic[[14]](#footnote-14). The Reducing Parental Conflict programme that's delivered through the DWP is working in a number of local authorities throughout England and Wales. They are funding some specific interventions.

I have a slight issue with the language because when I'm separating, I don't want an intervention. I want support.

The DWP have a number of interventions for parents who are struggling with conflict, many of whom obviously are separating or separated.

So there are masses and masses of them and one of one of the things we're working on at the moment is to try and establish a national association of separated parenting programmes so that people will go on them and know about them.

Wales, England, Scotland, you know, again, just the fact that we have a different legal system doesn't mean to say that we have to have our own bespoke parenting - the parenting is the same. Needs of children are the same all over.

So I can certainly share some of the links of those online ones. So I don't know if it's interesting, but the SPIP[[15]](#footnote-15) is what we have, which is the one approved by CAFCASS here in England and Wales.

A friend of mine runs it for RCJ Advice[[16]](#footnote-16) and they have just had the survey responses from 300 attendees recently.

When asked*, “Will this course have a positive impact on the child?”* 79% said yes.

*“Would you suggest somebody else in a similar position attended this course?”* 97% said yes.

*“Do you wish you had done this course earlier?”* 86% said yes.

These courses, a bit like the speed awareness course, as we have here. The only thing about the speed awareness course is that it presupposes that attendees have done something bad, in terms of speeding, and we don't want to give any loaded language here.

We want this to be uplifting and positive and point people forwards and talk about thriving childhood. So we don't want loaded language. But there does need to be an expectation that when parents separate, there's some useful information, it's helpful to know what will enable your child you know, to thrive in the rest of childhood with parents who live apart. So I think all the online resources are fantastic and there's zillions of them. Actual ones in person in in Wales I don’t know.

IAN MAXWELL

New Ways For Families® that we do is a mixture of online training and one-to-one coaching and we've recruited quite a number of family lawyers and mediators and social workers to do the coaching in Scotland.

I think just relying on online is not necessarily enough, just watching something on screen, but if you can watch something on the screen, and learn from that, and then talk about it with both a skilled coach and other parents that is good. Parenting Apart has this interaction between parents.

Some countries do have compulsory training courses for divorcing parents, I'm not quite sure whether you can do the same thing for people who aren't actually going through a divorce process, but making it widely available is important. And as you say, Helen, don't make it a penalty, it's not punishing people for separating, it's helping them.

HELEN ADAM

Yes, it's not an intervention, either. It's meant to be a helpful support.

IAN MAXWELL

If 90% of the of the trainees recommend other separating parents do a course, that is a really strong sort of recommendation. If every family lawyer can offer the information to their clients about this training alongside the representation they're doing, because it's there are two different things going on here. You're wanting somebody to actually help you sort things out and to guide you through the process, but it's well worth learning more at the same time.

One thing that I want to ask Helen is about the ReFLEx training. Is this training for professionals or for parents?.

HELEN ADAM

It's for legal professionals, essential skills training for legal professionals of all types. It's been put together by a lady called Gillian Bishop who's the retired senior partner of a very successful central London law firm called Family Law In Partnership (FLIP).

She has been wanting to develop a wider training base for family lawyers, because she's a family law supervisor. She works with too many family lawyers who are stressed, who are feeling that they're dealing with clients with increasing issues of narcissism and allegations of all kinds of abusive behaviours and demands.

These family lawyers are needing to know how to establish boundaries, how to manage listening, how to understand the different areas of me that these clients have and ultimately, these families of lawyers are increasingly stressed. I mean, really stressed.

The clients that come to us may need some legal advice but there's a whole raft of other things they need that we are not equipped or skilled to do. This creates a very difficult professional relationship.

Gillian has got together with a range of other experts from different fields to put together a series of online training programmes. Again, it's all online, you do it yourself, you complete three modules and you get a diploma.

But, you know, for the Modern Family Lawyer, I think many of the younger people coming into our profession are realising that this isn't just about law. My son's girlfriend is doing her solicitors’ qualifying examination course at the moment and there's absolutely nothing about the wider needs of families who separate, it just doesn't come anywhere near their syllabus. And so, you know, for the younger members coming into the profession, doing something like ReFLEx essential skills training is not expensive and can be done in one’s own time. They'll be really transformational in equipping us to handle these cases in a way that doesn't turn us to drink and sleeplessness or stress and all the other things that come when working lives become too difficult.

IAN MAXWELL

Amanda, is there anything like this available for family lawyers in Scotland?

AMANDA MASSON

Not that I'm aware of, but I'll certainly be recommending it to my team. And also, when I get back to teaching on the law diploma, I will be highlighting this to the family law elective students as well, because I really do think it's invaluable. It might also even be worth us talking to the Family Law Association in Scotland and highlighting.

HLEN ADAM

I don't know, in Scotland, whether there are moves towards family law supervision, but it's something that's really growing. Inevitably it is in those firms where there's a little bit of money so that they can afford to pay supervision for their family law, solicitors. Whereas, in fact, it's probably needed across the board

As mediators, we have to have supervision, we have to have four hours a year, but our family law colleagues don't. And yet, they're dealing with stressful difficult cases, as we all are. Supervision can be really helpful.

AMANDA MASSON

20 years ago Anne Hall Dick who's a well-known mediator in Scotland used to arrange for us to have supervision. Now I worked with her a wee bit later on in my career and I certainly found it enormously helpful. It's just something that was never really carried on or picked up on by other firms. But I agree it would be really useful for us.

HELEN ADAM

I was just going to say that I think all of us need to recognise the wider needs of the people that we're working with, the parents and the children, the unseen children often, and how that impacts on us and who's out there to provide this more holistic response.

IAN MAXWELL

Shared Parenting Scotland now has about 40 solicitors across Scotland who take turns to attend our group meetings and provide information.

We find this is very useful to the people who come to our support meetings, because it helps them to understand what happens in the local courts, but it also provides a pretty good learning experience for the solicitors who come along. We often get comments from them saying, “Oh, I didn't realise that happened” and “I had never come across this”, because we tend to get the people who are in the most extreme cases coming to us.

We feel that we are providing a bit of a sort of post-qualification experience through this scheme, but we're also getting a lot of help from these lawyers and they can also put it down as CPD in terms of their own annual requirement.

We certainly will publicise this ReFLEx scheme as there's no reason why it shouldn't apply to Scottish people and we will continue to look for other examples of this sort of stuff wherever it is in the world, because it's useful to help family solicitors.

QUESTION

***The raft of support facilities and agencies is overwhelming. would it be possible to obtain government funding for a centralised portal to guide professionals and clients to the most appropriate local support agencies?***

HELEN ADAM

This is crying out for a website, isn't it?

IAN MAXWELL

it's a lovely cue for me to mention one of the other talks in this series which will be from the Netherlands. They developed through the legal aid board and other partners a scheme called Rechtwijzer[[17]](#footnote-17) which was an online dispute resolution process, with lawyers sitting behind the online system.

This was very interesting but it just didn't quite gel. I also think there was some resistance from the legal profession in the Netherlands because they felt it was stealing their business. But some of the people behind Rechtwijzer have developed a new scheme called Uitelkaar[[18]](#footnote-18). Laura Kistemaker who works with this will talk about this new scheme on 26th October.

We're also going to ask her to see whether they could do a feasibility study on whether this process could be developed for use in Scotland. People are using online processes to do lots of things in their life, whether it's to do with finding a partner, finding holiday accommodation or buying things. If you're going to meet your partner through an online processes, I think you might also be able to navigate the dissolution of that partnership in a similar manner.

We obviously need to remember the people who don't have access to online because they may be some of the most disadvantaged, but that's not a reason for not trying to develop online systems. There's another scheme that we know of in Australia, which again, is doing these things.

So we are we are raising the issue with government and trying to get a wee bit of money to try and develop something like this.

Can I just ask for a final word from both of you?

HELEN ADAM

I think there is hope and many of us have an understanding of the broader needs of these separating families. Some of the younger people coming into the profession are coming in with a much more holistic approach. We are all in tune with mental health vulnerabilities of ourselves, our clients and their children. I think we will see change, but government is slow to respond and it may be down to the practitioners to lead the way for change and the government will possibly follow.

AMANDA MASSON

Lots to be positive about, including the fact that we are having this discussion. There is a great commitment for change.

1. <https://www.judiciary.uk/wp-content/uploads/2020/04/PRIVATE-LAW-WORKING-GROUP-REPORT-1.pdf> [↑](#footnote-ref-1)
2. <https://www.judiciary.uk/wp-content/uploads/2022/07/FamilySolutionsGroupReport_WhatAboutMe_12November2020-2-final-2.pdf> [↑](#footnote-ref-2)
3. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf> [↑](#footnote-ref-3)
4. <https://law.exeter.ac.uk/research/groups/frs/projects/mediationinmind_evaluation/> [↑](#footnote-ref-4)
5. <https://www.gov.uk/government/collections/reducing-parental-conflict-programme-and-resources> [↑](#footnote-ref-5)
6. <https://www.reflextraining.co.uk/> [↑](#footnote-ref-6)
7. <https://thepromise.scot/the-promise> [↑](#footnote-ref-7)
8. <https://www.carereview.scot/> [↑](#footnote-ref-8)
9. <https://www.legislation.gov.uk/asp/2020/16/contents/enacted> [↑](#footnote-ref-9)
10. <https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995-summary-report/> [↑](#footnote-ref-10)
11. https://www.relationships-scotland.org.uk/family-support/parenting-apart-groups [↑](#footnote-ref-11)
12. <https://www.onlymums.org/what-about-aruna> [↑](#footnote-ref-12)
13. <https://thecoparentway.com/the-co-parent-way-online-course/> [↑](#footnote-ref-13)
14. <https://thecoparentingclinic.co.uk/> [↑](#footnote-ref-14)
15. <https://www.cafcass.gov.uk/grown-ups/parents-and-carers/divorce-and-separation/parenting-together/separated-parents-information-programme/> [↑](#footnote-ref-15)
16. <https://www.rcjadvice.org.uk/> [↑](#footnote-ref-16)
17. <https://rechtwijzer.nl/> [↑](#footnote-ref-17)
18. [www.Uitelkaar.nl](http://www.Uitelkaar.nl) [↑](#footnote-ref-18)