OFFICIAL REPORT
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Education and Skills Committee

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Session 5

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EDUCATION AND SKILLS COMMITTEE
21st 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)
*Clare Haughey (Rutherglen) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Ruth Maguire (Cunninghame South) (SNP)
*Gillian Martin (Aberdeenshire East) (SNP)
*Oliver Mundell (Dumfriesshire) (Con)
Tavish Scott (Shetland Islands) (LD)
*Liz Smith (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ellen Birt (Scottish Government)
John Paterson (Scottish Government)

CLERK TO THE COMMITTEE

Roz Thomson

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Education and Skills Committee

Wednesday 6 September 2017

[The Convener opened the meeting at 10:00]

Interests

The Convener (James Dornan): Good morning. I welcome everyone to the 21st meeting in 2017 of the Education and Skills Committee. I remind all present to turn their mobile phones and other devices to silent for the duration of the meeting. I have received apologies from Tavish Scott.

Agenda item 1 is a declaration of interests from Oliver Mundell. I welcome Oliver and give him the opportunity to declare any relevant interests.

Oliver Mundell (Dumfriesshire) (Con): Thank you, convener. I am delighted to be joining the committee. I confirm that I have no relevant interests to declare.

Decisions on Taking Business in Private

10:00

The Convener: Agenda item 2 is a decision on whether to take in private two items of business. First, is everyone content that item 5 of this meeting be taken in private?

Members *indicated agreement.*

The Convener: Secondly, do members agree to consider in private any future discussions of evidence on the Children and Young People (Information Sharing) (Scotland) Bill?

Liz Smith (Mid Scotland and Fife) (Con): Can I ask a question about the specific nature of our future considerations?

The Convener: Yes.

Liz Smith: It is not clear whether you mean all evidence.

The Convener: I am referring to the discussions of evidence.

Liz Smith: Okay.

The Convener: Do we agree to take those discussions in private?

Members *indicated agreement.*

Subordinate Legislation

Education (Fees and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/180)

Welfare Reform (Consequential Amendments) (Scotland) Regulations 2017 (SSI 2017/182)

10:01

The Convener: Agenda item 3 is subordinate legislation. We have in front of us two statutory instruments, which are listed on the agenda. We considered the instruments in June and agreed to write to the Scottish Government. A response was received over the summer and the relevant extract of that response is included in members' papers. We had agreed that once we had received the response we would decide whether to hear more from Government officials on the instruments. No member has asked that officials attend today.

As no member has any additional comments on either of the instruments we will move on to the next item of business.

Children and Young People (Information Sharing) (Scotland) Bill: Stage 1

10:01

The Convener: Agenda item 4 is a briefing from Scottish Government officials on the Children and Young People (Information Sharing) (Scotland) Bill. I welcome to the meeting Ellen Birt, who is the bill team leader, and John Paterson, who is a divisional solicitor. This is our first meeting on the bill, so I invite the officials to brief the committee on its detail, its financial implications and its delegated powers.

Ellen Birt (Scottish Government): I am happy to do that. My intention is to provide a bit of background to the bill and an explanation of what its provisions will do. I will also address the financial memorandum and delegated powers within the bill, which the convener has just mentioned.

The Children and Young People (Scotland) Act 2014 provides the statutory underpinning for the getting it right for every child approach, which is our national approach to improving outcomes and supporting the wellbeing of children and young people by offering the right help at the right time and from the right people. The named person service and the child's plan are central to the approach; they put the wellbeing of every child and young person at the centre and ensure that services work together to support children, young people and their families.

The policy was developed in response to real-life experiences and expert advice that a timely and early offer of advice or help can prevent troubles from becoming crises. It was developed in response to parents asking for a clear point of contact for children, young people and their parents, should they be seeking support, information or advice.

The Scottish Government is committed to ensuring that all children and young people have access to the same standard of support, irrespective of where they live, and it remains committed to provision of a universal named person service for all children and young people up to the age of 18. It is against that backdrop that the 2014 bill was passed.

As members know, the 2014 act was, in the case of the Christian Institute and Others v the Lord Advocate, challenged as being outside the Scottish Parliament's legislative competence. The grounds for challenge were that part 4 of the act, which relates to the named person service, related to reserved matters and that it was incompatible

with the European convention on human rights and European Union law.

In July 2016, the Supreme Court gave its decision. It dismissed the challenges on reserved matters and EU law. On the human rights challenge, the Supreme Court found that the provision of a named person service was

"unquestionably legitimate and benign".

However, it went on to find that the information-sharing provisions in part 4 were not in accordance with the law. In brief, that was because of the very serious difficulties in accessing the relevant legal rules and a lack of safeguards that would enable the proportionality of an interference with article 8 rights to be examined.

What has happened since the Supreme Court case? The Scottish Government held an intense period of extensive engagement between September and December 2016. It included more than 50 meetings with about 250 organisations and groups. We heard from about 700 young people, parents and carers, practitioners, professionals and leaders from education, health, local authorities, the police, faith communities, unions and charities. Through that engagement, we also listened to those who had raised concerns about the named person policy, including Christian Action Research and Education for Scotland, Clan Childlaw, Together and the Scottish Parent Teacher Council, among others.

The bill seeks to address the points that were raised by the Supreme Court and to ensure that decisions around sharing of information are taken in partnership with children and young people and their parents. That is something that children and young people, parents and practitioners expressed was a key issue for them, and it is core to the getting it right for every child approach. The bill will make changes to parts 4 and 5 of the 2014 act, which relate to the named person service and the child's plan. The changes that the bill will make relate to information sharing only. It seeks to clarify the provisions around information sharing and to ensure that proper safeguards are in place.

In relation to part 4 of the act, on the named person service, the bill will substitute a new section 26 and insert a new section 26A. Those sections relate to the provision of information by or to a named person service provider. The previous duty to share information under the 2014 act will be removed and replaced with a new duty to consider sharing information. First, the named person or other information holder who is seeking to share information with the named person service provider must consider whether providing the information

"could, in its opinion, promote, support or safeguard the wellbeing of the child".

Secondly, the provider will have to consider whether the relevant information could be shared in accordance with the law. That includes data protection law, human rights law and the law of confidentiality.

Thirdly, the bill provides a power to share information. That means that there will no longer be a duty to share information, but named persons and others who seek to share information with the named person will be able to continue to exercise their professional discretion.

Section 1 of the bill will amend section 23 of the 2014 act, on communication in relation to the movement of children and young people. The changes, which are similar to those that I have just set out, will ensure that information may be shared where that

"could ... promote, support or safeguard the wellbeing of the child or young person."

There is also similar provision making it clear that information can be shared only where that is in accordance with the law, which includes data protection law, human rights law and the law of confidentiality.

The proposed new section 26A makes it clear that information cannot be shared under part 4 unless the Data Protection Act 1998 and other relevant law can be complied with. It also ensures that information cannot be shared where that

"would prejudice the conduct of a criminal investigation or the prosecution of any offence."

With regard to delegated powers, the bill will introduce a new section 26B into the 2014 act, which will place a duty on ministers to issue a code of practice about the provision of information under part 4, which means by or with named person service providers. The bill provides for the code to be binding and states that it

"must ... provide for safeguards applicable to the"

sharing of information. The bill sets out the procedure that must be followed before issuing a code of practice, which is akin to affirmative procedure. It places obligations on ministers to consult relevant persons, to lay a draft before the Parliament for 40 days and to take account of any views expressed by the Parliament.

Although the Supreme Court focused on part 4 of the act, in relation to the named persons service, the bill will make similar changes to the information-sharing provisions in part 5 of the 2014 act, which relates to child's plans. In particular, it will bring those provisions into alignment with the new provisions on information sharing under part 4, thereby making clear that

information can be shared only where that is in compliance with the law and where it would not

"prejudice the conduct of a criminal investigation or the prosecution of any offence."

Proposed new section 40B will place a duty on ministers to issue a code of practice in relation to the sharing of information under part 5, in the same way that proposed new section 26B will in respect of the named person service. The committee has been provided with an illustrative draft code of practice. That is intended to assist the committee in understating how the power to issue a code of practice could be used. It is intended to be an illustration only and shows how a code of practice could provide for additional safeguards in relation to information sharing. As it is an illustration, it was drafted with regard to the law as it presently applies. The illustrative code is set out in two parts: the first concerns safeguards and the second is a description of the relevant law. Those are both aspects on which the Supreme Court focused.

The code sets out the steps that the named person service provider, or the relevant authority seeking to share information with a named person, must follow in order for the information sharing to be in compliance with the law. It sets out the responsibilities to inform the person to whom the information relates and the need to seek consent, which will be applicable in most circumstances. Practically, that is likely to be the consent of the child or young person or their parents. It sets out the responsibilities that apply in the limited circumstances where the law permits consent not to be required, including steps to inform persons affected before or after sharing. Importantly, the code does not change the law on data sharing or human rights, but sets out the safeguards that must be followed to ensure that information sharing is in compliance with the law. The code also contains requirements to records decisions, which is an important part of good decision making.

The second part of the code provides a description of the relevant law. Again that is because of the importance that the Supreme Court placed on the matter in its decision. As I said, the draft that has been published is for illustrative purposes only: any code of practice will be subject to consultation and the procedure that is set out in the bill.

Before taking questions, I will address the financial memorandum. The Scottish Government has supported local implementation of the getting it right for every child approach by providing £10.2 million to local authorities to prepare for the commencement of parts 4 and 5 of the 2014 act. Prior to the planned implementation date of August 2016, local authorities, health boards, Police Scotland and other organisations had confirmed that they were ready and prepared to be compliant with those parts of the 2014 act on commencement.

The financial memorandum sets out the additional costs of £1.2 million that will be required to develop training and learning materials to support national consistency and to backfill for staff who are undergoing training on the new duties on information sharing only, which are set out in the bill.

The financial memorandum is based on the same modelling that was agreed with stakeholders and Parliament during the passage of the 2014 act. The expectation is that that training will complement and become part of the regular supervision and continuous professional development requirements that professionals undertaking the named person and child's plans responsibilities already undertake. That will be supported by revised statutory guidance under the 2014 act, and by information and practice materials that the GIRFEC policy team will be developing in collaboration with children, young people and practitioners in advance of implementation.

I hope that that summary has been of assistance to the committee. My colleague and I are happy to answer any questions.

The Convener: I might ask some questions later, but I will first let Liz Smith ask her questions.

Liz Smith: Thank you for the information that you have provided us with.

During the passage of the Children and Young People (Scotland) Bill several years ago, one of the concerns that was expressed by witnesses—specifically the Faculty of Advocates, Clan Childlaw and Professor Norrie, who gave a legal interpretation of some aspects in order to assist the committee—was that there had not been sufficient consultation on the implications of data sharing and on some of the legal implications of specific terms, which I will come to in a minute. What consultation on those specific issues have you had in preparation for the bill? In particular, what consultation have you had with the Information Commissioner's Office?

10:15

Ellen Birt: As officials, we have been engaging very closely with the Information Commissioner's Office. As I said, there was an intensive three-month period of engagement on the back of the Supreme Court decision, during which we sought to look critically at the issues that that decision raised and at how best we could move forward to ensure that the objective of a named person

service could be fulfilled, because we know that practitioners and parents have told us that when the getting it right for every child approach is working, it supports them.

Recently, following that period of intensive engagement, we have continued to work through our close stakeholder groups. We have a national implementation group and a GIRFEC lead officers group, with which we have discussed the intricacies of the plans that the Government intends to implement. In the past few weeks, we have again met the Information Commissioner's Office. The bill and the illustrative draft code of practice that is before the committee have both been drafted to be cognisant of the fact that the general data protection regulation is on the horizon. The way in which the bill is set out allows us to be responsive to that changing landscape and to ensure that, when additional safeguards and explanation are required once the position of the United Kingdom Government on the general data protection regulation is clear, we will be able to provide those through the procedure on the code of practice that I set out.

Liz Smith: Thank you for that.

On a technical level, are you confident that your advice to ministers about the legal definitions in the bill, and the advice on the legal interpretation that has been provided by the Information Commissioner's Office, are clear?

Ellen Birt: I will defer to my legal colleague on that.

John Paterson (Scottish Government): The answer to the question is yes.

I will pick up on Ellen Birt's answer. In addition to the consultation that took place prior to the draft code of practice being published, there is a proposed requirement for the Scottish ministers to consult. I envisage that that consultation would include relevant bodies such as the Information Commissioner's Office.

Rather than providing a power for ministers to issue a code of practice, the bill makes it a requirement for them to do so. The consultation that would take place prior to the code being issued forms part of the scheme that is proposed under the bill.

Liz Smith: I will make two technical points. The Faculty of Advocates notes that a section in the draft code of practice relates to the law of confidentiality, which is said to derive from common law. The Faculty of Advocates understands that the Scottish Government's interpretation of the law of confidentiality is that it is a common law. In its submission, it says:

"It is not clear to what this section refers."

Could you help us out with that?

John Paterson: From the Scottish Government's perspective, the law of confidentiality is a common law that applies in relation to the provision of information that has the quality of confidentiality. Reference to various legal texts will illustrate that that duty exists.

I think that it is correct that the submission from the Faculty of Advocates says that the duty exists only in relation to certain people in certain circumstances. The submission refers to the circumstances of doctors and lawyers. However, the Scottish Government's position is that the duty extends more widely than merely to doctors and lawyers and, in its submission, the Law Society of Scotland recognises what one might describe as a law of confidentiality.

Liz Smith: That is helpful up to a point, but the Faculty of Advocates is asking which section of the bill the duty refers to. I take on board what Ms Birt said. If the bill is to work well, there must be an understanding among named persons and people who are going to implement the law that they must decide when to share relevant information—that is the change. Do you agree that, if they are not clear about specific definitions, the Government should be advised to tighten that up?

Ellen Birt: Perhaps I can be of assistance. It is important to highlight that the bill will not change the law on confidentiality and data sharing or human rights law. Public authorities across Scotland already have to comply with those laws and already grapple with issues such as data sharing. The bill clarifies, on the back of the Supreme Court's decision, the interaction between what the amended 2014 act will be and the law as it stands.

Liz Smith: I accept that. I am sorry to labour the point, but that is not what the Faculty of Advocates says. It says that it is not clear which section of the bill the law of confidentiality refers to. That is the point.

John Paterson: The law of confidentiality applies generally to all powers—

Liz Smith: To all of the bill?

Ellen Birt: It applies to parts 4 and 5.

John Paterson: It applies to any sharing of any information. The question is whether the information in question has the quality of being confidential. For example, this exchange is not confidential, as it is taking place in public. On the other hand, an exchange that I have with a minister in relation to legal advice may well have the quality of confidentiality. If I were a solicitor in private practice and provided legal advice, that advice would also possess that quality.

The Convener: Is the Faculty of Advocates looking for something that would normally not be required because the confidentiality, as you say, holds across the piece?

John Paterson: My understanding is that the Faculty of Advocates recognises that there is a duty of confidentiality in certain circumstances—for example, between a doctor and a patient—but does not recognise a broader law of confidentiality. The Scottish Government's position is that there is a broader law of confidentiality, of which the duty between a doctor and a patient is a part.

The Convener: And that view is supported by the Law Society.

John Paterson: That view is supported by the Law Society.

Liz Smith: Forgive me, but I wish to return to the nub of the issue. When the previous bill was before Parliament, there was controversy—irrespective of people's views on named persons; this is not to do with that debate—around the accuracy and clarity of the law specifically in the bill, and that is what is going to matter. We have received a number of submissions from people who are supportive of the policy but who are concerned that they do not have clarity of specific legal meaning. We did not have that the last time, and that gave rise to concerns about inaccurate scrutiny of the bill. I suspect that that is one of the reasons why we ended up with such a difficult issue.

The Convener: Stick to the point, please.

Liz Smith: It is a technical point. I am asking whether we now have that understanding and clarity about these specific legal issues. Wellbeing is currently defined by the SHANARRI—safe, healthy, achieving, nurtured, active, respected, responsible and included—indicators. Has there been any discussion at a technical level about whether that is an adequate definition of wellbeing, given that concern about that was raised by the Supreme Court?

Ellen Birt: I will start by dealing with your first point, to wrap up the discussion that we were having. You asked about what the Faculty of Advocates said when it asked which provision or section of the 2014 act the law of confidentiality applies to. The bill simplifies the relationship between what will be an amended 2014 act and the law. One of the concerns that the Supreme Court raised was how a duty to share information—a duty that did not carry any professional discretion—sat alongside the requirements of data protection law, human rights law and the law of confidentiality. The bill now removes that tension; there is no longer a requirement to share information. The bill creates a legal prompt for named person service providers and others seeking to share information with them to consider whether sharing that information would support, promote or safeguard the wellbeing needs of a child, and then gives them the power to share it. The law of confidentiality, data protection law and human rights law will apply to all of that decision-making process.

In relation to your point about the definition of wellbeing, it is again important to recognise that the 2014 act is setting up a named person service that provides help to children and young people and their families when they need it, in order to prevent low-level issues from escalating and turning into bigger problems. By their very nature, the wellbeing needs of children will be as different as the number of children. That concept has been well utilised and understood among practitioners, families and children who are using the indicators now. The 2014 act put those wellbeing indicators on a legislative footing for the first time. It is important to read the indicators with reference to the wider statutory guidance and practice materials that have been developed and will be redeveloped in relation to the bill. The Government's position is that for wellbeing, unlike welfare concerns, there is not a threshold that children have to meet.

Liz Smith: Indeed. Thank you.

Colin Beattie (Midlothian North and Musselburgh) (SNP): I have just a couple of questions. The Scottish Public Services Ombudsman considered that there was quite an overlap. Has that been taken into account? Is it going to be adjusted?

Ellen Birt: An overlap in what respect?

Colin Beattie: I am quoting from the papers that I have here. The SPSO sees an overlap between the complaints process and the

"existing jurisdiction for complaints. They suggest that the bill is amended to remove this duplication."

Ellen Birt: I am familiar with the SPSO submission. Thank you for that clarification. The bill relates to the information-sharing provisions in parts 4 and 5 of the 2014 act. There is a complaints procedure set out in the act, which was agreed upon and passed by the Parliament. My colleague can correct me if necessary, but my understanding is that there is a requirement for secondary legislation in relation to that complaints procedure. That will be developed ahead of implementation, so the Parliament will have an opportunity to consider it before full implementation of parts 4 and 5.

Colin Beattie: There seems to be an awful lot more detail laying down who is responsible for

what this time around. Has it been found necessary to include that?

Ellen Birt: In developing the Government's proposal we have listened carefully to the concerns that were raised by the Supreme Court and to those that arose through the intensive engagement that we had with families and practitioners. As we know from the Supreme Court judgment, the issue of clarity is extremely important, so the bill and illustrative code seek to make very clear the steps that a named person service provider or person seeking to share information with them has to go through in order to fulfil their responsibilities and to be compliant with the law.

10:30

Colin Beattie: As a result of the court's judgment, has it been necessary to extend the requirements as to who does what?

Ellen Birt: I am not sure that the bill extends the requirements of who does what, but the bill makes that clearer, which has been our intention.

Daniel Johnson (Edinburgh Southern) (Lab): As you have set out, one of the principal changes from the bill is a move from there being a duty to share information to a situation in which professionals must consider and make a judgment that balances the sharing of information to promote wellbeing against relevant laws, particularly on data protection. What consideration was given to what that will do to the role of professionals and, in particular, to the capacity and capability that those professionals have to make that judgment as part of their work?

Ellen Birt: I point to the fact that the people with those responsibilities are professionals; they are the teachers, health workers and others who are already engaged with children and families. The intention behind the named person service was that families, children and young people would have a single point of contact who they were already familiar with.

As I said before, the law that the bill requires compliance with is the law that already applies. When considering whether sharing information could promote, support or safeguard the wellbeing needs of a child, the duty under the Data Protection Act 1998 in the vast majority of circumstances is that that is done with the consent of the child or their familiy. Those wellbeing needs would be discussed with the family, and any intervention or proposed move forward would also be discussed with the family.

Daniel Johnson: I accept that that is the situation for the majority of cases, but where it becomes controversial is in the extremes. You are right—we are talking about professionals who are trained, but they are trained in healthcare or education, and not the law. Was any work carried out to look at their capacity—their ability to carry out the work—and capability to undertake those judgments? What new implications will the change have for those professionals?

Ellen Birt: During the passage of the Children and Young People (Scotland) Bill and the current bill, we have engaged extensively with education and health stakeholders in relation to the impact that the approach will have on the workforce. We also have a national implementation support group that includes professionals from local authorities and the health sector, and we continue to engage closely with health boards, unions and representatives of the teaching workforce.

In relation to difficult or extreme cases, it is important to underline that the bill and the 2014 act do not in any way alter current child protection mechanisms. The law is clear on what professionals must do when there is a significant risk of harm, and professionals who work in an education or healthcare setting are familiar with that.

It is also important to highlight that the expectation is that front-line workers will not be left on their own to scrutinise the legislation. As always, we will work closely with partners in health and education to make sure that effective, good-quality and accessible training and development materials are available for front-line practitioners—and, importantly, for families, children and young people themselves—and that training on the responsibilities that are placed on those individuals will form part of their regular CPD and supervision.

Daniel Johnson: Part of the Supreme Court judgment explicitly stated that the court remained concerned that it was an exceptionally difficult requirement to impose on professionals in respect of every child and that, furthermore, the imposition risks making professionals' jobs considerably more difficult and undermining the trust of families. Given that that was part of the Supreme Court judgment, what is there in the amended legislation that mitigates the points that were raised by the Supreme Court?

Ellen Birt: The Supreme Court obviously considered the previous framework that was in place under the 2014 act and the provisions that had not been commenced. It considered the tension that arose between the duty that the 2014 act placed on the named person service providers, or on a person sharing information with them, to share information, and the further requirements and responsibilities that were on them under the wider law, including human rights law, data protection law and the law of confidentiality. The

new bill clarifies that position by making it clear that there is no duty to share information but that there is a duty to consider whether sharing information could benefit the wellbeing of a child, and that there is a power to do so where that professional believes that it could be of benefit to wellbeing. Crucially, the bill says that that information can be shared only where doing so would be in compliance with the law as it stands.

Daniel Johnson: Some concern has been raised that that may well lead to defensive behaviour in the way in which those judgments will be applied. What kind of considerations were made from a behavioural standpoint when the amended legislation was drafted?

Ellen Birt: As the Deputy First Minister has said in his previous statements to Parliament and to the committee, it is the Government's responsibility to ensure that we build trust and confidence in the named person service and child's plans provisions. As I have said before, it is our intention to work in conjunction with those professionals who will be delivering those responsibilities, and with children and families, in order to increase their understanding and to build that trust and confidence. The process that we are involved in now in scrutinising the bill is part of that.

The Convener: There is a brief supplementary from Johann Lamont.

Johann Lamont (Glasgow) (Lab): My question is on a specific point. You said on the question of consent that it would be with the consent of the child or the family, and then you spoke about working with the family. Do you accept that there is sometimes a conflict between the two? How would that be resolved?

Ellen Birt: Yes, I accept that, and that is a conflict that arises now. The illustrative code of practice that is in front of the committee sets out the responsibilities that already apply in relation to capacity. We would expect that the professionals working with children and families would be looking to achieve the best outcome for them. I defer to my colleague on the technical legal point about—

Johann Lamont: It is not a technical question. It a question of whether, if it is possible to get the consent of a child to share information, you then have to speak to the family or not. Secondly, what evidence would a worker have to provide to show that they had considered the question of whether to share information? They have a duty to consider it, but how is it established whether that duty has been carried out?

Ellen Birt: I can ask my colleague to address the specific point about the law.

John Paterson: Paragraph 5 of the illustrative draft code makes reference to the position under the Data Protection Act 1998, which is that a child who is 12 years of age or older is

"presumed to be of sufficient age and maturity"

to have understanding in order to be able to give consent themselves. That would be the starting point for any person who is considering whether to seek the—

Johann Lamont: The technical point is whether, if a child under 12 has given information to somebody about what is happening to them in their own circumstances and what they said was about the family, and that person thought that they should share that information with other agencies, that person would have to seek the family's consent. Technically, if the child is under 12, they would not be deemed to have given consent. The family would have to be spoken to about something that the child said about them.

John Paterson: Although the presumption that a person under 12 has sufficient age and maturity in order to be able to give consent will not apply, one could still conclude that a particular child under the age of 12 has sufficient maturity and understanding to give consent. If the person concluded that a child of five does not have sufficient maturity and understanding, the question would be whether it was necessary not to seek consent because the particular issue related to the mother and father, for example. If the person concluded that it was necessary not to seek consent in order to protect the child's interests, it would be open to them to do that. The likelihood is that they would be required to do that in order to fulfil their duties.

The Convener: Is it not the case that that happens just now?

John Paterson: Exactly.

Ellen Birt: Yes.

The Convener: So in respect of the bill, it is irrelevant that the same sort of safeguards and procedures would be in place to ensure that the information that was required to protect somebody under 12 was in place.

Johann Lamont: So the concerns that maybe prompted some of the legislation are not being addressed, as that is where we already are just now.

The Convener: No, that is not the case at all. I am sorry, but we will move on to Ross Greer.

Ross Greer (West Scotland) (Green): We have touched on this issue, but I am looking for further clarity about the provisions on consent being in the code of practice rather than in the legislation. What makes you confident that you

have met the requirements of the Supreme Court without putting those provisions directly into the bill?

Ellen Birt: The bill and the illustrative draft code of practice do not seek to change the law on consent. In the data protection legislation and human rights law, there are limited circumstances in which information can be shared without consent. The bill does not seek to create a new law on consent; it requires that, when information is to be shared, it can be shared only when that complies with the law.

The illustrative code of practice seeks to respond to what the Supreme Court said about safeguards and to ensure that we do not leave the interpretation of the law as it stands just to the named person service providers. There will be a binding code of practice that sets out the steps that a service provider or others who seek to share information with them will have to go through to demonstrate that they comply with the law on data protection and therefore the law on consent.

Ross Greer: Thank you. Much of what I wanted to ask about has been covered.

Oliver Mundell: I would like to take the issue a little further and explore the decision not to put the safeguarding guidance into primary legislation. The delegated powers memorandum says that it would be impractical to do that. How far was that issue explored before you reached that conclusion?

Ellen Birt: By its nature, primary legislation has to be precise and technical. In considering the options that the Government might take, we were clear about the requirement to respond to the Supreme Court's concerns about safeguards and to ensure that clear and accessible guidance was available to practitioners who undertake the responsibilities.

10:45

The intention behind providing the committee with an illustration of what the code might look like is to demonstrate how the additional contextual information that is required to put the safeguards in place has a different nature from the provisions in the bill. The bill provides for the code of practice to be binding—it is not optional. It is not statutory guidance to which professionals will be required only to have regard; they will be required to comply with the steps that are set out in any code of practice. The approach that the Government set out was what we determined was the best way to balance what we heard from the Supreme Court about providing clarity on the relationship between the 2014 act and the law as it stands with providing detail on safeguards and the relevant law.

Oliver Mundell: I appreciate that it might be difficult to put all the guidance into primary legislation, but was any consideration given to creating a hybrid, in effect, to enshrine some of the guiding principles in the legislation?

Ellen Birt: As I said, we carefully considered the points that the Supreme Court raised and we used the intensive three-month period to listen to what professionals, families, and children and young people told us was important to them about the named person service and the getting it right for every child policy. The Government feels that the approach that is before the committee best addresses the Supreme Court's concerns.

Oliver Mundell: Was any other drafting work done before that decision was taken or was the decision taken in principle because the issue was too difficult? Was the approach worked through to arrive at the conclusion?

Ellen Birt: As you would expect, we officials work through any issues in the drafting process. That is a normal part of the process before a bill is put before a committee.

Oliver Mundell: So although it was deemed difficult in practice to put the guidance into the legislation, it was not deemed legally impossible when the bill was drafted.

John Paterson: As Ellen Birt said, detailed consideration was given to exactly how to approach the matter. For example, people suggested that we should say up front in the bill that consent was required. Clearly, it would have been possible to do that, but it would have been possible only to say that consent was required except in certain circumstances. We would then have had to set out those circumstances much in the way that the code does, except that we would have had to do it with the level of precision that is required of primary legislation.

Oliver Mundell: So it is okay legally for guidance to be imprecise but primary legislation has to be precise. Is that right?

John Paterson: That is not quite what I am saying.

The Convener: You need to stick to the bill, Oliver. You are talking about drafting bills.

Oliver Mundell: I do not think that I am.

The Convener: You are. You are talking about how bills as a whole are drafted. Are you suggesting that everything should be in every bill?

Oliver Mundell: No—I am talking about what should be in the bill that is before us. Other committee members are about to come on to questions about whether what is in the bill is akin to affirmative procedure. I am trying to understand what was decided.

The Convener: I think that the witnesses have answered you about five times, but feel free to draw your questioning to a conclusion.

Oliver Mundell: What requirement is on the Government to take into account what the Parliament says and what is the legal standing of that? What does that mean in practice?

John Paterson: Really just what it says. If Parliament expresses a view on the draft code—I take it that we are talking about the draft code.

Oliver Mundell: Yes.

John Paterson: In producing a final version of the code, the Government is required to take into account any view from Parliament on the code.

Oliver Mundell: What does taking into account mean in practice? Does the Government have to listen to the Parliament? Does the Government just have to take the information on board? Is there no requirement or legal duty to take action as a result of any concerns that are expressed?

John Paterson: The legal duty is to take the view into account. If the Government failed to take it into account, it would fail in that legal duty.

Oliver Mundell: That would have to be challenged in the courts; it could not be challenged in the Parliament. Would the question just be the subject of a parliamentary debate?

John Paterson: All law is ultimately subject to interpretation and enforcement by the courts; the bill is no different from any other law in that respect.

If I may, I will go back to the point that you made about the code of practice. Although you mentioned guidance, it is not guidance but a code of practice that will be issued under proposed new sections 26B and 40B of the 2014 act. In paragraph 107 of its judgment, the Supreme Court recommended that as one of the possible ways in which to address the matter. In an earlier paragraph of its judgment, the court referred with approval to a code of practice in relation to policing. It is fair to say that that consideration by the Supreme Court influenced our thinking.

Johann Lamont: You have talked about an illustrative code of practice. Has such a document been produced for previous legislation in the Parliament?

Ellen Birt: Not to my understanding. John Paterson can correct me if I am wrong, but I think that there have been instances where, during the parliamentary process for bills, early drafts of subordinate legislation that bills will provide powers to produce have been provided to assist Parliament. Mr Swinney decided to provide an illustration this time in recognition of the significant interest that there has been in the matters concerned.

Johann Lamont: What is the document an illustration of?

Ellen Birt: It is an illustration of how the power that the bill sets out in relation to providing a code of practice could be used. However, it is important to recognise that, should the Parliament approve the provision in the bill that places ministers under an obligation to issue a code of practice, it is the procedure that is set out in the bill that would have to be complied with. The illustration is not intended to be the code of practice that would be in place when the provisions are implemented.

Johann Lamont: So the code of practice could be very different from the illustration, which gives us no guarantee that that is what the code could look like.

Ellen Birt: We cannot presume at this stage what the parliamentary view of the bill will be.

Johann Lamont: Do you accept technically that our view of the bill will in large part be shaped by what we think the capacity to deliver the bill's intent through the code of practice is, so there is a gap? You seem to say that we can look at the bill in order to agree to it, but there will subsequently be a code of practice that might not be like the illustrative code of practice. The code of practice will therefore not have the same scrutiny as will apply to the bill that delivers the requirement to have the code.

Ellen Birt: The process that we are engaged in is scrutiny of the bill, in the normal way that legislation is scrutinised by the Parliament. It is not our submission that the illustrative code of practice is required in order for the Parliament to give its view on the bill.

Johann Lamont: Is it reasonable for the Parliament to expect the core bit of the bill, which is the delivery of the code of practice, to receive the same scrutiny as the bill receives? I might be missing something technical, but it feels as if the Parliament is being asked to confirm that we require the code of practice. That code could be very different from the illustration, but we will not have the same capacity to scrutinise it as we will have to scrutinise the bit of legislation that insists that it should come into being. Do you see that there is an issue of scrutiny and building confidence about the bill's outcomes?

Ellen Birt: It will be for members to express their views about the proposal that the Government has put forward. The proposal in the bill is that ministers would require to publish a binding code of practice—under a procedure that requires consultation—and a draft code of practice

would be laid before Parliament. We are in a process now in which the bill is being scrutinised.

Johann Lamont: For the sake of argument, let us say that I completely accept that there should be a code of practice. I might have concerns about the ability of the code that comes out at the end of the process to deliver on the bill's intention, but I—and, more important, the committee—would not have the same opportunity to scrutinise that code as we will have to scrutinise the provision that requires the code to be issued. Should there not be clarity about that, particularly given the contention around the bill? Did you consider how you could build into the process parliamentary scrutiny of the code that is as full as the scrutiny of the bill itself?

Ellen Birt: As I said, we are in a process of scrutiny now.

Johann Lamont: With respect, we are scrutinising an illustrative code of practice, not the code of practice.

Ellen Birt: I meant that we are in the process of scrutinising the power.

The Convener: I seek clarification. If you had not given us the illustrative code of practice, what would you have given us in its place?

Ellen Birt: The Deputy First Minister decided to provide the committee and the public with an illustration of a code of practice on the basis that it would be of assistance. That was the decision that he took; that is what he felt would be most helpful.

The Convener: I accept that, but I am trying to get at what information, if that decision had not been made, would normally have come to us about the code of practice at this stage. Would we just have been told that we were going to have a code?

Ellen Birt: Normally, there would be discussion and information about how the Government intended to use the powers that the bill before the Parliament placed on ministers. Given the nature of the bill, the Deputy First Minister decided that it would assist the committee and the public in general to see what a code of practice might look like. That also assists us as Scottish Government officials. We hope that the debate about the illustrative draft that takes place through this parliamentary process—if we assume that, at the end of it, the Parliament will confer on ministers the responsibility to issue a code of practice—will help us to ensure that a draft that is later consulted on is cognisant of views that have already been shared.

The Convener: Let me clarify one other point on the illustrative code of practice. If, having looked at it, we think that there are two or three things wrong with it and we do not like the way it looks, and we feed that back to you, would that view affect what the code of practice would eventually look like? I know that you cannot speak for the minister, so that is an unfair question.

Ellen Birt: I underline the point that I made earlier. We, as the Government, cannot presume what powers or duties the Parliament will confer on ministers. As I said, the Deputy First Minister took the view that sharing an illustration of how the power that is set out in the bill could be used would be benefit parliamentary consideration of the bill.

Assuming that the provision that we are talking about is approved by Parliament, the procedure that is set out in the bill would have to be complied with. There will be a full and proper consultation of the relevant persons who will be affected, a requirement to lay a draft of the code of practice in front of the Parliament for 40 days and then a duty on ministers to consider any views that Parliament expresses.

11:00

Oliver Mundell: I am slightly struggling to follow that. Is it correct to say that the bill as introduced could have been introduced just the same, without any amendments, if no illustrative code of practice had been provided?

Ellen Birt: I am not sure that I understand what you mean when you ask whether it could have been introduced without amendments.

Oliver Mundell: Could the bill have been introduced as it is at the moment?

Ellen Birt: Yes. The normal process is that a bill is laid without supporting materials in the form of illustrations of how subordinate powers might be used.

Oliver Mundell: In this specific case, would the bill remain exactly the same, whether the code was there or not?

Ellen Birt: Yes. The provisions of the bill are not affected by the illustrative code of practice that has been provided for the committee.

Oliver Mundell: So that code has no legal standing in terms of the bill.

Ellen Birt: The illustrative code does not have any legal standing. If the powers or duties that are set out in the bill are duly conferred on ministers, there will be a requirement on them to issue a binding code of practice.

The Convener: I want to draw this to a close. We wrote to the cabinet secretary about it and he got back to us to say that he would provide an illustrative draft code of practice to accompany the bill just to show us how the powers might be

operated once the bill has been passed. We are getting caught on something that was meant to be helpful—regardless of whether we find it so—when there are more important issues to discuss about the bill.

We will move on with Johann Lamont. Please do not go back to the code of practice.

Johann Lamont: No, I will not. We can raise that with the cabinet secretary himself.

I have a couple of final questions. Has there been a change in the policy intention in this area of work? I ask because what we are now seeing feels a very long way from the real world. The real world is not just about families who are seeking help; there are also families who resist seeking help and their children are vulnerable. Does the bill address that situation?

Secondly, we all know of stories in which the problem was that large numbers of people were engaged in a child's life, but information was not shared or the story was not told and the child suffered, often with tragic consequences. There is no duty to share information, so you have still to tell me what it will look like for somebody to prove that they have considered sharing information. If people do not share information or say that they noticed this or that, we will be in the same place that we have been in with every tragic case. How will we address that if there is no duty to share information? I think that, in policy terms, the Government has moved back from that. How are we addressing the situation of vulnerable children being let down by a system that has not noticed the signs of vulnerability—which is, in my view, what prompted the legislation? How will the bill help? Am I right in saying that the policy intention has had to change?

Ellen Birt: Again, I refer to the previous statements that the Deputy First Minister has made: policy has not changed in relation to the GIRFEC approach, the named person service and child's plans. The Supreme Court determined that that policy and the aims of the 2014 act are "legitimate and benign", but it has required the Government to consider again how the information-sharing provisions will operate, and how we can provide clarity to ensure that information sharing happens in compliance with the law.

It is absolutely the intention that the named person service will seek to improve the position that we are in and, as Johann Lamont identified, that it will address the issues that we have heard about many times before with different services holding bits of information that could, had they been seen together, have told an important story.

That is why the requirement in the 2014 act for the provision of the universal service has not changed. The Government's policy intention is that a named person service will be available for all children and young people in Scotland—there is obviously an exception in relation to the children of people who are in the armed forces—and the provisions in the bill will ensure that professionals working in that service understand and have clarity about the responsibilities that are being placed on them. The bill will, for the first time, place a duty on all named person service providers to have regard to the wellbeing needs of children. The evidence that the Care Inspectorate has submitted to the committee highlights that although good progress has been made over a number of years, there are still gaps and issues.

Johann Lamont: What evidence will they have to show that they have considered it?

Ellen Birt: That they have considered what?

Johann Lamont: You say that, rather than someone having a duty to share information, they have a duty to "consider" sharing it. What evidence must they show? If there is none, that does not feel very different from current practice.

Ellen Birt: Are you asking me what evidence people will be required to provide?

Johann Lamont: Yes.

Ellen Birt: The illustrative draft code of practice includes a requirement that professionals record their decision making. That is already a requirement of good decision making, but the binding nature of the code of practice will ensure that the named person service and the approach on child's plans—

Johann Lamont: So people will have to record that they decided not to share information.

Ellen Birt: Yes—they will be required to do that.

Johann Lamont: I might be missing this completely, but what consideration has been given to the impact of the change in governance of schools on a local authority's responsibility for children and the named person service? The list of who is responsible at different ages and stages says that the local authority has the responsibility, but I am sure that you accept that, under the governance proposals, many of the powers that local government has over schools will change. Has that been factored into the bill?

Ellen Birt: At official level—that is obviously the level that I represent today—we are working closely with our colleagues who have responsibility for delivering the Government's policy objectives on school governance. The bill and the 2014 act do not change local authorities' responsibilities. The duty to provide the named person service will still rest at local authority level.

Johann Lamont: That is despite the fact that more powers and autonomy are going to the headteachers in individual schools. Has there been any consideration of the shifting of that responsibility to schools and headteachers? Has there been a conversation about whether it would be a good idea?

Ellen Birt: As officials, we have been having discussions about the impact of our respective policies on each other, as you would expect us to do, but the Government's policy intention has not changed.

The Convener: That is clearly an issue that Johann Lamont will raise with the cabinet secretary when he comes here.

Ellen Birt: Yes. Thank you.

Liz Smith: I have a question about the financial memorandum. You referred to it earlier when you said that you have to be satisfied that there are sufficient resources and money available to ensure that the people who deliver the named person service are professionally competent. What plans do you have for that on an on-going basis? What costs do you think will accrue as a result of the policy? As I understand it, those professionals will now have to make a judgment about whether to share information, rather than having a duty to do so put upon them. To make that judgment, they will have to have knowledge of the law and be very competent in weighing up, under the wellbeing concern, the merits of sharing or not sharing information. Those people are busy and are not necessarily trained as lawyers, so I think that that would involve substantial training. What financial consideration has been given to that?

Ellen Birt: As I said in my opening statement, £10.2 million has already been invested in supporting the people who will have responsibilities for the named person service to ready themselves for implementation. Those organisations confirmed with the Government ahead of August 2016 that they were ready to be compliant with the law under the 2014 act.

As I set out, the bill will make changes in relation to information sharing only. It clarifies the relationship between what would be an amended 2014 act and the current law on data sharing, human rights and confidentiality. Using modelling similar to that which was used during the 2014 act's parliamentary progress, the Government has identified a further £1.2 million that will be invested in 2018-19 to develop the training and ensure that it becomes embedded within the normal CPD and supervision requirements that persons who will take on those new responsibilities already undertake. Our expectation is that it will be a one-off investment and that that training will become part of the regular and ordinary professional development and supervision.

Liz Smith: Why would it be a one-off investment, given that new named persons would require continuing training?

Ellen Birt: That is how services deal with turnover of their staff now. The additional funds that are being invested are to ensure that the training methodology and the practice materials that will be required to support that training are in place.

Liz Smith: Are there no financial predictions for the continuing costs beyond the additional £1.2 million in 2018-19?

Ellen Birt: As I said, we used the same methodology that was applied to the 2014 act. We will put in place the finances that are required to ensure that that training can be given, and that backfilling can be done, in 2018-19. However, as the financial memorandum sets out, the expectation is that that will be a one-off investment, with that training becoming part of the normal professional development and supervision requirements with which those professionals already engage.

The Convener: Thank you very much. I draw the evidence-taking session to a close and thank Ms Birt and Mr Paterson for attending and for their forbearance.

11:13

Meeting continued in private until 12:26.

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