

# **HEALTH AND COMMUNITY CARE COMMITTEE**

Wednesday 28 March 2001  
*(Morning)*

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## HEALTH AND COMMUNITY CARE COMMITTEE

† 10<sup>th</sup> Meeting 2001, Session 1

### CONVENER

\*Mrs Margaret Smith (Edinburgh West) (LD)

### DEPUTY CONVENER

\*Margaret Jamieson (Kilmarnock and Loudoun) (Lab)

### COMMITTEE MEMBERS

\*Dorothy-Grace Elder (Glasgow) (SNP)

\*Janis Hughes (Glasgow Rutherglen) (Lab)

\*Mr John McAllion (Dundee East) (Lab)

\*Shona Robison (North-East Scotland) (SNP)

\*Mary Scanlon (Highlands and Islands) (Con)

\*Dr Richard Simpson (Ochil) (Lab)

\*Nicola Sturgeon (Glasgow) (SNP)

\*attended

### THE FOLLOWING ALSO ATTENDED:

Scott Barrie (Dunfermline West) (Lab)

Irene McGugan (North-East Scotland) (SNP)

### WITNESS

Malcolm Chisholm (Deputy Minister for Health and Community Care)

### CLERK TO THE COMMITTEE

Jennifer Smart

### SENIOR ASSISTANT CLERK

Irene Fleming

### ASSISTANT CLERK

Joanna Hardy

### LOCATION

Committee Room 2

† 9<sup>th</sup> Meeting 2001, Session 1—held in private.



## Scottish Parliament

### Health and Community Care Committee

*Wednesday 28 March 2001*

*(Morning)*

[THE CONVENER *opened the meeting at 09:36*]

**The Convener (Mrs Margaret Smith):** Good morning, everybody, and welcome to this morning's meeting of the Health and Community Care Committee.

Under agenda item 1, I ask members whether they are happy to consider items 4 and 5 of this morning's meeting in private. Item 4 is consideration of the proposed witnesses for the budget process; item 5 is finalisation of our report on the measles, mumps and rubella vaccine, which will be made public later today. Does the committee agree to take those items in private?

**Members indicated agreement.**

## Subordinate Legislation

**The Convener:** Agenda item 2 is subordinate legislation. The committee is asked to consider a negative instrument, the National Health Service (General Dental Services) (Scotland) Amendment Regulations 2001, which was originally circulated to members on 14 March. No comments on the instrument have been received from committee members.

The Subordinate Legislation Committee made the following comments on the instrument in its 13<sup>th</sup> report of this year:

"although section 28A of the parent Act is referred to in footnote (a), it was not cited as an enabling power."

The Executive explained that it did not consider section 28A to be an enabling power under which the instrument is made and that

"reference to section 28A was made in the footnote in error."

The Subordinate Legislation Committee also noted that

"regulation 2(1) refers to Schedule 2 'of' the principal Regulations rather than 'to' those Regulations".

The Executive acknowledged that that was an error.

The instrument is drawn to the committee's attention on the ground that it is defectively drafted in those respects. No motion to annul the instrument has been lodged. I suggest that the committee does not wish to make any recommendation in relation to the instrument. Is that agreed?

**Members indicated agreement.**

## Regulation of Care (Scotland) Bill: Stage 2

**The Convener:** Agenda item 3 is stage 2 consideration of the Regulation of Care (Scotland) Bill. This is our first consideration of a bill at stage 2. We have, of course, done work on the bill at stage 1.

We are joined by Malcolm Chisholm, Deputy Minister for Health and Community Care, and his team. I welcome the minister, Liz Lewis and the other officials. I am not sure whether we will end up having to hold one another's hands through this, but we will attempt to get through it. We have an awful lot of amendments in front of us.

Members should ensure that they have a marshalled list of amendments, the bill and the amendment groupings. All amendments have been grouped. The intention is that the committee will go no further than section 4 and schedule 1 this morning.

### Section 1—Constitution of Scottish Commission for the Regulation of Care

**The Convener:** Amendment 99 is in the name of Kate MacLean, who is not here. The amendment is grouped with amendments 123, 126 and 127. Does any member wish to move amendment 99?

**Janis Hughes (Glasgow Rutherglen) (Lab):** I will speak to the amendments.

**The Convener:** You may move amendment 99 and speak to all the amendments in the group.

**Janis Hughes:** Kate MacLean lodged the amendments as convener of the Equal Opportunities Committee, which feels that equal opportunities should underpin the bill—and indeed all bills. The committee feels that these small amendments are important in that they require the bill to adhere to the ethos of equal opportunities and to observe equal opportunity requirements.

I move amendment 99.

**The Convener:** Do you wish to speak separately to amendment 126?

**Janis Hughes:** Amendment 126 outlines the definition of equal opportunities as that in part II of schedule 5 to the Scotland Act 1998. The act defines equal opportunities as including the subject matter of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.

The Scotland Act 1998 interprets equal opportunities as meaning

“the prevention, elimination or regulation of discrimination

between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.”

Including reference to that part of the Scotland Act 1998 would give a stronger basis to the definition of equal opportunities.

**The Deputy Minister for Health and Community Care (Malcolm Chisholm):** I am pleased and feel that it is appropriate that this is the first grouping of amendments. I have spent the first 18 months of the Parliament badgering ministers to put such things into bills. Usually, that has been in alliance with Kate MacLean, so it is entirely appropriate that she has lobbed one back in my direction.

It has always been our expectation that both new bodies would promote equal opportunities in all that they do. Kate MacLean's amendments will enshrine that in legislation. I am happy to accept them.

We have a choice between Kate MacLean's and Janis Hughes's definitions. I am sure that Janis Hughes will accept that Kate MacLean's definitions include hers, but that they are slightly more comprehensive, as Janis Hughes pointed out. They refer to the famous schedule 5 to the Scotland Act 1998 and section L2 of part II in particular, which reserves equal opportunities except for

“The encouragement ... of equal opportunities, and in particular of the observance of equal opportunity requirements.”

I hope that Janis Hughes will accept that we cannot agree to amendment 126 and to amendment 127 and that amendment 127 is more appropriate. With that proviso, I accept amendments 99, 123 and 127 and ask Janis Hughes not to move amendment 126.

**Janis Hughes:** I welcome the minister's comments. It is vital that the cause of equal opportunities be enshrined in the bill. I accept the minister's point that Kate MacLean, whose knowledge of equal opportunities is superior to mine, has drawn the definition much better. I am delighted that the minister accepts the amendment.

*Amendment 99 agreed to.*

**The Convener:** I invite Shona Robison to speak to and move amendment 106, which is grouped with amendment 100.

09:45

**Shona Robison (North-East Scotland) (SNP):** Amendment 106 attempts to extend the remit of the commission to include a supervisory role in

relation to assessment and placement. The committee received evidence from a number of organisations about the remit of the commission and how far it should go. In speaking to amendment 106, I am arguing on behalf of the Law Society of Scotland, which feels that it would be appropriate to extend the remit to include a supervisory role. There is concern that if the commission exists only to promote improvements in care services in Scotland, it will not have any role in relation to the key elements of assessment and placement. An accurate assessment is required if care services are to be effective.

I must be honest about the fact that I have some concerns about the practicality of amendment 106. However, I thought that it was worth lodging, so we could hear the minister's views on the remit.

I move amendment 106.

**The Convener:** I invite Scott Barrie to speak to amendment 100.

**Scott Barrie (Dunfermline West) (Lab):** Although amendment 100 has been supported by a number of leading child care organisations and has its roots in other child care legislation, the basic principles that it articulates can be extrapolated to cover all user groups, not just children. Without the amendment, the Regulation of Care (Scotland) Bill will lack the anchor of a basic ethos or principle.

Amendment 100 adds to the bill, putting it into context by acknowledging the crucial role that service users play. It is not just a bill about doing things to people; it is about having a working partnership with people. Amendment 100 seeks to acknowledge that by placing service users further up the agenda than is the case in the bill as drafted. As it stands, the bill regulates and does things to people. We all acknowledge that the best interests of service users should always be of paramount concern. That is the premise behind my amendment and I hope that it will be given cognisance.

**Mr John McAllion (Dundee East) (Lab):** I share Shona Robison's concern about the practicality of amendment 106. As I understand it, assessment and placement of patients is a matter for the health service and social work departments to decide on. How would the commission regulate consultants in the national health service? By withdrawing registration, perhaps? That does not seem a very practical suggestion.

**The Convener:** It is an interesting suggestion.

**Mr McAllion:** It is an interesting suggestion, but not a practical one or one that is within the scope of the bill.

I favour amendment 100. We took evidence from many organisations that said that there

should be some sort of statement of principle, so it will be interesting to hear what the minister has to say about that.

**Malcolm Chisholm:** I was pleased to hear Shona Robison argue against herself when she moved her amendment. I hope that I shall not do that later. There is obviously an issue over the practicalities, but we must draw a line in principle between the commission's areas of responsibility and those of local authorities. Amendment 106 seeks to extend the commission's duty to include overseeing needs assessments, admissions and transfers in relation to care services. I share Shona Robison's view of the importance of those processes, but I do not think that they are the direct concern of the commission.

Local authorities will continue to have statutory powers and duties under the National Health Service and Community Care Act 1990 to ascertain the needs of people who require care services or who may want to use services, as well as the needs of the family members who support and care for them. Equally, social workers and care managers, in partnership with other relevant professionals, will continue to have a duty to assess need and to assist people who are eligible for care services. That is not a duty that the commission should regulate, as such decisions and priorities are rightly for local authorities.

Nevertheless, the commission will be able to report to ministers and the Parliament, by means of the annual report that will be laid before Parliament, on any effect that commissioning and assessment policies are having on care services. I know that Richard Simpson wants to talk about commissioning later on.

I am sympathetic to amendment 100, as it seeks to highlight the importance of protecting and promoting the interests of people who use care services. That is a key aim of the bill. However, the amendment does not insert such an aim at the appropriate place. I believe that Scott Barrie's concerns can be addressed when we come to debate amendment 101. Moreover, amendment 100 would narrow the direction-making power, so that it could not be used in relation to the internal management of the commission or in relation to other matters about which the committee has concerns.

I ask Shona Robison to withdraw amendment 106 and Scott Barrie not to move amendment 100, although the subject matter of Scott Barrie's amendment will be revisited in a moment, at a different place in the bill.

*Amendment 106, by agreement, withdrawn.*

**The Convener:** Amendment 100 has been debated. Do you want to move your amendment, Scott?

**Scott Barrie:** I accept what the minister said. One of the difficulties in lodging amendments is that one does not know what amendments other members may lodge. I am broadly sympathetic to what the minister said, and the general principles of what I hoped to achieve are encompassed, to a large extent, in amendment 101. My only concern is that that amendment does not include the words "best interest". Can the minister say something about amendment 101, before it is moved?

**The Convener:** You may answer that question, minister.

**Malcolm Chisholm:** I can pre-empt discussion of amendment 101 by saying that I shall speak positively, in general terms, about the amendment and allow the committee to debate the drafting of it. It may be possible to address Scott Barrie's concerns at stage 3.

**Scott Barrie:** On that basis, I shall not move amendment 100.

*Amendment 100 not moved.*

*Section 1, as amended, agreed to.*

### Schedule 1

#### THE SCOTTISH COMMISSION FOR THE REGULATION OF CARE

**The Convener:** Amendment 102 is grouped with amendments 1, 2, 104, 105, 3, 124 and 4. I invite Janis Hughes to move amendment 102 and to speak to the other amendments in the group.

**Janis Hughes:** As I mentioned previously, there is a wish to enshrine equal opportunities in the bill.

I move amendment 102.

**Malcolm Chisholm:** As members know, schedule 1 makes detailed provision for the constitution of the commission, including aspects such as the appointment of the convener and members of the commission and the groups that should be represented on the board.

Amendment 102 would require Scottish ministers to have regard to the encouragement of equal opportunities when deciding on appointments to the commission. We strongly support that principle and I am happy to accept amendment 102.

Amendments 1, 2 and 3, which are in my name, would alter the proposed membership of the commission's board. As it stands, schedule 1 requires ministers to have regard to balancing the interests of various stakeholder groups when making appointments. We now consider that such an approach would not provide the most effective model for the governance of the commission and propose that the board should be smaller than originally envisaged, in line with current thinking following the Scottish Qualifications Authority

experience. For example, members will know that the Enterprise and Lifelong Learning Committee recommended that the SQA board should have only nine members, although I think that that reform would go a little too far for our purposes.

Members of the board ought to be selected on the basis of their governance and management abilities. Trying to achieve a balance is likely to result in a large board, particularly as the commission's scope widens. We want to ensure that the users of services and their carers have a direct voice at the heart of the commission. The proposed amendments would allow members of the board to be appointed on the basis of their abilities rather than as representatives of particular stakeholder groups. In view of the importance of providing direct input from users and carers to the commission, if the amendments are accepted, at least two places on the board will be reserved for users and carers. The amendments are designed to ensure the effective management and operation of the commission, while fulfilling the need to allow the users of services and their carers to have a direct say in the operation of the body.

Schedule 1 includes provisions for the appointment of staff, but makes no explicit provision for the commission to pay its employees pensions, allowances and gratuities. Amendment 4 would enable the commission to make those payments. We expect almost 400 existing local authority and health board staff to transfer to the commission and we have given an undertaking that they will do so with terms and conditions that are no less favourable than those that they currently enjoy. That cannot happen unless we make amendment 4. The commission will also employ new staff and will need to be able to pay pensions, allowances and gratuities to them as well.

I have something to say about the other three amendments, but perhaps Shona Robison would like to speak to them first.

**Shona Robison:** Amendments 104, 105 and 124 affect the procedure for appointing and the tenure of office of members of the commission.

Schedule 1 contains information on the constitution of the commission and enables Scottish ministers to make regulations that specify the manner of appointment of members of the commission, their tenure of office and their payment by way of remuneration and allowance.

The commission will carry out important decision-making functions. It will determine whether applications for registration succeed and will have the power to cancel registration, if that is deemed appropriate. In carrying out those functions, the commission should be regarded objectively as independent and impartial for the



purposes of article 6 of the European convention on human rights, which says:

“everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The crux is that if the bill does not contain information about the tenure of office of members of the commission, no assessment can be made of the commission's compliance with article 6 of the convention. I would like to hear the minister's views on that.

10:00

**Malcolm Chisholm:** As Shona Robison said, amendments 104, 105 and 124 would remove the provision that enables ministers to make regulations on the tenure of office and removal from office of members of the commission and replace it with detailed provisions on the face of the bill. She also said that the amendments are—at least in part—inspired by concerns about ECHR compliance. The bill and any regulations made under it must be ECHR compliant. On its introduction, the bill was certified as being within the legislative competence of the Scottish Parliament and ECHR compliant.

On many issues, there is an on-going argument among lawyers about what ECHR compliance means. In our opinion, the bill is ECHR compliant, but to reassure members, I say that the more fundamental point is that there is no requirement under article 6 of the convention to place such provisions on the face of the bill, provided that there are sufficient enabling powers in the bill to achieve general ECHR compliance in any regulations that are made. The powers under paragraph 5 of schedule 1 will mean that any regulations can achieve ECHR compliance. The proposed changes would restrict the current flexibility of schedule 1, for example by stipulating fixed minimum periods for tenure of office and specific measures for the removal of members of the commission from office.

On amendment 104, as the minister with responsibility for older people and in the light of the equal opportunities amendment that was passed a moment ago, I object to the age limit of 75, especially given the extent to which older people are a focus of the work of the commission. Under the existing provisions, there is no suggestion that ministers would have carte blanche. Arrangements for tenure of office and removal from office will have to be set out in regulations, which will be laid before Parliament. Amendments 104, 105 and 124 would remove the ability to change such arrangements reasonably easily, should circumstances so require, and could therefore have an impact on the effective management and operation of the commission.

Accordingly, I hope that Shona Robison will agree not to move the amendments.

**Janis Hughes:** Am I right in thinking that the minister has said that he will accept amendment 102?

**Malcolm Chisholm:** Yes.

**Janis Hughes:** I welcome what the minister has said. It is important that we include equal opportunities in every possible way in the bill and that is especially important in relation to the commission. I am glad to hear that he accepts amendment 102.

*Amendment 102 agreed to.*

*Amendments 1 and 2 moved—[Malcolm Chisholm]—and agreed to.*

**The Convener:** Amendment 103 is in a group of its own. We have to go back through the process with it. We will deal with amendment 104 when we come to it on the marshalled list. Members were getting carried away—we thought for a minute that we knew what we were doing. I call Shona Robison to move and speak to amendment 103.

**Shona Robison:** I will be brief. Amendment 103 extends the general powers of the Scottish commission for the regulation of care to include a specific power to co-operate with other agencies or bodies that are involved in the care process. It is important that all agencies that are involved in the care process communicate with each other, where it is appropriate for them to do so. One could argue that provision should be made for inter-agency co-operation, and that is what the amendment seeks to achieve.

I move amendment 103.

**Dr Richard Simpson (Ochil) (Lab):** The only problem with amendment 103 is that the Mental Welfare Commission for Scotland is only one of a number of organisations that should be consulted. I have raised the issue of co-operation with the Scottish Hospital Advisory Service on uniform standards for the health service and institutional care provision. I have some sympathy for the amendment. Patients with Alzheimer's in particular who are looked after in institutions tend to be looked after in a community care institution rather than a health institution and, as I understand it, the Mental Welfare Commission does not have a right in relation to community care institutions. Nevertheless, if we single out various bodies with which the commission has to co-operate, we may limit the bodies with which it has to co-operate. I do not support the amendment.

**Nicola Sturgeon (Glasgow) (SNP):** I sympathise with Richard Simpson's comments. He has suggested a possible flaw in amendment 103. However, the principle that is embodied in the

amendment is important: given the nature of the work of the Scottish commission for the regulation of care, inter-agency co-operation is not just important but essential. It would be helpful if the minister acknowledged the importance of that principle and agreed to consider it further for stage 3, so that it can be embodied in the bill.

**Malcolm Chisholm:** I certainly agree that that principle is important, but our view is that the amendment is not necessary because schedule 1 already provides for the Scottish commission for the regulation of care to co-operate with any relevant organisation, including the Mental Welfare Commission, on matters relating to the exercise of its functions. As Richard Simpson said, although the commission will certainly want to co-operate with the Mental Welfare Commission, it will want to do the same with a number of other bodies. He mentioned SHAS, but the commission will clearly want also to co-operate with the Scottish social services council, to name but one other body. It is neither necessary nor appropriate to list those bodies on the face of the bill. Moreover, as it is drafted, the amendment implies that the Mental Welfare Commission provides care services, which it does not.

I will reassure people on two fronts. First, the regulation of care project in the Executive has already had contact with the Mental Welfare Commission as part of the preparatory work that is being undertaken for the Scottish commission for the regulation of care on establishing protocols with a range of regulatory bodies. Secondly, if once the commission is operational, concerns arise about the adequacy of the commission's co-operation with the Mental Welfare Commission or any other relevant body, it will be open to ministers to investigate and, where appropriate, issue directions requiring the commission to remove any impediment. Therefore, I ask Shona Robison to withdraw her amendment.

**Shona Robison:** Given those assurances, I am happy to withdraw amendment 103.

*Amendment 103, by agreement, withdrawn.*

*Amendments 104 and 105 not moved.*

*Amendment 3 moved—[Malcolm Chisholm]—and agreed to.*

*Amendment 124 not moved.*

*Amendment 4 moved—[Malcolm Chisholm]—and agreed to.*

*Schedule 1, as amended, agreed to.*

## Before section 2

**The Convener:** Amendment 101, in the name of Richard Simpson, is in a group of its own.

**Dr Simpson:** I will make a general point first. In the Scottish Parliament's legislation, the general principles of a bill should be included in that bill, unless there are serious reasons for not doing so. I am not sure that the appropriate place for amendment 101 is before section 2—that is a matter for discussion. Nevertheless, as a general principle, the bill's general principles should be stated in the bill. The principles that are laid out in amendment 101 are an amalgam of what came out of the consultation documents during the Executive's fairly lengthy consultation process.

I would be happy if the minister accepted the principle of amendment 101, even if the wording of the amendment is not absolutely correct. For example, it may be necessary to define "independence" in subsection (2)(c), as I am referring to autonomy rather than to independence, and that might be a matter of interpretation.

Amendment 101 refers to the concepts of the promotion of the welfare of persons who use the service; the protection of those persons; and the promotion of their independence or autonomy and of the diversity and choice of services—choice is of particular importance. Those principles should be used to interpret the rest of the bill. When the courts interpret the act, they will be able to indicate whether our efforts have been appropriate or inappropriate, as they will have reference to those general principles.

Subsection (3) is important. Although the minister has stressed that people who use services should be consulted, I advocate the inclusion of that general principle in the bill.

I move amendment 101.

**Malcolm Chisholm:** I welcome amendment 101 and I am sympathetic to the intention of putting at the heart of the bill the interests of people who use, or who may use, care services. We are determined to ensure that care services are of the highest quality for the people who use them. In relation to our aim to further their interests and to promote their well-being, it is important that we do not inadvertently assume that we have the monopoly of wisdom as to which services should be provided and how those services should be provided to the people who need them.

Carers and people who use care services have been fully involved in the development of the draft national standards that the Scottish commission for the regulation of care will use to regulate services from next April. One of their consistent messages is that their views and wishes have not hitherto been listened to sufficiently by service providers. People who use services want greater participation in the determination of their needs and how those needs are to be met. They look to

care services to assist them in their daily lives in ways that they find acceptable. They have high expectations of change from the bill, and we must not let them down.

I agree entirely with Richard Simpson about the importance that amendment 101 attaches to welfare, protection, promotion of independence—I accept his point about the precise meaning of independence—and the principle of consultation. The aim of amendment 101 is clearly in keeping with the system of care that we envisage for the future.

However, there are some difficulties with the amendment as drafted. The reference to the Scottish social services council sits uncomfortably in the part of the bill that deals with the Scottish commission for the regulation of care, so it would need to be placed at the beginning of the bill, before section 1.

This may seem to be a lawyer's point, but it is relevant: the word "action" has unfortunate wider legal implications, as it means court action. That is irrelevant here.

**The Convener:** That is relevant only to lawyers.

**Malcolm Chisholm:** User involvement is key to our approach, but subsection (3) might overly restrict the Scottish commission for the regulation of care in taking decisive action when required. Most people like the fact that the bill allows necessary action to be taken quickly. Finally, "relevant" might make the scope of the consultation a little unclear.

I hope that members do not think that those points are pedantic. With the committee's agreement, I will undertake to lodge an Executive amendment at stage 3 to address the points that have been raised and embody the principles that Richard Simpson described. I will be happy to work with him and anyone else who cares to be involved on developing an amendment that will embody those principles and perhaps pick up the point that Scott Barrie made. On that basis, I ask Richard Simpson to withdraw amendment 101.

**Dr Simpson:** I am grateful to the minister for accepting the concept behind the amendment. I will be happy to withdraw the amendment with the committee's approval.

*Amendment 101, by agreement, withdrawn.*

## Section 2—Care services

**The Convener:** I call Richard Simpson to move amendment 107, which is grouped with amendment 128.

10:15

**Dr Simpson:** Amendment 107 would add

hospice care services to the care services listed in section 2, and amendment 128 defines the phrase "hospice care service". I lodged the amendments to ensure that the fact that the bill will include hospices is recorded in the *Official Report* of this meeting and not just in that of the evidence-taking session. I also want to discuss the definition of hospice care and hear the minister's view on an issue that relates to that. I am concerned not only that the bill should achieve uniformity of care inspection and regulation across all the services that are defined in the bill, but that NHS services that in future may come outwith the NHS or which it may outsource should provide a comparable level of care.

I believe that patterns of care are likely to change substantially. Hospices provide an example of that as, on the basis of statements that the minister has made in the chamber, I believe that they are to be 50 per cent funded by health boards. Who is to say whether hospices will always be health service units with 50 per cent participation by outside groups?

I have chosen to put those points up for consideration by the minister. I would like to have it on record that hospices will be included in the bill under independent health care services or a separate heading. The other question that I raised may be slightly futuristic, but given the way in which services are developing, I believe that it may be of some importance.

I move amendment 107.

**The Convener:** Do any members wish to comment?

**Mr McAllion:** On a point of order. Would it be better if we heard the ministerial response before you ask members whether they want to participate?

**The Convener:** I believe that we are following the normal format.

**Mr McAllion:** We have been asked to speak before we have heard the minister.

**The Convener:** Apparently, we can change the format, but I am following the normal format of stage 2 debates so far.

**Nicola Sturgeon:** In previous stage 2 debates, committees have been quite flexible about hearing members before and after ministerial responses, which is helpful.

**The Convener:** I am happy to be flexible.

**Malcolm Chisholm:** It is these Westminster MPs, convener.

Richard Simpson makes an important point about levels of care being comparable with those provided by the health service. The commission

for the regulation of care will work closely with the Clinical Standards Board for Scotland. There has already been overlap and that will continue. Sandra Grant of the Scottish Health Advisory Service has been very involved in developing the care standards.

NHS hospices will not be regulated by the commission, but will be regulated as part of the NHS. Strictly speaking, that is a problem with amendment 128, because Richard Simpson is asking for NHS hospices to be regulated under the arrangements in the bill, which would be impossible in terms of its long title.

Richard Simpson is seeking assurances that hospices in the private and voluntary sector are covered under section 2(5). I assure him that they will be regulated as independent health care providers, which is what the hospice providers want. They will be regulated as independent hospitals, clinics or medical agencies.

Amendment 18, which the committee will debate later will, if it is agreed, add “palliative care” to section 24(8) and to the list of independent health care services for which Scottish ministers can make regulations and will ensure that hospices and other services are fully covered.

I acknowledge the principle behind amendments 107 and 128, and would be happy to discuss with Richard Simpson whether further clarification is possible in the bill. It would, perhaps, be possible to insert “hospice” in section 2(5), although I have said that it is not strictly necessary.

The only caveat is that we would have to arrive at a satisfactory definition of hospices, which, among other things, excluded NHS hospices. We could not work with the definition that Richard Simpson has given. There is currently no statutory definition of a hospice. I will be interested to hear Richard’s response to that point. I hope that he will withdraw amendment 107, but if members feel that it is important that hospices are explicitly mentioned, that option could be explored. There is no statutory definition, so work would have to be done on it.

**Dr Simpson:** I thank the minister for his response.

It is appropriate that hospices will definitely be included under section 2(1)(d). In the light of the minister’s comments, I am happy to withdraw amendment 107 and I will not move amendment 128. I will consider the later sections on palliative care to see whether hospices could be mentioned at an appropriate point.

The point about the joint basis of management may be a matter for future consideration.

**Mary Scanlon (Highlands and Islands) (Con):** I would like further discussion later about that. The

submission from the Scottish Association of Health Councils raised the issue of the need for clarity about independent health care. I am aware that that matter will come up later in the bill.

*Amendment 107, by agreement, withdrawn.*

**The Convener:** Amendment 33, in the name of Shona Robison, is grouped with amendments 35, 39, 111, 41 and 112. I call Shona Robison to move amendment 33 and speak to all the amendments in the group.

**Shona Robison:** In the light of the amendments that Margaret Jamieson has lodged, I would be happy not to move amendment 33 and to allow her amendments to be debated.

*Amendment 33 not moved.*

**The Convener:** We will debate the other amendments in the group when amendment 35 is moved.

I call Shona Robison to speak to and move amendment 34, which is grouped with amendments 36, 40, 42, 42A, 42B, 86 and 88.

**Shona Robison:** Amendments 34 and 40 were lodged before we knew whether the Executive would lodge amendments on adoption and fostering services, which it has now done. The only point that I will make is that the fact that the Executive amendments were lodged late—on Friday—has caused some difficulties for the committee and for organisations that wished to comment on the amendments. I urge the Executive to ensure that future amendments are lodged much more speedily. I acknowledge that Executive amendments 36, 42, 86 and 88—which insert and define adoption, fostering and adult placement services—are probably more appropriate than amendments 34 and 40.

I move on to amendments 42A and 42B, which would amend the Executive amendments—I hope that folk are following this. Amendment 42A is designed to ensure that the proposed definition of adoption service cannot be interpreted to include arrangements that are made by families for a private relative adoption, such as a step-family adoption. Although I agree that local authority adoption agencies and voluntary adoption societies must come within the scope of the bill, it is not appropriate that the definition of adoption services include legal private arrangements.

Amendment 42B concerns the definition of fostering service. The proposed new subsection (8C)(c) to section 2 deals with local authorities’ private fostering duties under the Foster Children (Scotland) Act 1984. I am happy that those duties are to be regulated, but they are different from the local authorities’ public fostering services that are provided under the Children (Scotland) Act 1995. Amendment 42B proposes a new subsection to

section 2 to clarify the distinction. Obviously, a definition of private fostering service would have to be provided later, but I hope that the minister will accept the principle and allow a definition to be introduced at stage 3.

I move amendment 34.

**Malcolm Chisholm:** I apologise for the fact that the Executive's amendments were not lodged earlier. That would have been desirable, but there were some difficulties because, as members will know if they have read all the amendments, the procedure has to be slightly different. That is why we propose to insert a new part 1A into the bill. I will explain that in a moment.

The policy position paper that was laid before Parliament in July last year set out our proposals for modernisation of the regulation of care services. Amendments 36, 42, 86 and 88 would ensure that the adoption and fostering services that are provided by local authorities and voluntary agencies are included in the scope of the bill. As with other care services that are defined in the bill, adoption and fostering services will be required to register with the Scottish commission for the regulation of care and will be subject to inspection. The amendments would effect the inclusion of adoption and fostering services among the care services that are listed in part 1 of the bill.

Amendment 42 would insert a definition of each of those services into the bill. I thank Shona Robison for amending my amendments. Her suggestions are helpful and I am happy to accept amendment 42A.

10:30

However, I have some difficulty with amendment 42B. I hope that Shona Robison will agree not to press that amendment to allow the Executive to introduce, at stage 3, an amendment that would build on her helpful suggestion. The distinction that we want to make is between private and public fostering services. If we call private services the Scottish private fostering service—they are referred to as such in proposed new subsection (8C)(c) to section 2—and we call public services the Scottish public fostering service, as they are referred to in proposed new subsections (8C)(a) and (8C)(b) to section 2, that would expand on the point that Shona Robison has made. I hope that she agrees that that would be the best way forward.

The amendments that I have lodged would ensure that provisions for the registration of local authority adoption and fostering services were prescribed separately. As I said a moment ago, the different approach is that the amendments would further ensure that cancellation of registration provisions did not apply to local

authority services. The amendments would also require the commission to report to Scottish ministers when local authorities failed to comply with an improvement or condition notice. The key point is that immediate deregistration would place local authorities in breach of their statutory duty to provide adoption and fostering services. Ministers would therefore be empowered to take direct compliance or other steps to ensure that services meet the necessary standards. The provisions that relate to that will be looked at in detail when the committee considers amendment 68, which proposes new part 1A after section 27.

Amendments 36, 42 and 86 would also allow the commission to regulate agencies that arrange adult placements. Those agencies comprise an important and growing sector that provides services to more than 800 vulnerable adults in Scotland. Such placements are usually provided by people who are not care professionals, but who can offer a caring home to a person. For example, placements can be offered to people who have learning disabilities, or to older people who would benefit from family support. Regulation of individual placements is not required, but responses to our recent consultation exercise on this topic confirmed our view that regulation of the agencies that arrange placements is necessary. That regulation will cover local authorities and the independent sector. That is particularly important because adult placement is the type of care that we expect to expand in the future. I commend these important amendments to the committee.

**The Convener:** As no member wishes to speak, does the minister want to wind up on his amendments?

**Malcolm Chisholm:** I hope that I have conveyed that I will accept amendment 42A. I also hope that Shona Robison will not press amendment 42B, on the understanding that it will come back in a fuller form at stage 3.

**The Convener:** I ask Shona Robison to wind up and to confirm whether she will press or seek to withdraw amendment 34. As she knows, we will come to her other amendments in due course.

**Shona Robison:** With the agreement of the committee, I will not move amendment 34.

**The Convener:** Amendment 34 has been moved, so you must seek the committee's agreement to withdraw it.

**Shona Robison:** I seek to withdraw amendment 34.

*Amendment 34, by agreement, withdrawn.*

**The Convener:** Amendment 35 is in the name of Shona Robison. Bearing in mind what happened a few moments ago, that amendment is now grouped with amendments 39, 111, 41 and

112. I ask Shona Robison to speak to and move amendment 35. I also ask Margaret Jamieson to stand by to speak to amendments 111 and 112.

**Shona Robison:** In the light of my previous comments about Margaret Jamieson's amendments, I will not move amendment 35.

*Amendment 35 not moved.*

**The Convener:** I shall ask Margaret Jamieson to speak to amendment 111 as the first amendment in the group when we get to that point in the marshalled list.

When does the Ensign Ewart open?

*Amendment 36 moved—[Malcolm Chisholm]—and agreed to.*

**The Convener:** The next amendment in the marshalled list is amendment 108, in the name of Scott Barrie, which is grouped with amendment 114. I understand that Scott has had to go to the Justice 2 Committee meeting, because it was not quorate. Does any other member of the committee want to move amendment 108? I am told that Irene McGugan, as a supporter of that amendment, can speak to and move it, although she is not a member of the committee. She can also speak to the other amendment in the group.

**Irene McGugan (North-East Scotland) (SNP):** Amendment 108 would ensure that fieldwork services are a key aspect of the care services that would be registered and inspected by the commission. The amendment is supported not only by the cross-party group on children and young people, but by the major child care organisations and by the British Association of Social Workers, which feels that the omission of fieldwork services from the bill could place social workers in local authorities in an exposed situation, compared with colleagues in other social work services.

Decisions about when and where a person is to be looked after away from home are crucial to their well-being. Although residential care services are to be adequately inspected and registered, the decisions and processes that lead to people entering residential care will not be. It is not possible to regulate adequately some of the care services that are currently listed in the bill without considering the route into those services. Such care should be seen as a package, and cannot be regulated simply by considering the quality of what is, in effect, the end service.

Scott Barrie apologises for the poor drafting of amendment 114. It should not contain the phrase,

“in the places where that care is provided.”

As I have been explaining, the bit of amendment 114 before that is what is important. We suggest that the process of assessment, care management

and care planning has a big impact on the quality of care services that are provided in a residential, foster care or any other care setting. If the commission is to fulfil its role in improving the quality of care services, it must be able to have a role in inspecting the fieldwork element of social work services.

I move amendment 108.

**Malcolm Chisholm:** Section 2, as members know, sets out the range of care services that will be regulated by the commission, and defines each of the services for the purposes of the bill. Although it is our intention that local authority day care, residential care and so on should be regulated by the commission in the same way as other services, the regulation of field social work functions is another thing entirely. Field social work services are part of the main functions of local authority social work departments. Some of those functions are the statutory responsibility of those departments alone. All those departments are controlled by a democratically elected body, namely the local council. It is not our intention, and neither should it be, that such functions should be regulated by an outside body.

In any case, in practical terms, even if we accepted the principle of the commission regulating field social work, that could not be achieved merely by including amendments 108 and 114 in the Regulation of Care (Scotland) Bill. It would require a vast number of amendments, because it is a statutory function of a local authority. I do not think that the number of amendments that members have seen on adoption and fostering would be the half of it if we were to lodge amendments on field social work services.

However—more fundamentally—we would need to withdraw the bill entirely and begin a major consultation exercise. Clearly, such a prospect is not realistic. I should point out that the bill provides for the functions of the commission to be extended by regulation, which is indeed the subject of the section 3. If, in time, it was considered and widely accepted that the commission should regulate wider social work functions, the mechanism to allow that would be relatively straightforward and would not require primary legislation. I hope that that is of some reassurance to Irene McGugan and any other committee members who would like field social work services to be regulated in due course. For the reasons that I have outlined, I hope that Irene McGugan will seek to withdraw amendment 108.

**Irene McGugan:** In light of what the minister has said, I would find it very difficult to press the amendment, so I would like to withdraw it.

*Amendment 108, by agreement, withdrawn.*

**The Convener:** We come to amendment 109, in the name of Richard Simpson, which is grouped with amendments 51 and 89.

**Dr Simpson:** I lodged amendment 109 after amendment 51 was lodged in the name of the minister, but I did so without knowledge of the Executive's amendment. Amendment 51 would introduce the concept of limited registration. Provided that we can be assured that the management of residences' finances under the Adults with Incapacity (Scotland) Act 2000 is covered with regard to those who provide that financial management service as part of a comprehensive service, and that the limited registration, as proposed by the minister, will now cover those who provide that service as an exceptional or separate service, I will be happy not to press amendment 109.

**The Convener:** So, are you not moving amendment 109?

**Dr Simpson:** I am not moving it. [*Interruption.*]

Actually, perhaps I should move it—until I hear the minister's reply. I just want to check. With the committee's approval, I move amendment 109.

**The Convener:** That makes life so much easier for me.

**Dr Simpson:** I was thinking that it might.

**The Convener:** Richard Simpson has moved amendment 109, but does not wish to speak to the other two amendments in the group.

**Dr Simpson:** That is correct.

**The Convener:** I ask the minister to speak to Executive amendments 51 and 89.

**Malcolm Chisholm:** First, I thank Richard Simpson for moving amendment 109, but accepting that it is no longer necessary. In fact, I think that it cuts across the regulatory regime as envisaged in the Adults with Incapacity (Scotland) Act 2000. I know that consideration of the Adults with Incapacity (Scotland) Bill was the last legislative outing for many members—that includes me, when I was a member of the Health and Community Care Committee. I remind members that part 4 of the Adults with Incapacity (Scotland) Act 2000 provides for hospital and care home managers to manage the finances of patients or residents with incapacity, subject to appropriate safeguards and under the supervision of the relevant supervisory body.

Amendments 51 and 89, which we have lodged in relation to later sections, would amend the Adults with Incapacity (Scotland) Act 2000 to reflect the change in regulator from local authority and health board to the proposed Scottish commission for the regulation of care. The proposals for that change were known when the

Adults with Incapacity (Scotland) Bill was progressing through Parliament.

As envisaged in the Adults with Incapacity (Scotland) Act 2000, care homes will automatically be registered to manage residents' finances, unless they choose to opt out. They will have to apply on an individual basis under the terms of the Adults with Incapacity (Scotland) Act 2000 to manage any particular resident's finances, following all the safeguards that are set out in that act. There is therefore no need for the management of finances to be defined as a care service under the bill.

However, there is a requirement for a provision for managers of residential facilities that are not care homes to apply to the commission to be registered for the sole purpose of managing residents' finances. That is what was envisaged under the Adults with Incapacity (Scotland) Act 2000, and it is what would be provided by amendment 51 and the definition that amendment 89 would insert. I intend to move those two amendments at the appropriate time.

**Dr Simpson:** I seek to withdraw my amendment.

10:45

**The Convener:** That is obviously a considered withdrawal, to which I hope committee members will agree.

*Amendment 109, by agreement, withdrawn.*

**The Convener:** I call amendment 37, in the name of Mary Scanlon, which is grouped with amendments 38, 110 and 28.

**Mary Scanlon:** Amendment 37 would insert a reference to respite care in a person's home. I ask the minister for assurance that respite care will be included. The issue was raised by some disabled persons groups who said that respite care for severely disabled people is often provided in the person's home, which has been uniquely adapted to a level that is appropriate for their care. There is uncertainty about whether that type of respite care is covered in section 2.

I move amendment 37

**The Convener:** Minister, would you like to speak to amendments 28 and 38?

**Malcolm Chisholm:** Just those two?

**The Convener:** Yes. That will allow you to, in a sense, lodge your amendments into the debate. You are going to speak to, but not move, amendments 28 and 38. We will return to them when all the other relevant amendments have been spoken to.

**Malcolm Chisholm:** Would it be out of order for

me to ask when the grouping on nanny agencies is going to be dealt with? I ask so that I know what is going on.

**The Convener:** That is dealt with in amendments 111 and 112, which are in the name of Margaret Jamieson. We will deal with it after we deal with amendment 39. Amendment 111 will be dealt with when we reach the foot of page 11 of my convener's script, which is two pages away.

**Malcolm Chisholm:** As the committee is aware, respite care and short breaks are vital to many vulnerable people and carers. Such services are becoming increasingly innovative to suit differing needs and are already provided in many settings. The standards that are being developed by the working group of the national care standards committee on short breaks will reflect the many ways in which respite provision is developing.

Section 2(2) of the bill covers a wide range of respite services that are provided to people in their homes or in the community. Section 2(3) covers care homes, including where respite care is provided. All respite care in a person's home that is provided or arranged by local authorities or health bodies, and all such care that involves personal care or personal support, is already covered by the definitions in the bill. We consider that to be sufficient protection for service users. I ask, therefore, that amendment 37 be withdrawn.

What is the other amendment that you want me to comment on?

**The Convener:** You can comment on any of them, but you might want to say something about amendments 38 and 28 at this stage.

**Malcolm Chisholm:** Amendment 28 is simply for clarification. It excludes the expression "housing support service" from the definition of support services. Amendment 26, to which we will come shortly, would insert a definition for housing support services.

**The Convener:** Does Richard Simpson want to speak to amendment 110?

**Dr Simpson:** Amendment 110 has already been debated and I would like to withdraw it.

**The Convener:** You can choose not to press it at a later stage.

**Dr Simpson:** I do not want to speak to it at this stage, in that case.

**Margaret Jamieson:** I would like the minister to clarify something that he said about respite services being provided in a person's home. The committee felt that, to ensure that the individual who was providing that care was working in a safe environment, the person's home should be registered to ensure that it complies with health and safety regulations.

**Malcolm Chisholm:** I take the point that Margaret Jamieson makes, but I think that it would be difficult for the commission to ensure that that happens.

**Margaret Jamieson:** Surely, as an employer, there is an obligation to ensure that individuals do not go into an unsafe environment. The issue was raised with the committee when we took evidence.

**Malcolm Chisholm:** As you know, the bill proposes to regulate the agency, so that issue would be addressed only where it applied to the agency. However, the serious difficulties would also apply to home care; we cannot walk into people's homes in such a way, which is why the agency is the focus of regulation.

**Margaret Jamieson:** The committee heard some scare stories about individuals who were living in inappropriate accommodation, particularly where an overnight service was provided.

**Malcolm Chisholm:** Although I understand Margaret Jamieson's point, I cannot see how the commission would deal with the problem. Perhaps some thought should be given to some other way of dealing with it.

I should really speak to amendment 38, as this will be my only chance to do so before we move on to the next grouping. Amendment 38 would exclude adoption and fostering from the definition of support services, because it would not be appropriate to include such services in the bill.

**The Convener:** Do you have any comments about any of the other amendments in that group?

**Malcolm Chisholm:** I think that I have dealt with them all.

**The Convener:** I call Mary Scanlon to wind up on this grouping, and either to press or seek to withdraw amendment 37.

**Mary Scanlon:** I feel that I have received the necessary assurances and clarity about respite care in section 2, so I seek to withdraw amendment 37.

*Amendment 37, by agreement, withdrawn.*

*Amendment 38 moved—[Malcolm Chisholm]—and agreed to.*

*Amendment 110 not moved.*

**Malcolm Chisholm:** As I have stated previously, section 2 sets out and defines each of the care services that will be regulated by the commission. Amendment 5 would allow us to remove certain services from the definition of a school care accommodation service if appropriate. If a service is caught by the definition or if the nature of a service changes, we can respond. That power would be used only where necessary, and



no exemptions would be made without prior consultation with those who would be affected. As members know, a similar provision exists for a number of other care services in section 2. In order to bring these matters into line, I move amendment 5.

*Amendment 5 agreed to.*

*Amendment 39 not moved.*

**The Convener:** Amendment 111, in the name of Margaret Jamieson, is now grouped with amendments 41 and 112.

**Margaret Jamieson:** The minister will appreciate that we want to include nanny agencies in section 2 because we feel that the bill omits a provision that will protect the most vulnerable—the 0 to three-year-olds—and we ask him to consider amendment 111. Shona Robison has indicated that the wording of the amendment is perhaps better than it was, and I should point out that it has the backing of the Convention of Scottish Local Authorities.

I move amendment 111.

**Malcolm Chisholm:** Amendments 35 and 39, in Shona Robison's name, which have not been moved, and amendment 111, in Margaret Jamieson's name, would mean that agencies that supply nannies to be employed to look after a child wholly or mainly in its home would be regulated by the commission for the regulation of care. At stage 1, we indicated that regulation would be extended to sitter services that directly employed the carer who was to work in the family home. We are now of the view that that does not go far enough, which is why we have not lodged an amendment that would deal with sitter services.

We want to agree to an amendment that meets the thinking behind the amendments that we are now considering. In fact, we would like an amendment that goes further than what has been proposed. The proposed amendments would not cover agencies that employed volunteers to provide much-needed child care to families who need additional money. Amendment 39 would not cover agencies in which the nannies are directly employed by the agency, and amendment 111 contains a loophole that would allow agencies to avoid registration by ceasing to provide parents with information on the suitability of nannies.

We believe that both categories of agencies should be covered by regulation. We are still developing our proposals for regulating home care services for children and we appreciate that it might not be sensible or possible to draw a line between agencies that employ nannies directly and those that recommend suitable nannies to parents. We want to draft an amendment that will cover both those situations. I accept and

recognise the committee's concerns and I shall ensure that those who have an interest in regulating nanny agencies will be involved in the drafting of our proposed amendments for stage 3, and that they will have the opportunity to comment on them.

There are also amendments in the same group that seek to regulate agencies that recruit and supply au pairs to assist with child care—

**The Convener:** I am sorry to interrupt, minister. I failed to call Shona Robison to speak to amendment 41. Shona, would you like to speak to amendment 41 before we hear from the minister on the issue of au pair agencies?

**Shona Robison:** No.

**The Convener:** Okay. You may continue, minister.

**Malcolm Chisholm:** The amendments relating to au pairs would regulate agencies that recruit and supply au pairs to assist with child care wholly or mainly in the child's home, and which provide prospective employers with information on their suitability. The amendment that I propose the Executive should lodge on nanny agencies should cover any au pair agency that provides child carers on the same basis as a nanny agency does. I hope that Shona Robison and Margaret Jamieson will be assured that we will take on board all their concerns and that we will build on their suggestions by eliminating any possible loopholes and, importantly, by incorporating agencies that use volunteers—which correspond largely to what we called sitter services at stage 1.

**The Convener:** Margaret, do you want to press amendment 111?

**Margaret Jamieson:** I seek to withdraw it in the light of the minister's comments.

*Amendment 111, by agreement, withdrawn.*

*Amendments 40 and 41 not moved.*

*Amendment 112 not moved.*

**The Convener:** That brings us to the end of the section concerning adoption, fostering, au pairs and so on. I propose that the committee take a five-minute comfort break.

10:59

*Meeting adjourned.*

11:11

*On resuming—*

**The Convener:** I bring the committee to order.

*Amendment 42 moved—[Malcolm Chisholm].*

*Amendment 42A moved—[Shona Robison]—and agreed to.*

*Amendment 42B not moved.*

*Amendment 42, as amended, agreed to.*

**The Convener:** Amendment 113, in the name of Richard Simpson, is grouped with amendments 43, 44, 45, 129 and 130.

**Dr Simpson:** Amendment 113 is another amendment that was lodged before we saw the full text of the amendments on adoption and fostering. Nevertheless, it is important that we make clear that respite caring and befriending services are not childminding services, but part of adoption and fostering services. As adoption and fostering services are now being included in the bill, amendment 113 may not be necessary, but it would be interesting to hear the minister's comments.

I move amendment 113.

**The Convener:** I ask the minister to speak to amendment 43 and other amendments in the group.

**Malcolm Chisholm:** I am tempted to start with amendment 113 as it is in everybody's minds. I do not agree with what Richard Simpson said—if I heard him right—about respite care being part of adoption and fostering. I explained the coverage of respite care when I responded to Mary Scanlon's amendment. Our interpretation of amendment 113 is that it would exempt from the regulations covering childminders a respite carer or befriender who is appointed by the local authority. I do not say that a respite carer or befriender is always a childminder, but that may well be the case sometimes. The term "child minding" applies to care that is provided

"on domestic premises for reward".

Where a child is put in the care of a childminder for respite or befriending purposes, it must surely be appropriate for that care to be regulated. I know that the situation is complicated, but no doubt Richard Simpson can come back on that.

Amendment 43 is intended to clarify the definition of "day care of children". It is our intention that the definition should cover, with certain exemptions, all services providing care for children for more than two hours a day on premises other than domestic premises. We were concerned that, as drafted, the definition would cover various children's clubs, classes and uniformed activities, such as scouts, which we did not wish to be the case. Full regulation would place a disproportionate burden on providers of those activities, which improve the quality of life for many children. Measures outwith the bill will help to protect children in clubs. Those measures

include the provision of access to criminal record checks and the parents' checklist. Omitting the word "activity" will ensure that only services that provide care will be regulated. We believe that early education has a care element, so it will be subject to regulation. However, to remove any doubt, we will insert wording about "educational activity".

Shall I stop there, or shall I speak about amendments 44 and 45?

**The Convener:** If you wish to comment on the other amendments in the group, you may do so now.

11:15

**Malcolm Chisholm:** I am happy to deal with Shona Robison's amendments 44 and 45. She can then adapt her speech and answer the points that I make.

Amendments 44 and 45 would remove the exemption from regulation that is currently afforded to day care for children and childminding that is provided for less than two hours a day and, in the case of day care for children, on less than six days a year. Those limits have been in place since the Children Act 1989 came into force. We consulted on the need for change and concluded that there was no compelling reason for change.

We are firmly of the view that a cut-off point is essential. If we regulate all care, we risk losing services that parents need. A small voluntary organisation that runs a holiday play scheme for a few days in the summer holiday, or a conference crèche facility or the crèche at the local church, would find the cost of compliance with regulation prohibitive. We are prepared to reconsider the duration of care that is exempted from regulation, if the committee has compelling evidence to support the need for change. I would be interested to hear whether members think that there have been problems with what has been in force since the Children Act 1989 was passed.

Shona Robison's other amendments, amendments 129 and 130, would limit the exemption from regulation for services that are provided directly by a school to those that are provided as part of the school's educational activities and provided by a person who is employed to work at the school and authorised to provide the service as part of the school's educational activities. One reason for excluding all activities that are run by schools is the difficulty in distinguishing between educational activities and child care. Our advice was that it was not practical to try to identify a school's child care activities separately from its learning activities. Therefore, the proposed amendments are unlikely to achieve the intended objective and I hope that Shona

Robison will not move them.

**Shona Robison:** I will deal with amendments 44 and 45 first. The minister encapsulated the problem. The limits of two hours in any day or six days in any year are arbitrary. There is no rationale for saying that childminding or day care that falls outwith those limits should not be regulated. The minister referred to holiday clubs, but the bill deals with day care and childminding so any such activities would have to fall within the scope of those definitions. I do not think that we have had a clear explanation of why a service that is provided for less than six days a year or two hours a day would be exempted, but one that is provided for three hours a day or seven days a year would be covered.

Amendments 129 and 130 relate to out-of-school care. I am concerned that the person providing out-of-school care activities in schools, as part of the schools' activities, is employed or commissioned by the local authority to manage those services. Section 2(17) appears to suggest that the services would not come under the remit of the new commission. I would like clarification on that. Amendments 129 and 130 seek to ensure that all care services that are provided on school premises for children and young people are within the scope of the bill. It is not my intention to drag all school activities under the scope of the bill, but rather to seek to distinguish between school education activities and child care activities. I think that that distinction can be made.

**The Convener:** If no other members wish to comment on this group of amendments, does the minister wish to make any further comments?

**Malcolm Chisholm:** I have already made my speech, but I get two bites at the cherry—I suppose I should welcome that. My point on the exemptions for services that are provided for less than two hours a day or less than six days a year was that there is a possibility of changing the place where the line is drawn. There would be some difficulty in not having a line at all, as that would mean that many crèches that run for a very short period of time would be captured. It would become quite difficult if we adopted an absolutist attitude in that regard. I mentioned the examples of a crèche at a local church and a conference crèche facility.

I would be open to Shona Robison's proposal if I could be presented with evidence of difficulties that have arisen over the past 12 years as a result of having the cut-off point. It would be useful to think in terms of concrete examples. We consulted on the matter and the cut-off point was not flagged up as a major concern; it was not a feature of the Children Act 1989 that people felt to be unsatisfactory. As I said, if evidence could be produced, we would consider changing the

thresholds. If Shona Robison's amendments were agreed, we would have to have enormous regulations saying, "We exempt this, we exempt that and we exempt the other thing." That would be quite awkward, although theoretically possible. We do not want to take a sledgehammer to crack a nut.

I understand Shona Robison's point on the other issue that is raised by this group of amendments, but I think that, in trying to disentangle various school activities, it is difficult to say where the line between education and care is drawn. In activities that are run by schools, such as homework clubs, pupils sometimes do homework, but sometimes play. It could be difficult to say what category such clubs came under. Given that all school activities come under school inspection regimes, it is not as though a part of the school activity is being overlooked. There is not a loophole in the legislation; inspection is simply being carried out under a different regime. Given the difficulty of simply drawing a line, I think we all accept that, with regard to good educational and child care thinking, we do not want a hard-and-fast traditional line to be drawn between education and care. It would be difficult in practical terms to define which of a school's activities were educational and which were wider than that.

I think that the most satisfactory way to proceed is to draw a line between activities being run by schools and inspected under one regime and activities being run by another party and inspected under something else.

**The Convener:** Richard Simpson will wind up on this group.

**Dr Simpson:** Before I do so, I should make a declaration of interest. I refer to my written declaration in respect of being a medical adviser on adoption and fostering. Although I have not spoken on nursing homes, I also have a directorship of a nursing home company, which is in England and, therefore, not affected by the bill.

With regard to my amendment 113, on respite carer and befriender services, the problem is that the Children (Scotland) Act 1995 does not cover fostering very well. It is a question of how respite carer and befriender services are to be tackled. It seems to me that they are not childminding services, as respite carers and befrienders are appointed to perform a specific task; that is why I suggested that they should be excluded from this section. However, I understand the minister's argument that someone might be a childminder and a respite carer or befriender. Therefore, with the agreement of the committee, I would be happy to withdraw amendment 113. Before stage 3, we will reconsider the sections of the bill that deal with adoption and fostering, to see whether they deal with this area as well.

*Amendment 113, by agreement, withdrawn.*

*Amendment 43 moved—[Malcolm Chisholm]—and agreed to.*

*Amendment 44 moved—[Shona Robison].*

**The Convener:** The question is, that amendment 44 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**FOR**

Robison, Shona (North-East Scotland) (SNP)  
Sturgeon, Nicola (Glasgow) (SNP)

**AGAINST**

Hughes, Janis (Glasgow Rutherglen) (Lab)  
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)  
McAllion, Mr John (Dundee East) (Lab)  
Scanlon, Mary (Highlands and Islands) (Con)  
Simpson, Dr Richard (Ochil) (Lab)  
Smith, Mrs Margaret (Edinburgh West) (LD)

**ABSTENTIONS**

Elder, Dorothy-Grace (Glasgow) (SNP)

**The Convener:** The result of the division is: For 2, Against 6, Abstentions 1.

*Amendment 44 disagreed to.*

*Amendment 45 not moved.*

*Amendment 129 moved—[Shona Robison].*

**The Convener:** The question is, that amendment 129 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**FOR**

Elder, Dorothy-Grace (Glasgow) (SNP)  
Robison, Shona (North-East Scotland) (SNP)  
Sturgeon, Nicola (Glasgow) (SNP)

**AGAINST**

Hughes, Janis (Glasgow Rutherglen) (Lab)  
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)  
McAllion, Mr John (Dundee East) (Lab)  
Scanlon, Mary (Highlands and Islands) (Con)  
Simpson, Dr Richard (Ochil) (Lab)  
Smith, Mrs Margaret (Edinburgh West) (LD)

**The Convener:** The result of the division is: For 3, Against 6, Abstentions 0.

*Amendment 129 disagreed to.*

*Amendment 130 not moved.*

*Amendment 114 not moved.*

**The Convener:** Amendment 46, in the name of Mary Scanlon, is grouped with amendment 26. I ask Mary to move amendment 46 and to speak to both amendments in the group.

**Mary Scanlon:** The Housing (Scotland) Bill has not yet been enacted, and I understand that the

Regulation of Care (Scotland) Bill is likely to be enacted before that bill. Amendment 46 seeks to clarify what a housing support service is and suggests a definition of such a service.

I move amendment 46.

**The Convener:** I call the minister to speak to amendment 26 and, if he wishes, to address amendment 46.

11:30

**Malcolm Chisholm:** Amendment 26 is purely a technical amendment to allow the existing definition of housing support services to be incorporated in the interpretation section of the bill.

Mary Scanlon will correct me if I am wrong, but, as far as I can see, amendment 46 reiterates a definition of housing support service that appears in section 81 of the Housing (Scotland) Bill. That definition may change as a result of further parliamentary consideration of that bill. In the circumstances, it seems to make sense to have only a signposting section in section 2 of the Regulation of Care (Scotland) Bill as drafted. We may also wish to confine regulation to prescribed housing support services only—that is also referred to in section 81 of the Housing (Scotland) Bill. We will consider whether we are able to provide more detail in the definition by stage 3.

My general point is that it seems more appropriate for the Social Justice Committee to deal with the definition of housing support services as part of its consideration of the Housing (Scotland) Bill, given that that is more a matter for that bill. It appears to me that the definition in both that bill and amendment 46 is the same. I am not sure whether it might be too much of a concession for the Health and Community Care Committee to allow the matter to be dealt with in the Housing (Scotland) Bill. Indeed, I am sure that Mary Scanlon could move amendments to that bill at the Social Justice Committee if she felt so inclined.

**The Convener:** You know, Malcolm, that this committee always tries to be helpful and courteous to other committees of the Parliament.

As no other members wish to make comments on this group of amendments, I ask Mary Scanlon to wind up and either to press or to withdraw amendment 46.

**Mary Scanlon:** I take Malcolm Chisholm's point. Amendment 46 is really a technical amendment. We are being asked to agree a definition that does not exist at present. I have no doubt that the Housing (Scotland) Bill will include a responsible definition, but it is difficult for the committee to agree a definition that we have not seen. My intention was to propose, and to have accepted, the definition that is in amendment 46, given that

we do not know how housing support services will be defined.

**The Convener:** Do you wish to press amendment 46 or to withdraw it and wait? The minister suggests that, by stage 3, we might have clarity of the definition.

**Mary Scanlon:** If there is agreement that we will return to this issue at stage 3, I am happy to withdraw amendment 46.

*Amendment 46, by agreement, withdrawn.*

*Section 2, as amended, agreed to.*

### **Section 3—Power to amend the definition of “care service”**

**The Convener:** Amendment 115, in the name of Richard Simpson, is grouped with amendment 116. I ask Richard to move amendment 115 and to speak to both amendments in the group.

**Dr Simpson:** The purpose of amendments 115 and 116 is to extend the scope of the consultation that ministers are required to undertake. It is interesting to note that the word “committee” does not appear in the bill at all and that consultation with the appropriate parliamentary committee is not referred to. In my view, the legislation of the Scottish Parliament should refer to consultation with the appropriate committee before ministers decide important matters, and that is the clear purpose of amendment 115.

I move amendment 115.

**Janis Hughes:** Section 3 deals with the power to amend the definition of care service. The purpose of amendment 116 is to add to the openness and transparency of defining care services by making a committee, or committees, of the Parliament responsible for considering possible amendments to such definitions. It is not that we do not trust Scottish ministers, minister, but the openness and transparency of the committee system is important. The relevant committees of the Parliament should be able to scrutinise any proposals to amend the definitions.

Amendment 116 goes slightly further than amendment 115, in that it takes cognisance of the fact that users of care services and those who provide care for users of those services should also be consulted. That takes into account the views of a number of witnesses who gave evidence to the committee at stage 1 about who should be consulted when any decisions are taken about the services that are provided under the bill.

The last part of amendment 116 talks about consulting

“providers of such services (whether ... local authority ... or otherwise).”

In wording that part of the amendment, I was particularly thinking about voluntary sector organisations and other organisations that provide care. All those organisations are important in the provision of care services and, as such, should be involved in the consultation process when any amendments are proposed to the bill.

**Mary Scanlon:** I support what Richard Simpson and Janis Hughes have said in the light of personal experience. Anything that we can insert into the bill to help ministers consult committees, particularly the Health and Community Care Committee, would be helpful.

**Malcolm Chisholm:** I welcome in principle amendments 115 and 116 on consultation in advance about changes in the definition of care service. The amendments suggest consultation of Parliament and relevant committees, and amendment 116 adds users, carers and providers. I echo what Janis Hughes said about the importance of the voluntary sector to care provision.

We support the wider scope of amendment 116. We have always maintained that we are committed to consultation on as many aspects of the new arrangements as possible and as widely as possible. I hope that members are aware of how widely we have already consulted on many aspects of the bill.

I would like to give further thought to the precise wording of an appropriate stage 3 amendment. One issue that might arise is that of consistency with other parts of the bill that concern consultation. I give a strong commitment to the intention of the amendment and hope that a form of wording will emerge that will ensure that the Parliament, its committees and the wider range of people who are referred to in amendment 116 will be consulted. I do not find much wrong with the wording of amendment 116. However, it needs to be adjusted slightly and, in particular, made consistent with all the different parts of the bill in which consultation is referred to.

I hope that Richard Simpson will withdraw amendment 115 and that Janis Hughes will not move amendment 116. I hope that they will work with me—and I invite any others who want to be involved to come forward—to produce a strong consultation commitment in various parts of the bill.

**Dr Simpson:** I thank the minister for his comments. I am happy to withdraw amendment 115.

*Amendment 115, by agreement, withdrawn.*

**The Convener:** I call Janis Hughes to move or not move amendment 116.

**Janis Hughes:** I welcome the minister's comments about supporting the wider scope of consultation, which is the spirit of amendment 116. I welcome his commitment to consider the issue. I understand that the wording of amendment 116 might not be perfect, but I am particularly concerned about including the voluntary sector and would be grateful if the minister would consider including the voluntary sector in any stage 3 amendments that he lodges.

*Amendment 116 not moved.*

*Section 3 agreed to.*

#### **Section 4—Information and advice**

**The Convener:** Amendment 117, in the name of Richard Simpson, is grouped on its own.

**Dr Simpson:** Section 4 deals with the issue of information and advice and lists those individuals or organisations to whom advice may be given. Amendment 117 begins to indicate the manner in which that advice should be given.

In my original draft of the amendment, I suggested that information should be available in Braille. I realise that many authorities have made significant advances, over the past few years, in providing information in appropriate forms for individuals who are seeking advice or information. The intention of amendment 117 is to ensure that such information and advice continues to be provided in printed form, as some individuals may find the move to electronic form—which may, within some of our lifetimes, become the only form in which information is available—inappropriate.

Amendment 117 also seeks to ensure that if someone is not satisfied with the standard of information that they receive, they will have the opportunity to seek it in a form that is appropriate to their needs. That is a new element in the amendment, which puts the power into the hands of the person who is seeking information to say, "I need the information in this particular form." I realise that that could incur costs for the commission. Nevertheless, if the information that is available from the commission is provided in a variety of forms, the number of individual requests should be small.

I move amendment 117.

**Malcolm Chisholm:** As Richard Simpson has said, amendment 117 seeks to ensure that the information and advice that the commission distributes will be accessible to everyone. Our commitment to that has been made in a number of public forums. For example, the national care standards are being put into plain English, which should mean that anyone reading them should know what they can expect of a service. Similarly, the reports of inspection will be made available to

anyone who wants them, both on the web and in hard copy, and will be free of charge where appropriate. We expect the commission to provide information in Braille or large text if that would help the person who is seeking it. Amendment 99, on equal opportunities, which we have accepted, should help to ensure that those things happen.

I do not think that we need an amendment to ensure that the agreed objective is achieved. However, if the committee feels strongly about the issue, I would be happy to lodge a similar amendment at stage 3, on the grounds that, notwithstanding what Richard Simpson says about people deciding what is appropriate, amendment 117 is rather broadly drawn and would be open to abuse. I am not saying that that is likely, but, according to the present wording of the amendment, it would be possible for somebody to demand anything that they thought was appropriate. It might be better to reword the latter part of the amendment to ensure a slightly more objective approach to deciding what is appropriate.

**Dr Simpson:** In the light of the minister's assurance that he will lodge an amendment at stage 3 that will cover the principles of amendment 117 in an appropriate way, I am happy to withdraw the amendment.

*Amendment 117, by agreement, withdrawn.*

**The Convener:** Amendment 118, in the name of Richard Simpson, is grouped with amendment 119. I call Richard to move and speak to amendment 118 and to speak to amendment 119.

**Dr Simpson:** Amendment 118 is in a similar vein to amendments 115 and 116. It seeks to ensure that the commission will be required to give advice to the appropriate parliamentary committee if that committee seeks advice. The amendment seeks to add the relevant parliamentary committee to the list of persons who can ask the commission for advice, along with the local authorities, the health bodies and Scottish ministers.

I move amendment 118.

11:45

**The Convener:** I call Shona Robison to speak to amendment 119.

**Shona Robison:** Amendment 119 seeks to ensure that there is a clear message that the provision of advice to individual users, carers and their representative bodies is as important as the provision of advice to ministers, local authorities and health bodies.

**Malcolm Chisholm:** I support the principle behind both amendments. We want the Parliament's committees, users, carers and their

representatives to be central to the commission's concerns. However, I do not think that amendment 118 is necessary. The Parliament can already call on bodies to give evidence; it can ask them questions and seek their advice. It would seem odd to specify one body in particular. That could even have the perverse effect of narrowing the power of the Parliament and its committees. Unless Richard Simpson can produce evidence that he is not receiving advice from comparable bodies, I am not persuaded that amendment 118 is necessary.

On the issue of the powers that the Parliament and its committees have, it must be stated in the bill that I shall receive advice, as I cannot demand it. In that regard, the committee has more power than I, as you can call anybody here to talk to you—a power that I do not have.

Amendment 119 refers to the commission providing advice to users and carers. The commission should not provide advice to individuals on care needs and how they should be met; that is for local authorities, the NHS and care providers. If that is not acceptable as a general principle, some thought ought to be given to the implications of individuals' seeking advice from the commission. There are many individuals out there who sometimes come and ask us for advice. It would be a massive undertaking if the commission was to agree to give advice to individual care users. That would be different from providing advice to care providers, who would need to have advice about, for example, the way in which they could meet the care standards. What the commission should provide is information to users and carers, which is allowed for in the bill. Section 4(1) states that it should provide information about the range of care services that are available and their quality.

I am afraid that I cannot offer to lodge an amendment at stage 3 on the matters that are raised in amendments 118 and 119. I invite Dr Simpson and Shona Robison to withdraw and not move their respective amendments.

**Dr Simpson:** The minister is correct in saying that the committee can seek advice. I was simply making the point that, in drawing up new legislation, we must always ensure that the parliamentary committees are provided for in bills. It was to raise awareness of that fact that I lodged amendment 118, but I am happy to withdraw it.

*Amendment 118, by agreement, withdrawn.*

**Shona Robison:** I take the minister's point about advising individual users. At stage 3, will he consider the bodies that represent users? I can think of occasions on which they may want to seek advice from the commission that is not straightforward information about care services.

**Malcolm Chisholm:** It would be entirely reasonable to consider those bodies. I will not make a snap judgment, but that seems a more reasonable proposition. However, I make no commitment at this stage.

*Amendment 119 not moved.*

*Section 4 agreed to.*

**The Convener:** That is the end of the public part of this morning's meeting. We have completed stage 2 scrutiny of sections 1 to 4 and schedule 1. I thank committee members, the minister and the bill team for their attendance. We now move into private for items 4 and 5, as agreed.

11:49

*Meeting continued in private until 12:32.*





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