EQUAL OPPORTUNITIES COMMITTEE

Tuesday 9 December 2003
(*Morning*)

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliamentary Corporate Body publications.

CONTENTS

Tuesday 9 December 2003

EQUAL OPPORTUNITIES COMMITTEE
10th Meeting 2003, Session 2

CONVENER

*Cathy Peattie (Falkirk East) (Lab)

DEPUTY CONVENER

*Margaret Smith (Edinburgh West) (LD)

COMMITTEE MEMBERS

*Shiona Baird (North East Scotland) (Green)
*Frances Curran (West of Scotland) (SSP)
*Marlyn Glen (North East Scotland) (Lab)
*Marilyn Livingstone (Kirkcaldy) (Lab)
Campbell Martin (West of Scotland) (SNP)
*Mrs Nanette Milne (North East Scotland) (Con)
*Elaine Smith (Coatbridge and Chryston) (Lab)

COMMITTEE SUBSTITUTES

Jackie Baillie (Dumbarton) (Lab)
Patrick Harvie (Glasgow) (Green)
Carolyn Leckie (Central Scotland) (SSP)
Tricia Marwick (Mid Scotland and Fife) (SNP)
Mr Jamie McGrigor (Highlands and Islands) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

Andrea Brown (Transalba)
Nicky Brown (Contact a Family Scotland)
George Burrows (LBGT Youth Scotland)
Douglas Hamilton (Barnardo's Scotland)
Nick Laird (Equality Network)
Maxwell Reay (Transmen Scotland)
Zara Strange (Press for Change)
Albi Taylor (Contact a Family Scotland)

CLERK TO THE COMMITTEE

Steve Farrell

SENIOR ASSISTANT CLERK

Ruth Cooper

ASSISTANT CLERK

Roy McMahon

LOCATION

The Hub

Scottish Parliament

Equal Opportunities Committee

Tuesday 9 December 2003

(*Morning*)

[THE CONVENER *opened the meeting at 10:06*]

Item in Private

The Convener (Cathy Peattie): Good morning and welcome to the 10th meeting in this session of the Equal Opportunities Committee. We are meeting in very grand surroundings. No apologies have been received.

Do members agree to take in private item 4, which concerns a draft committee report?

Members *indicated agreement*.

Education (Additional Support for Learning) (Scotland) Bill: Stage 1

The Convener: Under agenda item 2, I welcome Nicky Brown and Albi Taylor from Contact a Family Scotland and Douglas Hamilton from Barnardo's Scotland, who are here to give evidence on the Education (Additional Support for Learning) (Scotland) Bill. I will invite members to ask questions and panel members will participate. If witnesses want to say something about the issues that are being discussed, they should feel free to speak.

Do the witnesses support the general aims of the bill, as set out in the bill's policy memorandum?

Nicky Brown (Contact a Family Scotland): Yes. Contact a Family Scotland supports the bill's general aims, but we think that there are issues that need to be addressed.

Douglas Hamilton (Barnardo's Scotland): Barnardo's Scotland also supports the general principles of the bill and the proposed new system, which we think will be much more comprehensive and supportive than the current system. We welcome the broadening of the definition of people who will be covered by the legislation.

The Convener: A number of questions will be asked. If there are issues that you think should be addressed that have not been dealt with, I will give you an opportunity to deal with them at the end of the session.

Do you agree with the proposed definition of "additional support needs"?

Douglas Hamilton: As I said, Barnardo's is pleased with the new definition of additional support needs. As an organisation, we work with a wide range of children and young people who have additional support needs who would be classed as having special educational needs. In addition, there are children who are affected by homelessness, parental substance misuse and HIV and AIDS, and there are young offenders and children who are looked after. The list could go on and on. In reality, many of those children might need additional support in their education but, as the system currently stands, the education legislation excludes them from additional support. We are pleased that the bill will broaden out the definition, in particular to take account of social, emotional and behavioural difficulties, because it has always been difficult to know whether those would be included in special educational needs.

The Convener: Parents with children with special emotional needs feel that their children will

fall through the net because the bill will not recognise them.

Douglas Hamilton: Do you mean children with social, emotional and behavioural difficulties?

The Convener: Yes.

Douglas Hamilton: That was one of the concerns that we raised in our response to the draft bill. There are differences of opinion on how to assess social, emotional and behavioural difficulties, and on the definitions. In our initial consultation response, we argued that there should be national guidance on how to assess social, emotional and behavioural difficulties. We are pleased that the code of practice will provide guidance on social, emotional and behavioural difficulties.

Nicky Brown: We agree with the definition, because it covers a wide spectrum of children with different and complex support needs. However, it has not been opened out to include children who have input from people from voluntary and paid organisations. If that structure is not there in the first place, who will support those children?

Albi Taylor (Contact a Family Scotland): The concern with current legislation is that the definition is too narrow. Many more children will qualify under the bill but, in reality, the new definition is almost identical to that in current legislation. Circular 4/96, "Children and Young Persons with Special Educational Needs", states:

"provision for special educational needs means educational provision which is additional to or otherwise different from that generally made for those of the same age".

The bill defines additional support needs as the requirement for provision, to help a child or young person to benefit from education, that is additional to or different from what children or young persons of the same age normally receive. To my reading, those are almost identical. The problem is not with the definition, but with the implementation and monitoring of the procedures. Without adequate monitoring, one has to assume that the same criticism will be directed at the bill as is directed at existing legislation.

Mrs Nanette Milne (North East Scotland) (Con): You have touched on my question to some extent, but I want to consider the effect on equal opportunities. Will the bill have a positive effect on equal opportunities? Do you agree that it will help to ensure that children and young people with any type of additional support need will benefit from the same quality education as their peers?

Douglas Hamilton: It will have an impact on equal opportunities. The wider definition is of great benefit to the children and young people whom we work with. The fact that a duty will be placed on local authorities to identify and assess will be of great benefit and will assist many of those children.

Albi Taylor: I know that the equal opportunities section of the policy memorandum states that

"The Scottish Executive is committed to promoting equality of opportunity for all",

that children and young people will get

"the same quality of education as … their peers",

and that equal opportunities are

"essential to develop their potential",

but, in reality, although the bill provides legal rights, co-ordination and appeal rights, it does not provide equality of opportunity.

Mrs Milne: In the written evidence from Barnardo's, you state:

"some more thought needs to be given to ensure that the needs of all children with additional support needs are adequately addressed".

Will you expand on that?

Douglas Hamilton: That has been one of our main concerns during the consultation process. The background to the legislation is the development of special educational needs legislation. During the consultation process, the meetings in which we have taken part have involved people representing those with records of needs and representatives of bodies that are concerned with special educational needs. We have been trying constantly to remind the Executive and Parliament that the widening of the definition means that the new legislation will affect a large number of other children, although groups representing them have not been engaged in the process as much as they could have been. Partly, that is because a lot of groups have not realised that the bill will impact on them. The ones that have been most vocal about their concerns are those that are already involved in the special educational needs system.

Some of our services that deal with looked-after children who do not have a disability or a communication difficulty that would have made them eligible for a record of needs are still trying to get their heads around how the bill can help them. Our push has been to ensure that all young people who will be affected by the legislation are considered during the consultation process.

Marlyn Glen (North East Scotland) (Lab): The written submission from Contact a Family Scotland states:

"Currently parents enjoy legal rights to protect service provision from within the education authority. These rights will be removed by these proposals and replaced with a new dispute resolution procedure."

Will you expand on that statement?

Albi Taylor: I am not sure that any of my colleagues could expand on the definition of dispute resolution. As part of my research for my appearance today, I asked a few colleagues for their thoughts on dispute resolution. Most felt that it was unclear and that it sounded like something that would be done by the education department. Nobody was sure whether it would be an independent process. Most people felt that it sounded like a complicated quagmire and that, if we had a rights-based education system, there would be no need for dispute resolution. It was also suggested that the idea throws up the strong possibility of a two-tier process developing. For example, if the parents of a child who currently has a record of needs but does not qualify for a co-ordinated support plan are not happy with the situation, they will find that the tribunal route is not open to them, because the tribunal will be able to take only approved co-ordinated support plan cases, so parents will be referred to the dispute resolution process as a means of pacifying them. That would mean that there would be a first and second-class resolution system. To ensure that all children have an equal right to appeal decisions, only one route should be available.

Nicky Brown: A similar concern is raised by local authorities' differing abilities to provide financially for educational needs services. In recent years, the financial difficulties of Scottish Borders Council have had a big impact on children with special needs. Whether their needs would be covered by the bill or are catered for outwith the education authority, it has always been down to the educational psychologist to bring on board elements relating to additional needs. If the educational psychologist is not the main pivot in that process any more, who will be?

Marlyn Glen: That is an important point.

Will Douglas Hamilton state his views on the removal of compulsory assessments?

Douglas Hamilton: We are satisfied with the concession in section 6 that allows parents to request an assessment, even though the compulsory assessment has been removed.

Marlyn Glen: From an equal opportunities point of view, will that be an effective way of working?

Douglas Hamilton: I think that it will be. The bill will require a change in people's mindset. The new general duty and the fact that anyone who requests an assessment should be assessed opens up the process to a much wider range of people than could currently be included in the system.

Nicky Brown: That would also apply to Scottish Borders Council, where the educational psychologist is the pivotal person for additional needs. If parents are responsible for choosing assessments, will they be knowledgeable enough to know which assessment will be their best route into services within the authority's remit? If a parent specifically chooses the health assessment—which as a rule they would get in any case—will that put a duty on the authority to look into additional needs? At the moment, I do not think that it would.

Elaine Smith (Coatbridge and Chryston) (Lab): We have already touched on the fact that the bill proposes to replace the record of needs with the co-ordinated support plan. I want to explore that issue further, as a number of concerns have been raised, some of which the Executive took on board when redrafting the bill. Do Contact a Family Scotland and Barnardo's Scotland support the replacement of the record of needs with the co-ordinated support plan?

Albi Taylor: Both the record of needs and the co-ordinated support plan are purported to be for children and young persons with significant and enduring needs, who require support over a long period. I am at a loss to understand how about 9,000 children who have a record of needs will not qualify for a co-ordinated support plan. A child can be classified as having an additional support need if outside agencies are continuously involved with them. My son has autism and fell away from speech and language therapy because the service was woefully understaffed. He still has significant and enduring needs that have an adverse effect on his education, but under the new guidelines, he will not qualify for a co-ordinated support plan.

Douglas Hamilton: We favour the co-ordinated support plan, but we have a number of concerns about how it has been set up.

A co-ordinated support plan must be about co-ordinating support. For a plan to be produced, a child must receive support from a variety of agencies. In the initial consultation, we asked which agencies were meant. We suggested that voluntary agencies should be included in the definition, and the bill indicates that voluntary agencies may be identified through regulations by Scottish ministers as appropriate agencies to provide co-ordinated support.

However, the definition must be wider than that. Co-ordination does not depend on whether someone is supported by a health authority, an education authority, a social work department or a voluntary agency. A family member or neighbour may provide support. Structures may be very informal—a child may receive additional support from anyone outside their school. Informal support needs to be co-ordinated every bit as much as official support, because it may be making the difference. Barnardo's Scotland and I are concerned about the current definition that requires agencies to be involved in supporting a child.

The prediction for the number of children who have a record of needs but who will not receive co-ordinated support plans has been mentioned. We must ensure that every child who requires a plan receives one. It seems crazy to take rights away from children and families who currently have them, to reduce levels of support and to reduce legal entitlements. In my view, far more children will qualify for co-ordinated support plans than qualify for records of needs. The figures in the financial memorandum on the number of plans that will be needed do not seem to add up.

Elaine Smith: The committee should pursue that point from an equal opportunities point of view. Albi Taylor mentioned autism, but concerns have also been expressed about dyslexia.

Albi Taylor: If a child has a single impairment and there is not a secondary call-in of health or social work services, they will not qualify for a co-ordinated support plan.

Elaine Smith: Some time ago, concern was expressed that legal challenges could be mounted to decisions about records of needs. Earlier, you indicated that legal challenges will be replaced by a dispute resolution procedure. What are your views on that? Do you think that, at the end of the dispute resolution procedure, people should still have the right to mount a legal challenge?

Douglas Hamilton: That is where the tribunal comes in. It will deal with disputes about co-ordinated support plans.

Elaine Smith: Will that be adequate?

Douglas Hamilton: I have concerns about that. Legal aid will not be available. The Executive has said that it will encourage education authorities not to take legal representatives to tribunal hearings. To be honest I cannot see that happening, and if the education authorities take along legal representatives, it is understandable that parents will also want to have legal representation. Parents will have to find the money to be able to do that. That is an issue, particularly because the bill as it stands does not contain provision for independent advocacy.

We are also concerned about the jurisdiction of the tribunal. Although tribunal decisions are binding on the local education authority, other agencies might need to be bound by those decisions in cases that involve co-ordinated support plans.

Elaine Smith: In your submission, you talk about the role of supporters. You say:

"we have concerns about gaps that may arise because a parent cannot or will not participate."

You recommend

"a duty to make provision for 'supporters'"

and consideration of

"the potential role of independent advocacy services."

Does the submission contain all the detail that the committee needs to have on those proposals or would you like to say anything further on the subject?

Douglas Hamilton: We were particularly pleased that the original draft bill and the accompanying documents contained provisions for supporters. However, the provision is not mentioned in the bill as introduced; it is mentioned only in the policy memorandum. Two or three concerns arise as a result. Many Barnardo's staff could be asked to become supporters, because we provide support in different situations for the child and their family. Our services are stretched at the moment, as are most voluntary and social services. If agencies were asked to act in that capacity, the additional time that would be required would need to be recognised in some way.

Another concern relates to the need to ensure that families who do not have someone whom they can call on as a supporter have access to supporters. If a family wants a supporter to attend a meeting with them, they want someone who knows the subject area. It might be nice to have a spouse, an aunt or another family member there as a supporter, in the sense of hand-holding and so forth, but ideally a supporter is someone who knows the system and who can give advice about how to act at meetings. A duty should be placed on the education authority to make supporters available to families.

Elaine Smith: My final question is for Contact a Family. You touched on this issue earlier in response to a question from Marlyn Glen. In your submission, you talk about your concern that, when no other services are involved, there is

"no requirement for such co-ordination for services solely from within the education authority."

You touched on the role of the educational psychologist. Will you expand on those concerns?

Nicky Brown: As the parent of a disabled child, I can speak about how things work for people such as educational psychologists in the Scottish Borders. Because of its limited financial budget—whatever the reason for that is—Scottish Borders Council has problems in supplying education services, never mind the special needs provision that comes from outwith the education remit. The bone of contention that I have with the withdrawal of the record of needs is that it has the legal status behind it that is needed to force the issue. From what we have heard so far about CSPs, we do not think that they will have the same legality. It is purely for that reason that parents like me will be reluctant to give up the record of needs.

The Convener: I have often heard parents of children with special educational needs say that

they have to fight for everything that their children get. They talk about having to battle all the way through the process. Will the bill make the situation easier or worse for parents?

Nicky Brown: Like Albi Taylor, I have a son with Asperger's syndrome. In all honesty, I think that the bill will make the situation worse. It will take the legal status of the record of needs away from me. I need that to be able to force the issue.

Albi Taylor: At the first consultation that I attended on the Education (Additional Support for Learning) (Scotland) Bill, at the beginning of the year, I said to the gentleman who was sitting next to me, "I have a record of needs for my son." He said, "You will automatically get a CSP." At the next meeting, it turned out that that is not the case. I had to fight with blood, sweat and tears for 18 months to get a record of needs for my son. Parents of children with special needs do not need any more pressure, or to have to face all these people who know what they are talking about. We sit at night going though screeds of paper, trying to teach ourselves the language. I finally got a record of needs for my son, Jack. He has had it for two years, and now it is going to be pulled, along with all the support and everything that we have worked for. Jack's needs are not any less enduring just because the Government has changed its policy.

10:30

Shiona Baird (North East Scotland) (Green): Parent groups that gave evidence to the Education Committee on 3 December suggested that there should be a universal mechanism for recording all children's educational objectives, as opposed to a three-tier system, with personal learning plans, individualised educational programmes and co-ordinated support plans. Will you state your views on that suggestion?

Albi Taylor: The existing mainstream system should be strengthened by personal learning plans, and all children should have such plans, because any child might require additional support at some time in their life. There is a need to focus on the planning process and not on documentation, to ensure that plans are actively co-ordinated and that children receive the support that they need to remain at their peer level.

Nicky Brown: We must also bear in mind co-ordination between health boards and education authorities. For example, co-ordination is needed for a speech therapist to go into the education side.

Shiona Baird: I thought that you might believe that the suggestion that I referred to would provide for more equality for all children, across the board, and less discrimination. All children would be regarded as equal because they would all have a personal learning plan, regardless of how much was in it. You do you not think that that is an issue, though.

Albi Taylor: I suppose it is, but the real issue is what is mandatory. At the end of the day, there is an enormous financial strain on special educational services. Everyone is in favour of better co-ordination, which is fundamental to the system, but it has to be used across all services. To achieve a multi-disciplinary approach, the bill would need to cover more than just education.

I do not know whether you were going to ask about tribunals, but it is a big concern that the tribunals will have no authority over health and social work, regardless of what is decided at them. Even if a tribunal decides that a child needs speech and language therapy, and that is in the child's CSP, the tribunal will have no power to insist that the health board provides that therapy. The worry is that the system will become a tiered system rather than a support system. Children can have all the plans we like, but if those plans are not enforced, we will struggle to cope. Speech and language therapy is so understaffed and educational psychologists are changing all the time. Those areas are struggling to keep up and, if it is proposed to increase the number of supported children, there will have to be huge financial backing.

Marilyn Livingstone (Kirkcaldy) (Lab): My first question is directed to the witnesses from Contact a Family Scotland; it follows comments on the Disability Discrimination Act 1995 in your submission. Are you concerned that there will be a gap in the legislation if the bill does not make provision for aids and adaptations?

Albi Taylor: When the Disability Discrimination Act 1995 was extended to education in 2001, it did not cover auxiliary aids, which were explicitly excluded because they were covered at that point within the special educational needs framework. It was assumed that the record of needs would cover the child in that respect. However, now that the record of needs is being pulled, an unintended gap has emerged between what it covers and the bill itself because the CSP will not cover that particular matter. Furthermore, there is no additional route of access, because it was never deemed necessary.

As a result, there are no rights under the proposals. The 50 per cent of children and young people with disabilities who are supported under existing legislation but who will not receive a CSP will have no alternative access to auxiliary aids and services and will receive no protection for the auxiliary aids and services that they already receive. That is particularly the case for those who have single disabilities such as dyslexia, hearing

impairment and autism—which are all clearly included within the definition of disability in the Disability Discrimination Act 1995—and who do not access services from health or social work. That reduces their chances of benefiting from the Government's commitment to inclusion.

The way forward would be to allow anyone with a disability as defined under the Disability Discrimination Act 1995—where the condition is present for more than a year and has a significant impact on day-to-day activity—to retain their legal right to appeal through tribunal, or their external right to independent appeal. The bill takes away that equal opportunities right.

Marilyn Livingstone: I am quite concerned about the gap that you mentioned. For example, in relation to autism, constituents have highlighted the fact that under the current system a youngster might have a learning plan for two thirds of the year but receive no support when they are not in school. Indeed, I have been examining that major issue in my own local authority area. Services for people who require continual stimulation stop for a third of a year. Will that situation worsen under the proposed legislation and, if so, why? Will you also elaborate on your comment that there would be no authority over health and social work? How will that impact on the other third of the year in which services stop? What changes are needed?

Albi Taylor: Many cases involving auxiliary aids and services are being referred to the Disability Rights Commission. However, the Commission has to make it clear that those aspects will not be covered by the tribunal. Obviously parents find that to be astonishing, because the tribunal will cover everything else.

The Disability Discrimination Act 1995 was never meant to stand alone; rather, it was supposed to work in partnership with the SEN framework. As I have said, people are struggling to get what they can. If the services in question are pulled, those people will be in a worse position. As far as health and social work is concerned, the paediatricians, speech and language therapists and so on to whom I have spoken have said that they want to be covered by the tribunal. They know that if they are covered, their managers will have to find the money to fund services.

Far too much of the proposed legislation relies on good practice. It would be fantastic if everyone could adhere to the code of practice, the manual of good practice and circular 4/96. However, they are only guidelines. Parents come back to me from hearings and say, "They said they were only guidelines", and I think, "Well, exactly". Everyone is up to their ears in work and no head teacher is going to say that they will take on more educational psychologists. Unless the matter is put on a more mandatory footing, many more children will fall through the gap.

Marilyn Livingstone: I was going to ask you for your views on the proposed tribunal service, but I think that you have more or less answered that question. Do the other witnesses want to comment on that before I move on?

Nicky Brown: As Albi Taylor has just pointed out, the code of practice is good if it is adhered to. However, if the situation is not coherent from region to region, we could end up with a postcode lottery.

Albi Taylor: The difficulty is that the children and young people who will access the tribunal system will have the most significant and enduring additional support needs, but will not be afforded the right to legal aid and legal representation at the tribunal hearing. I suggest that it will be a breach of human rights and of equal opportunities if their cases are compared to those of children and young people who have additional support needs but who do not have a CSP and can access legal aid if they qualify. That is a real issue for parents, because children from low-income families will be put at greater disadvantage if those families cannot afford legal representation.

Parents and young people will be able to refer a case to the Court of Session on a legal point, but how will they know whether a legal point has been breached? It is clear that parents and young people will be at a disadvantage in presenting their cases and in cross-examination.

Marilyn Livingstone: I want to take a step back and discuss independent mediation services. What do you think of the proposal that education authorities will have a duty to make provision for independent mediation? Can many issues be ironed out at that stage?

Albi Taylor: The worry with that proposal relates to how independent such mediation would be. At the consultations that I attended, it was said that the local authority would run the service but that the mediation would be independent. A genuine issue involving the establishment of trust is involved. If trust has been stripped away and people have to go to mediation, they will not want to go to a local authority mediator. Even if mediation were completely independent, it seems—sadly—that councils could ignore decisions, irrespective of the findings or the outcomes of any mediation.

Douglas Hamilton: Barnardo's supports the introduction of mediation, but I agree that it is important that such mediation must be seen to be independent. Obviously, the attraction of mediation is that it tries to deal with matters in order to prevent confrontational situations. In our experience, confrontation with an authority is often

the most draining part of the process, so anything that can be done to minimise such battles and to provide as many alternative options as possible is a positive thing.

Marilyn Livingstone: I take your point. We would want such matters to be resolved through independent mediation. Albi, how would you improve matters?

Albi Taylor: The whole tier system would have to be removed. The tribunal should have power over all additional support for learning matters. All children should have a right to access the tribunal and that tribunal should have power over all CSPs. We are talking about multi-agency working, but if the court can mandatorily pull only one section of that work, there will not be multidisciplinary working and efforts will fall at the first hurdle.

Margaret Smith (Edinburgh West) (LD): Many parents also raise with us their concerns about transitional arrangements. Parents might have concerns about a child in full-time education, but they can also be concerned about their child's leaving their educational facility—I have heard of two cases in the past week alone. What are your views on the transitional arrangements in the bill? In particular, Contact a Family has said that a minimum of 12 months is too short a transitional period. Should that period be extended in the bill to, say, 18 months? What do you think about the arrangements that are outlined?

Albi Taylor: With the record of needs, transition is planned from age 14. We do not want the current situation to be worsened. More children with complex needs are leaving school and are living when perhaps they would not have done so before life expectancy was increased, so that is an increasing concern. The resultant pressures are emerging as a key issue for families.

For Contact a Family Scotland, 14 seems to be the minimum age at which planning should start, but the draft bill proposed a minimum of six months, which the post-consultation document increased to a mandatory minimum of 12 months. Bearing in mind the record of needs minimum of six months from start to finish, a straw poll of parents at last week's consultation showed that only one in 15 had achieved record of needs planning within six months. The average was 18 months, which is three times the mandatory minimum level.

If the mandatory period for effective planning for a child is 12 months but effective planning ends up taking three times as long as that—36 months—how many children will find themselves out of secondary education with no support or planning in place for tertiary placement proposals? The notion of multi-disciplinary working is again being flagged up. Adult services need to be given the time to plan effectively for an individual's future and if, as a result of poor or rushed planning, the individuals concerned are at a disadvantage compared with their peers, their access to equal opportunities will be reduced.

10:45

Douglas Hamilton: I support many of the concerns that people have raised around transition, although it is not something that we have considered in detail. It is important to remember that a wide range of children will be covered by the co-ordinated support plan. There must be a minimum time scale and it must be clear that, although the minimum time scale is 12 months, the individual needs of each child should be taken into account and planning must start at the appropriate stage. Whatever time scale might be set—even if it is 18 months—planning will in some cases have to start earlier.

Margaret Smith: Are you generally happy that the present situation regarding future needs assessment will actually be changed? Has the current system caused concern in the past?

Albi Taylor: I have a bit on that subject in my submission, but I cannot find it at the moment.

Margaret Smith: I think that your submission or explanatory notes said that some parents who had been consulted said that they were unhappy with the way in which things worked at the moment and that the transition period was quite difficult. Have you had any feedback from parents about the need for the system to be changed?

Albi Taylor: Off the cuff, I would say that any concerns that exist will only be heightened by an adverse adjustment in the time scale. That goes back to the issue of multi-disciplinary co-ordination between health and social work. If a child with disabilities requires services, the child should receive that support, no matter where he or she comes from.

Margaret Smith: The convener has already highlighted the fact that some parents feel that any support that they have managed to get for their children has been as a result of a hard battle. There are overarching issues, obviously, relating to lack of staff and resources. I believe that the issue of resources is picked up on in the Barnardo's submission.

Section 3(2)(b) of the bill provides a sort of get-out clause by saying that the education authority is not required to do anything if doing so

"is not practicable at a reasonable cost."

That seems to be a "get out of jail free" card that might be used because of a lack of resources. Do you believe that the financial memorandum's

conclusions about the level of resources that are required are correct? What do you think about section 3(2)(b)? Do you have any other comments about personnel? I note that comments have already been made about the lack of speech and language therapists, clinical psychologists and others. Given that we are talking about reducing the number of people who have co-ordinated support plans, but extending additional support across the board, will we have a problem in terms of staff availability?

Douglas Hamilton: Yes. That is the starting point of my answer, although I will not pretend that I know the figures. The Scottish Executive has worked out the figures using various formulae and statistics, but I will not go into the detail. However, when the bill was published, the financial memorandum was the first thing that I looked at. I did that because of the Audit Scotland report—which was published earlier this year—about the presumption of mainstreaming in the Standards in Scotland's Schools etc Act 2000. The report highlighted that that presumption had not been properly costed and that we probably still do not know its cost implications.

My initial reaction to the financial memorandum's statement that the expected additional yearly costs for local authorities will be about £2.7 million is that the figure seems to be small. I do not have the details, but I do not believe for a second that at present we meet the needs of every pupil who requires additional support, despite the great efforts of local authorities throughout Scotland. If we were doing that, new legislation would not be needed to give those pupils additional rights. The legal rights to additional support clearly need to be strengthened, which will require additional resources. As I said, I believe that, because of the range of needs that will be taken into account in the wider definition, more children and young people will have co-ordinated support plans than have records of needs. That is why I have concerns about the resources.

On the get-out clause in section 3(2)(b), it is interesting that I have not seen the word "practicable" used in other legislation. Section 15 of the Standards in Scotland's Schools etc Act 2000, which introduced the presumption of mainstreaming, has a similar financial clause to the effect that the cost of provision of that education must be reasonable and that it should not affect the education of other pupils. I cannot remember the exact wording of that provision, but it seems to be stronger than the provision in the Education (Additional Support for Learning) (Scotland) Bill. At the very least, the financial get-out clause in the bill should be similar to the one in section 15 of the 2000 act. As local authorities will not have sufficient resources to meet everyone's needs, they will have to decide, on the basis of priority, where to allocate resources. I doubt that the word "practicable" is strong enough.

Margaret Smith: The financial memorandum considers the costs of the bill to the Scottish Executive and to local authorities, but I presume that there will also be a knock-on impact in costs to the voluntary sector.

Douglas Hamilton: Yes. For example, there will be an impact on provision of the role of supporter, although that is not covered directly within the bill. The bill will have a knock-on impact on a range of agencies.

Mrs Milne: The bill proposes a code of practice, which will include guidance on identifying complex and multiple factors in considering whether a child should have a CSP, and on seeking the views of children and young people and parents. Do you have views on what the proposed code of practice should contain?

Albi Taylor: I reiterate that, in the past, fabulous codes of practice have been widely read but widely ignored. The code of practice should set a minimum level of service for people wherever they are in Scotland: that would be the best hope for consistency. My one question is: what will happen if an organisation breaks the code?

Douglas Hamilton: My understanding is that a statutory code of practice is a stronger tool than guidance is because education authorities must comply with it. That is why a code of practice is proposed. I am pleased that the bill will introduce a code of practice because, as was said earlier, inconsistency throughout Scotland is one of the big concerns with the record of needs; it is also a concern about the new system. At least the code of practice will set out the standards that will be expected to apply everywhere.

When it comes to issues such as mediation, dispute resolution and the tribunal, the code of practice will play a key part in ensuring that young people get the service that they are supposed to get.

Shiona Baird: At point 14 in your submission, you advocate additional rights for children where the parents or carer

"cannot or will not participate."

That is an interesting concept. How would you see it working if it were included?

Douglas Hamilton: First it has to be said that there are additional provisions in the bill to ensure that the child's voice is heard throughout the process, which we support. One of the key things that is missing from the bill is mention of children's ability to appeal or request assessment. Those rights are given to parents and young people over the age of 16.

There are two threads of argument. The first is about a rights-based approach. The Age of Legal Capacity (Scotland) Act 1991 sets out that children over the age of 12 have legal capacity to instruct a solicitor and to bring civil cases in their own name. That is dependent on maturity and there are complications within that act. During the passage of the Standards in Scotland's Schools etc Act 2000, an amendment was lodged to give children the right within the same framework to appeal against exclusion from school. That recognises that children have had legal capacity for a number of years and that they should be able to exercise it in decisions that affect them directly. Decisions about children's education, exclusion from school and the support that they receive go right to the heart of what the concern is about. In order to achieve consistency with that, under the same definition as that which is in the Age of Legal Capacity (Scotland) Act 1991, children should be able to appeal or request assessment in the same way that their parents or young people aged over 16 will be able to.

The second thread of argument is about practical issues. A child might require additional support, because the parent is not capable of supporting them. The parents of some of the children with whom we work have substance misuse problems or are going through a difficult time because of homelessness, so they might not be in the best position to fight on behalf of their child or to make requests. On that basis, children and young people should have the legal right to make requests.

The Convener: Have you had the opportunity to raise all the issues that you wanted to raise this morning? I will give you a minute if you want to make any other points.

Albi Taylor: I sit in front of you today as a mother whose son has the same disability that he had last week, but under the bill he will not qualify for a co-ordinated support plan. As a result he will not be allowed a right of appeal to the new tribunal system. He will lose his right to his current auxiliary aids and he will be less likely to succeed in his current mainstream and fully inclusive placement because of the removal of that support.

The Convener: Thank you for your evidence. I suspend the meeting for five minutes to allow a changeover of witnesses.

10:59

Meeting suspended.

11:05

On resuming—

Gender Recognition Bill (UK Legislation)

The Convener: I welcome our next group of witnesses, from whom we will take evidence on gender recognition. It is understood that a Sewel motion on the Gender Recognition Bill will come before the Parliament in the new year. Although we are unsure of the precise timing of that, the committee felt that it was important to take evidence on the bill. The clerks will produce a summary of the evidence from today's session and from the written submissions. We will then submit that to the Executive when we know exactly what is happening. I apologise for the lack of clarity on where today's evidence is going.

I welcome our witnesses: Andrea Brown, from Transalba; Maxwell Reay, from Transmen Scotland; Zara Strange, from Press for Change; Nick Laird, from the Equality Network's transgender issues forum and the Sandyford Initiative; and George Burrows, from LBGT Youth Scotland. I extend a very warm welcome to you. We will move right into the question session.

Will the panel briefly outline for the committee and for public record the difficulties that are currently faced by transgender people in the absence of the proposed Gender Recognition Bill?

Andrea Brown (Transalba): It is a very complex situation or, rather, the situation has been made very complex. The situation is actually very simple, given that gender dysphoria is a medical condition like any other medical condition. Unfortunately, because it relates to gender, that makes everything complicated.

Currently, we do not have the right to have our true gender recognised. We object to the use of phrases such as "sex change". We have not undergone a sex change. We have aligned our gender to our true gender, which is the one in which we should have been born but unfortunately were not. At the moment, we are not allowed to marry. There are issues regarding pension rights, next-of-kin status and even simple things such as benefits, because even though we may have gone through official name changes and so on, we are not recognised as our true selves.

We welcome the Gender Recognition Bill as a step towards ironing out a lot of those irregularities and problem areas. However, in the answers from me and my colleagues over the course of the next hour, the committee will find that there are still certain issues that, as it stands, the Gender Recognition Bill does not cover.

Maxwell Reay (Transmen Scotland): Without the bill, transsexual men, whom I work with and support, fear that somebody may find out that they were born a different gender. Their lives can become difficult because of prejudice and discrimination. The bill will help people to live ordinary lives without the fear of being outed and the ramifications that that might have for their employment and housing, for their families, and for their personal safety and security.

The Convener: Does the bill go far enough towards providing the required improvements?

Andrea Brown: Certain elements of the bill create institutional outing for transgender people—particularly people in my circumstances. I am legally married. To claim my human rights and change my birth certificate, I would have to divorce my wife and—if the correct legislation is passed, as we hope it will be—ultimately convert my marriage to a civil partnership. However, the civil partnership offered is only same-sex civil partnership, which in itself is a form of outing. To achieve what the Government says is my basic human right—to be recognised as who I am—I would be institutionally outed twice. Divorce proceedings are a matter of public record. There are tabloid journalists who make a steady living out of trawling court records looking for what they regard as newsworthy stories.

Nick Laird (Equality Network): The bill goes a long way towards addressing most of the issues, although the Sex Discrimination Act 1975 should be extended to cover discrimination against trans people in the provision of goods and services. As things stand, trans people are protected in employment, so although an organisation would not be able to discriminate against somebody in employment, it could refuse to serve that person, for example. That is a mismatch.

Section 2A of the Sex Discrimination Act 1975 talks about discrimination against a person who

"intends to undergo, is undergoing or has undergone gender reassignment."

The Gender Recognition Bill, on the other hand, talks about a person who has lived for two years in the role. That mismatch should be fixed so as not to cause any problems.

Elaine Smith: I have a supplementary question that I would like to put to Andrea Brown. Paragraph 28 of the explanatory notes to the bill says, under the heading "Clause 9: General":

"*Subsection (2)* provides amplification of *subsection (1)*, making clear that the recognition is not retrospective, so the certificate does not rewrite the gender history of the transsexual person".

It therefore seems that if you obtained a new birth certificate, that would not expunge from the record the original birth certificate. From what date would the new birth certificate apply? Could people go back to look at the original birth certificate, and could that cause problems? One example springs to mind, although I am sure that there are many more. If an acquired-gender man wanted to become a Catholic priest, what would be the implications? I am not very clear about such issues. Can you throw any light on them for me?

Andrea Brown: There are two distinct systems—the way in which gender recognition will be handled in England and the better way in which it will be handled in Scotland. That affects those of us unfortunate enough to have been not only born a man but born in England—I will be subject to the lesser practice.

In England there would be some form of marking on the original birth register that my gender had changed. The new birth certificate that would be issued to me would look like one issued today—there would be no matching of birth certificates. There are two clues there for anybody who wants to look—if they look at the original record, they will see an annotation. Those responsible are saying, "We will be very careful about how we annotate the register", but if one sees an annotation often enough, one thinks, "Oh, that's what that means."

11:15

Elaine Smith: If you were asked to produce your birth certificate, would you need to produce one that was dated today? If so, people might ask you questions about your age.

Andrea Brown: Yes, it would arouse suspicions. The system would be better in Scotland, in as much as there would be a gender recognition register. All inquiries about people's antecedents and birth certificates would automatically entail an examination of that information, and those are the only details that they would be given—not that there would be any change in those details. The birth certificate that is issued to someone today would be germane to the type of certificate that would have been issued when they were born. Birth certificates might change every 10 years. I was born in 1953 so if I could get a new birth certificate through the Scottish system, I would get a 1953 birth certificate.

Mrs Milne: All the written evidence that we have received so far indicates that there is a preference for the age limit in Scotland to be set at 16, to tie in with the legal age for marriage. As you know, the bill currently gives the age of 18 for gender re-registration. Will the panellists comment further on that? Are you content with the other criteria for registration?

George Burrows (LBGT Youth Scotland): The way I see it, at the age of 16 you can finish compulsory education, get a job, live on your own and have responsibilities, but you cannot get gender recognition. I see that as a discrepancy.

Zara Strange (Press for Change): I have no preference on the matter, but the issue clearly affects younger people. I return to what was said before about birth certificates. It might appear that, if I were to get a new certificate today, it would register me as being 49 years younger than I am. Although I think that that would be marvellous—

The Convener: I thought that, too.

Zara Strange: I understand that that will not be the case. My birth is registered in England as well, and my new certificate would register my true date of birth.

Andrea Brown: The certificate would give the true date of birth, but it would be issued in the style of a certificate for a new birth in 2003.

Nick Laird: The requirements for the certificate are generally reasonable. However, because the legal age of capacity in Scotland is 16, the age limit in the bill should tie in with all other requirements. If someone can legally marry at 16, the age for gender re-registration should match up.

People who transitioned six years ago have a six-month period in which they can be fast-tracked, according to the provisions of the bill. Six months might not be enough time because most trans people—especially people who transitioned a long time ago—would not be in contact with any of the support groups or services; they would just be getting on with their lives. There is no reason why the period should last only six months. If it were extended to two years, that would give everybody enough time to find out about their options

The bill refers to a six-month limit on interim gender recognition. There is no reason why the interim certificate should lapse—that provision was not included in the draft bill and was not consulted on—and it could continue. The cost could impact on people if they had to reapply. There is no real reason for the inclusion of that provision.

Elaine Smith: Are you all content with the provisions to establish gender recognition panels, as outlined in schedule 1, or do you have any comments to make on the make-up of the panels?

Zara Strange: My understanding is that because the bill clearly defines when panels should accept or refuse applications, little room is left for discretion. Clearly, I would like a gender recognition panel, with Scottish representatives, to be set up in Scotland. If there is to be an appeals process, a lot of people would find it expensive to travel to the panel if it were set up in the south of England. It would also be nice to have people on the panel who have experience of what our lives are like, but I would not argue too strongly for that, because many issues are more important.

Elaine Smith: The bill states that members of the panel can be legal members or medical members. Is that enough?

Zara Strange: There are some well-qualified professional trans people in both those professions.

Elaine Smith: So you would be happy with that.

Andrea Brown: I do not see that there is any other option. Panel members would be considering matters of medical fact and legal fact. Yes, it would be nice to have a lay person on such a panel—purely on the basis of what is reasonable to the man on the Clapham omnibus—but that increases the chance of somebody being unsympathetic. It is a difficult situation. I am happy with the projected set-up. We do not need to be too concerned about it. We will judge the situation on the results. If it became apparent that something was wrong with the system, we would look for something to happen.

We were asked whether the age of consent for making an application should be 16 or 18. Like Zara Strange, I am well past the age when that could affect me, but the issue is one of the sovereign differences between Scotland and England, which I would like to see maintained.

Elaine Smith: Concerns were raised by Press for Change about the potential cost to applicants of providing reports as evidence to the gender recognition panel. The evidence that we received from young transsexuals suggested that the cost of applying should be no more than the current cost of applying for a passport, and that the fee should be waived completely for applicants who receive benefits such as income support. The concern was also raised in evidence that fees might rise into the hundreds of pounds. What are the panel's views on those issues?

Zara Strange: It has been indicated that the process has to be self-financing, but because of the number of people that we are talking about, the cost would be hundreds of pounds or, in one case in particular, thousands of pounds. I am in employment, but it will be difficult for me to find that kind of money, as it will be for a lot of people.

Elaine Smith: Could you expand on the case in which the cost would be thousands of pounds?

Zara Strange: Volume 2 of the 19th report by the Joint Committee on Human Rights, on the Draft Gender Recognition Bill, contains the evidence that was taken by the committee and includes a graph showing the three options.

Andrea Brown: While Zara Strange is finding that information, I will add a comment on fees. The Gender Identity Research and Education Society commissioned a survey a couple of years ago into the employment, or otherwise, of transsexual people. It revealed that a growing number of transsexual people are on long-term health benefits, often with the collusion of general practitioners. Given the lack of protection that exists, people find that maintaining a life under the stress of work is detrimental to health. It is probable that more than half the transsexuals in the United Kingdom are on benefits rather than in work. As Zara Strange said, it is difficult for people who are working to find the money. For people who are on benefits, it would be impossible.

Zara Strange: I refer to page 78 of volume 2 of the 19th report by the Joint Committee on Human Rights. The whole process, on a full-recovery basis, would cost £833, according to the Government's estimates. On top of that, there are fees for a statutory declaration. The process is different in England, but if Andrea Brown wanted to have a solicitor make a declaration, for example, that would cost up to £135. People also need a medical certificate, which can cost between £25 and £50. If someone transitioned a long time ago and their doctor's records had been lost, they might have to go through the full process again, in which case they would need three consultations. If they went private because they could not wait for the NHS, the consultations would cost £600. If they wanted a copy of their birth certificate, that would cost £11; a new birth certificate would also cost £11. If we add all that together, it comes to £1,640, so although applying for the registration certificate costs only £833, a lot of other expenses are involved.

Elaine Smith: In terms of equal opportunities, will those costs exclude poor people? It is only richer people who will be able to access the system.

Maxwell Reay: I stayed in employment throughout my initial transition, but so that I could have my chest surgery when I could be off work, I had to fund my transition myself. If I had gone through the NHS, I would have had to go for surgery when the NHS wanted me to go. That might not have suited my employment at the time, so I ended up funding my transition so that I could stay in employment. Even though I was earning a wage, an extra cost on top of the transition would have made it even more difficult to access.

Margaret Smith: Several of the bill's provisions around marriage are complex—and marriage can be complex at the best of times. I would like to investigate a few of those provisions. Andrea Brown has outlined how her particular set of circumstances would be affected. Will you outline how people feel about the fact that people who are in marriages, a significant minority of whom will wish to stay in their marriage, will have to divorce? That will have an impact on their families and on benefits, financial security and other aspects of their lives.

I am also interested to hear whether you are happy with the introduction of a new ground for divorce in Scotland—the issuing of an interim gender recognition certificate. Earlier Nick Laird spoke about the time limit of six months on the interim certificate, which was not included in the draft bill and has not been consulted on properly. From the information that we have received, there seems to be concern both about the lack of consultation on the time limit and, more significantly, about whether the provision is required. Presumably, the Government believes that if the time limit is not in place an interim gender recognition certificate could continue indefinitely and people would not get divorced. Should the time limit of six months be extended to, say, two years? The Government would then get its end of the bargain and people would be able to hear about what was happening in good time. That would allow them to put their house in order and to do something about the situation.

11:30

Andrea Brown: The marriage issue has become a minefield, but in fact it is quite simple. It is particularly simple in Scotland, because there is nothing in Scots law to say that people cannot maintain a same-sex marriage; the law says simply that people cannot enter into such a marriage. There is no reason why Scots law could not be invoked today to say that the very small number of people who are lucky enough to have a marriage that is strong enough to cope with the transition should not remain married.

The problem is compounded by some of the vagaries of the replacement civil partnership registration. It has been suggested that, although the transition from marriage to a recognised civil partnership will be automatic, in effect there will be a one-day delay. That means that for one day people will totally lack legal protection for their partnership. They will have to stay at home, wrap themselves in cotton wool and hope that the boiler does not blow up. If anything happens to them in that period of 24 hours—for example, if they are hit by a bus—their ex-wife or husband and partner-to-be will have no legal protection. They will have no pension rights; in hospital, they will have no legal say as next of kin.

If there is to be a transition, why can it not happen seamlessly? I do not see why it has to happen at all. People get married because they want to be married and do not get married

because they do not want to be married. We are campaigning vigorously that civil partnerships should not be just for same-sex couples, as they are a form of institutional outing.

Margaret Smith: You note the lack of a seamless transition from marriage to civil partnership. During the transitional period, people could stay in and try not to get knocked down by a bus. However, when we are dealing with rights such as pension rights, which are dependent on the length of a marriage, the transition could be seen as a break. Those rights could be affected by a break of even one day. The relatively small number of people who want to request an interim gender recognition certificate and to indicate that they wish to retain their marriage could do both things at the same time.

Andrea Brown: Even then, there would be problems. People may have rights because of the length of their marriage, but they will lose those rights because civil partnership registration is not retrospective—it begins at day 1. The outcome is not satisfactory in any way.

Zara Strange: If someone wanted to use the interim certificate provision, which is restricted to six months, but civil partnerships were not in place by the end of that period, they might have to reapply, which has inherent costs. Alternatively, people could decide that they wanted to divorce anyway.

Andrea Brown: The bill also takes it as read that the divorce proceedings will proceed within six months, which I do not think is possible for us. Someone could lose their interim certificate and have to start again. There are several inherent weaknesses in the bill and that is one of them. We end up going round in a spiral, because one thing leads to another, which has a knock-on effect that in turn affects something else.

The arbitrary setting of a period of six months is one of the big flaws in the bill. If the courts are very full when someone needs to go through a divorce—leaving aside the question of whether they should have to do that—and the divorce can be obtained only in seven months, their interim certificate will lapse. Where does that person go then?

Margaret Smith: How can we get out of that cycle? Should the bill be amended to allow full gender recognition without the requirement to dissolve an existing marriage first? Is that the only way in which we can avoid getting into that cycle?

Andrea Brown: It is probably the case that nearly a majority of the other member states of the European Union now recognise same-sex marriages. We are talking about the bill because it has been forced on the United Kingdom by the EU saying that the vast majority of people are recognising same-sex marriages. Until the bill is enacted, the UK will be keeping exclusive company with Andorra and Albania. Those are the only two other countries that will not renew a birth certificate, so the UK is a member of quite an exclusive club. Andorra is known for stamps, and the history of Albania on human rights issues leaves a lot to be desired. Ultimately, the UK will have to recognise same-sex marriages.

I cannot understand why the bill should not be amended, given that transsexuals are in a tiny minority in the UK anyway and that only a tiny minority of those are in a marriage that is strong enough to withstand the pressures and strains of the situation. To me, it would be perfectly possible to insert one line in the bill, to say that, where the marriage in question is legal and both parties wish it to continue, that should be allowed. I do not think that that would set a precedent, because it would not allow same-sex couples to enter into a marriage; it would simply allow an existing marriage to continue.

Margaret Smith: According to the figure that we have, there are about 300 transsexuals who are known to the medical profession in Scotland. That figure is probably lower than the actual number. It has been suggested to me that the percentage of people in such a situation who might want to retain marriages is no higher than 10 per cent—in fact, it is nearer 5 per cent. Is it fair to say that we are talking about roughly 5 per cent of 300 people?

Andrea Brown: When it comes to statistics, I share Jonathan Swift's view that there are

"lies, damned lies and statistics."

Margaret Smith: We are talking about a handful of people.

Andrea Brown: Yes, we are talking about a handful of people who are in exceptional circumstances. We are not talking about the thin end of a wedge, opening any floodgates or radically changing any laws; we are asking that the law not be changed.

Zara Strange: Notwithstanding what Andrea Brown has said, I want to record my view that, as schedule 2 stands, I support the proposed Scottish way of proceeding on divorce or annulment on the basis that an interim gender recognition certificate has been granted. In England and Northern Ireland, an application to dissolve a marriage has to go before the courts within six months. I see no logic for that. I want to put it on record that I am pleased that the Scottish Parliament will not make that requirement and that anyone who has an interim certificate will be able to apply at any time, not just within the first six months. I think that that is a great move.

Maxwell Reay: I want to comment on the marriage situation from a religious point of view.

There are people who will not want to be divorced, because they had a religious marriage ceremony. I am a member of the Metropolitan Community Church in Edinburgh, some of whose members have had a Christian wedding ceremony and have a legal marriage, which would have to be dissolved in order for them to be allowed to change their gender. It seems strange that somebody would have to deny a commitment that they have made in front of God and their family and friends in order to change their gender. It is important to remember that there are people for whom marriage is not just a legal matter but has religious significance as well.

Margaret Smith: At the beginning of the meeting, the convener said that we are a little bit in the dark with regard to timings. The likelihood is that Westminster will legislate for Scotland by way of a Sewel motion. Is the panel content with that? The convener said that we felt that it was important to take evidence so that when we debate the Sewel motion—the time scale is likely to be short—we will have an idea of what the issues are.

Zara Strange: As opposed to waiting longer and allowing the Scottish Parliament to deal with the matter separately?

Margaret Smith: Yes. The Scottish Parliament is able to legislate only on devolved matters and not on reserved matters, such as pensions.

Zara Strange: We would like equality throughout the UK, because many of us were born in one country and live in another. We continually move about and, for all that is said, we quite like each other. Time is of the essence and, although I voted for a Scottish Parliament, if a Sewel motion can produce a result quicker, on a purely selfish basis, I would like the legislation to be passed as soon as possible.

Nick Laird: Overall, the bill is good. There are things in it that could be changed, but the Sewel motion is the best way forward, because it will be quicker.

The Convener: All the witnesses are nodding, so I take it that that is the consensus.

Shiona Baird: My question is on consultation. You have raised points about flaws and discrepancies in the bill. The evidence notes that neither the Joint Committee on Human Rights nor transsexual people have had any opportunity to scrutinise the new provision. That would seem to raise issues regarding the consultation process during the development of the legislation. Were panel members involved in consultation on the bill and are you satisfied with how the process has been handled?

Andrea Brown: I have been involved through the Equality Network for a long time. I feel that I am in something of a cleft stick because, like Zara Strange, I want the bill to be made law as soon as possible, but I know that that automatically cuts down consultation time. Given that certain things that we thought had been accepted during the consultation have either failed to appear in the bill or been changed radically, a little more consultation time on the bill would do no harm.

However, we want everything now—we want the bill passed tomorrow exactly as we want it. As we obviously cannot have that, I would be content to have the bill as it is in place. I would then campaign to have it tidied up and to get certain elements changed and for the Scottish Parliament to recognise that it has rights and responsibilities in this area under the devolution settlement. It could then change the bill with regard to such things as the age level and maybe even marriage. There is nothing in Scots law that says that the marriage cannot continue. I do not think that there is anything in UK law that says that. The proposed legislation is brand new; nothing exists that can cope with the situation, even though everyone seems to be saying that it does. All we are asking is for things to be left alone. Give us what is in the bill but leave everything else alone.

11:45

Zara Strange: Like Andrea and probably every witness sitting at the table, we have spent a long time, often many years, considering these issues. It has not come as a shock. We anticipated some issues, particularly those that had a Scottish element.

The difference between the draft bill and the bill as it now stands is that two changes were introduced that have to be considered. Trans men between the ages of 60 and 65 who have been forced to retire at age 60 by their employer will suddenly have to go out and find employment for the next few years. That is not easy for anyone, and particularly not for someone in that situation. The other change is the addition of rights for disclosure and the six-month interim period. There has been no discussion about that. We only got the papers last week, probably at the same time as members did.

Marilyn Livingstone: It is interesting that pensions were mentioned in all your submissions. How would the panel like the issue of pensions to be handled for those who, once they reregister gender, are likely to lose a pension that they are already receiving?

Andrea Brown: Pensions are similar to so much else in the situation. There are not many people who would form exceptions to what is being proposed, but there are some. There is a difference between dealing with the situation as it is and creating a problem for the future.

As Zara Strange said, a female-to-male transsexual aged 62 who has been receiving a pension for two years would have to look for a job for those three years in order to receive his human rights. I do not understand that; I do not see why it is not possible to say that that person can continue under those circumstances.

Marilyn Livingstone: Is that the only group that is affected?

Andrea Brown: It is a very noticeable and self-evident group. There are also problems with private pensions. I do not understand why it appears to be impossible to say that, in certain very limited situations, things should just be allowed to stay as they are. We are not saying that all trans men should be entitled to a pension at 60. We are just saying that if someone is over 60 when the bill is enacted, and they are in transition, they should be allowed to continue.

Zara Strange: The retirement age is going to be equalised between 2015 and 2020, so any precedent will be only for the short term.

Marilyn Livingstone: Is that the witnesses' general view?

Maxwell Reay: From the people that Transmen Scotland has spoken to, it is clear that there are trans men who will fall into that category of being between the ages of 60 and 64. There might not be a huge number of them, but there will be some. They have often been economically disadvantaged in the past because their employment was lower paid when they were female, they have not been able to do the jobs that they might have wanted to do, and they were made to retire at 60. We certainly support a change so that the position becomes more equal and we think that such people should retain their pensions until the pension age is made equal for everyone.

Marilyn Livingstone: My second question has partly been answered, but I ask all the witnesses to express their views on the fast-track procedure in clause 26 of the bill.

George Burrows: In general, it is a good idea, but there could be an issue with young people whom I represent. For example, someone aged 13 or 14 may have known that they were transsexual and have every intention to live in role as the bill will require, but, because of their situation—perhaps living in a family in which it is not practically possible to do that—they may miss three years, so it will appear that they did not live in role for that three-year period, when they may have done everything that was reasonably possible to do so. That might also raise the question of what evidence is acceptable to show that somebody has lived in role: would it be a name-change document in England or would it be acceptable for a parent, a medical practitioner or a psychologist to say, "Yes, this person has lived in role," although they might not have a diagnosis that dates back to the correct stage?

Zara Strange: I am very much in favour of the fast-track procedure. It is seven years since I went through the changing of the legal documents, so I would just fall into the category in clause 26. To have to go through the full process and go back to the people to whom I was referred years before would be difficult and costly, so I very much support the six-year fast tracking.

Marlyn Glen: All those who have submitted written evidence have expressed concern regarding the recognition of rape in Scots law for post-operative transsexuals. What are the witnesses' views?

Nick Laird: In England, the Sexual Offences Act 2003 already specifically mentions surgically constructed genitalia and demonstrates that gender-specific offences apply fully to trans people, so a law already exists and we need only to make the same law for Scotland. It is a necessary amendment to Scots law and, as such an amendment has already been made in England, it could be done without any problems in Scotland as well.

Zara Strange: Two months ago, I was stalked—I was followed. It is all recorded with the police. I thought that there was a sexual element to the stalking, but I was loth to report it, and I did so only when a friendly policeman said, "Zara, if you don't, other people could be affected by that person." However, having gone through it, I would not report anything of a sexual nature that happened to me.

Because this is a key issue, I have spoken to trans men about it. A young trans man told me very clearly that, if he was sexually assaulted—and a young trans man could be vaginally raped—he would not report it. There is the trauma of having to go through the court system. The victim does not decide how to record the crime; it is the court that does that. I was told that the prospect of recording the assault as rape would be more traumatic for someone seeking justice than the rape itself. The young trans man told me that, because of that, he would not report the rape. As a trans woman, I too would not report it. That is the kind of level that we are talking about.

Andrea Brown: Rape is a pressing issue for trans people in general. Probably a third of all male-to-female transsexuals in Scotland whom I know have been raped. Those were not opportunistic rapes; they were targeted rapes. Attitudes have changed: they have changed a great deal in the police, who are much more positive today. I work a lot with police forces in Scotland to help to develop that work.

One of our members who is 16 or 17 years post-operative has been raped three times. The rapes were targeted rapes. On the first occasion, when she tried to report it to the police, she was told, "Well, you want to be a woman. This is what happens to a woman." She was told to go away.

The current rape laws do not protect us. The issue will have to be addressed in the future.

Zara Strange: The issue is quite simple. I believe that, among your papers, you have a paper that includes the Parliament's definition of rape. The definition needs the simple removal of a few words and the addition of the equivalent of the wording in the Sexual Offences Act 2003, which recently passed through the Westminster Parliament. The addition would be:

"References to a part of the body include references to a part surgically constructed".

We are not talking about major changes to the bill.

I know that a lot of law in Scotland is based on case law. However case law, procedures and the suggestion of sitting down and chatting things through will not work. I firmly believe that, for us to have the protection that we need, the offence needs to be enshrined in legislation. At the moment, that protection is not there.

Andrea Brown: The issue of rape needs to be addressed outwith the context of the bill. My birth certificate says that I am male. Under Scots law as it stands no one can rape me. The issue of rape is much wider than the bill and it needs to be looked at.

Marlyn Glen: Thank you. The issue is difficult, but it is important that your evidence is put on the record.

Frances Curran (West of Scotland) (SSP): Your evidence is harrowing. I want to ask the panel about privacy, which is linked to the issue that we have just discussed and to other issues to do with discrimination. Andrea Brown spoke about her birth certificate. Are the privacy provisions in the bill adequate to protect the identity of people who have reregistered their gender?

Maxwell Reay: Clause 21(4)(c) says—

The Convener: I am sorry, Maxwell, but we will have to stop for a minute. There is a changeover of technicians and your microphone is not switched on. Right, you can fire away again.

Maxwell Reay: As I said, clause 21(4)(c) says:

"the information is protected information by virtue of subsection (2)(b) and the person by whom the disclosure is made does not know or believe that a full gender recognition certificate has been issued".

On reading that, I became concerned—the words really jumped out at me. The wording seems to offer a loophole to people. They could say, "Oh, I am sorry. I did not know that you had a gender recognition certificate, so I could tell anybody I liked that you were a transsexual".

In circumstances where a gender recognition certificate has had to be provided for, say, a pension or insurance, it could be argued that the organisation has that certificate and is therefore aware of it. However, if, for instance, I took up new employment where my boss, not knowing that I had transitioned and knowing me just as Maxwell, for some reason searched the website, found my name on the documents, thought, "Oh, that person has transitioned," and then outed me, they could quite easily say that they did not know that I had a certificate because I would never have had to give them the certificate. In a sense, to get protection from being outed, I would have to out myself with my certificate every time that I took a new job. I think that that paragraph needs to be looked at and changed.

12:00

Nick Laird: On privacy, I recently did some qualitative research workshops with some trans people. One thing that came out of that was that privacy is an issue, particularly within the NHS. There is a definite need for suitable training, guidance and standards within the NHS on the treatment of trans people and privacy issues.

For example, one woman in the group told how her own general practitioner put "Mr" followed by her female name on her prescriptions. When she said to the GP, "I have to go into a chemist to pick up this prescription," the GP scored out the "Mr" and wrote "Miss", which drew even more attention to it. She repeatedly asked for that to be changed on her records, but the GP told her, "I'll decide when you're feminine enough to change it." That may be an extremely bad example, but it actually happened to somebody. That is the kind of attitude that can exist, but there are many examples. There is a report containing examples of people's issues with the NHS. That is a privacy issue that needs to be addressed.

Zara Strange: Between the draft bill and the final bill, paragraph (f) was added to clause 21(4). I was pleased to see that, because paragraph (f) states:

"the disclosure is for the purpose of preventing or investigating crime".

Paragraph (d) has always been in the bill. Paragraph (d) states:

"the disclosure is in accordance with an order of a court or tribunal".

In view of the fact that paragraph (f) has been added, I cannot see the justification for the retention of paragraph (e), which states:

"the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal".

That is an all-embracing provision, which could include witnesses, jurors and victims.

Among the other things that I do, I have been a children's panel member for 10 years. There are occasions when the press are allowed into a children's hearing, so the provision could include me. I was outed seven or eight years ago by the press, so they know who I am. Under that provision, the press could come into a children's hearing and, although they certainly could not identify the child, they could well and truly identify me.

For the sake of criminal and family law, I can see the reasoning behind the provision. There is a need to be able to ensure that justice is done and seen to be done. However, I believe that clauses 21(4)(d) and 21(4)(f) would cover that. The all-encompassing and all-embracing clause 21(4)(e) should be removed.

The Convener: Obviously, we are dealing with a Sewel motion, but I would be interested in hearing what the various organisations are doing to try to influence the discussion in Westminster. I spoke to an MP recently who was confused that we were taking evidence on the issue. I am not sure what evidence or areas of work MPs will be looking at. What discussions are under way at Westminster, if any, that you may be able to influence, or through which you can put forward your views on the bill?

Zara Strange: There is a committee, which is chaired by—I am not sure which MP it is. Could somebody help me out here? She is a lovely lady. I cannot remember her name, although she is the MP for Birmingham Selly Oak. There are people from Press for Change on that committee, and other organisations have representatives on it, too. Members of that committee have been restricted in what they can say. However, the trans community has been represented on it. It is leap of faith to think that the committee will do what we want it to do, as its members could not tell us what they were doing. Hopefully, that committee will continue its work. It is the old thing, however: it is not quite as if things north of Watford Gap do not happen; it is as if things north of Berwick do not exist. It is important that consideration is given to the subject here, even using a Sewel motion and, as I said, a lot is going on at Westminster.

The Convener: Thank you very much for your evidence this morning, which will form part of our report on the Sewel motion.

12:06

Meeting continued in private until 12:33.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Wednesday 17 December 2003

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75
Special issue price: £5
Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0870 606 5566 Fax 0870 606 5588

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF12BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0131 348 3415

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178