

# **HEALTH AND COMMUNITY CARE COMMITTEE**

Wednesday 16 January 2002  
*(Morning)*

Session 1

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2002.

Applications for reproduction should be made in writing to the Copyright Unit,  
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ  
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate  
Body.

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

Wednesday 16 January 2002

Col.

ITEMS IN PRIVATE.....	2315
SUBORDINATE LEGISLATION.....	2316
COMMUNITY CARE AND HEALTH (SCOTLAND) BILL: STAGE 2 .....	2317

---

### HEALTH AND COMMUNITY CARE COMMITTEE

#### 1<sup>st</sup> Meeting 2002, Session 1

##### CONVENER

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

##### DEPUTY CONVENER

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

##### COMMITTEE MEMBERS

\*Bill Butler (Glasgow Anniesland) (Lab)

\*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)

\*Nicola Sturgeon (Glasgow) (SNP)

\*attended

##### THE FOLLOWING ALSO ATTENDED:

Hugh Henry (Deputy Minister for Health and Community Care)

##### CLERK TO THE COMMITTEE

Jennifer Smart

##### SENIOR ASSISTANT CLERK

Peter McGrath

##### ASSISTANT CLERK

Graeme Elliott

##### LOCATION

Committee Room 2



## Scottish Parliament

### Health and Community Care Committee

*Wednesday 16 January 2002*

*(Morning)*

[THE CONVENER *opened the meeting at 09:34*]

### Items in Private

**The Convener (Mrs Margaret Smith):** Good morning, everybody. Welcome to this morning's meeting. Does the committee agree to take agenda items 4, 5 and 6 in private? Item 4 is on the appointment of an adviser on mental health legislation, so we may discuss individuals. Item 5 is on a draft report on organ donation for transplantation. Item 6 is consideration of last week's parliamentary debate on hepatitis C and of possible action. Members will recall that the Executive accepted that we should have some input into the remit of the expert group. Individuals may be mentioned in that discussion. Is it agreed that we take those items in private?

**Members** *indicated agreement.*

## Subordinate Legislation

### National Health Service (Scotland) (Superannuation Scheme and Additional Voluntary Contributions) (Pension Sharing on Divorce) Amendment Regulations 2001 (SSI 2001/465)

**The Convener:** No members' comments have been received on the regulations. The Subordinate Legislation Committee has no comments and no motion to annul has been lodged. The recommendation is that the committee does not wish to make any recommendation on the instrument. Is that agreed?

**Members** *indicated agreement.*

### Road Traffic (NHS Charges) Amendment (Scotland) Regulations 2001 (SSI 2001/466)

**The Convener:** No members' comments have been received on the regulations. The Subordinate Legislation Committee has no comments and no motion to annul has been lodged. The recommendation is that the committee does not wish to make any recommendation on the instrument. Is that agreed?

**Members** *indicated agreement.*

## Community Care and Health (Scotland) Bill: Stage 2

**The Convener:** We will continue our scrutiny of the Community Care and Health (Scotland) Bill at stage 2. Hugh Henry is present for this agenda item. Good morning, minister.

**The Deputy Minister for Health and Community Care (Hugh Henry):** Good morning, convener.

### Before section 1

**The Convener:** Amendment 56 is in a group on its own.

**Shona Robison (North-East Scotland) (SNP):** At stage 1, the Minister for Health and Community Care said that he was not hostile to a general principles amendment to the bill. We urged him to lodge such an amendment at stage 2 and it is unfortunate that he chose not to do that. In the absence of an amendment from him, I have lodged amendment 56, which reflects the view of nearly all the organisations that gave evidence to the committee. It is good practice to include general principles in a bill, as was done with the Regulation of Care (Scotland) Act 2001. The minister was initially loth to do that, but was persuaded of the wisdom of the provision.

The main reason for including the provision on general principles is that it states the underlying ethos of the bill. That is important, because someone would not necessarily pick up the ethos of the bill from reading it. A statement of the general principles lets everyone know what the bill is trying to achieve. Carers Scotland supported the general principle of carers being partners in care, which is an element of the general principles in amendment 56.

The Minister for Health and Community Care said that he did not believe that such a statement would do any harm. I cannot see how he could have changed his mind and I am interested to know whether the deputy minister concurs with him. The amendment pulls together the comments on the general principles in the committee's stage 1 report. On that basis, I would be surprised if it did not receive the support of the rest of the committee.

I move amendment 56.

**Mr John McAllion (Dundee East) (Lab):** I agree with Shona Robison about enshrining in the bill principles such as partners in care if possible, but I have concerns about the implications of amendment 56. It refers to "free personal care" and to the need for

"Fairness and equity in the provision of social care services".

I have lodged a probing amendment, which we will debate later, about free personal care for all younger disabled adults. If we were to agree to amendment 56, anyone under 65 could go to court and ask the judges to decide whether the bill discriminates against them because it does not provide free personal care for people under 65. That would have huge financial implications. Any decision must be a political one taken by the Parliament and not left to the courts. I am therefore loth to support amendment 56 as it is worded.

**Hugh Henry:** I start by making it clear that the Executive agrees with the principles that amendment 56 seeks to promote. However, we oppose the amendment on the basis of the effects that it would have in practice. John McAllion has rightly identified some of those concerns.

We understand and sympathise with the points that were raised on the issue in the committee's stage 1 report. I remind the committee that we have made significant concessions to address those points by way of the amendments that are being discussed today, which make our commitment to the principles of free personal care more explicit, and the amendments that we lodged earlier in stage 2, which bolster the bill's support for the principle of carers being partners in care. In both cases, rather than inserting a vague commitment that might look good on paper but that means little in law, we have focused on provisions that will implement those principles in a specific way.

That is an important distinction. As Malcolm Chisholm said at stage 1, we need to distinguish between having good intentions and making good law. I know that there is a temptation to draw parallels, as Shona Robison has done, with the Regulation of Care (Scotland) Act 2001 and the principles that were added to it during its passage through Parliament. However, the Community Care and Health (Scotland) Bill is a very different piece of legislation. Rather than being a focused bill that creates new law on a specific subject, as was the case with the Regulation of Care (Scotland) Act 2001, the Community Care and Health (Scotland) Bill covers a wide range of policy areas and major parts of it amend existing legislation rather than creating wholly new law.

Although the principles of the Regulation of Care (Scotland) Act 2001 serve to give the new bodies that it established some founding principles, the position with this bill is different. The principles stated in amendment 56 would have no direct effect on the actions of national health service bodies or local authorities, because they apply only to the functions exercised under the bill by ministers: issuing regulations, directions and guidance. Although we do not disagree with the

sentiments of the amendment, we believe that it is legally unworkable and would create such legal uncertainty over the exercise of any ministerial function, and over the validity of any regulations, directions or guidance, that it would be detrimental to the purpose of the bill. That is an important point.

Some of the terms used in amendment 56 are not defined and are so imprecise that it would be impossible to be clear about what they would mean when we were putting the law into practice. As John McAllion said, no one could argue against an objective of fairness, but there are questions about what that would mean in practice. What are the agencies referred to in proposed subsection (4)? What is

“the best delivery of services”,

and who measures it? What is meant by “partners” in proposed subsection (5)?

Such uncertainty can give rise to numerous problems. Everyone would have a different idea of what is fair. The effect would be that anyone who was unhappy with a decision could challenge it in court on the ground that it was unfair from their perspective. The end result of that and other uncertainties would be that the effect of the legislation would not, as it should be and as John McAllion has said, be decided by Parliament; it would be decided by the courts. That is not the way to make good legislation.

The amendment contains a number of other deficiencies. For instance, it seeks to govern ministers’ functions under the bill in relation to carers and direct payments, but ministers have no such functions other than under other legislation.

I hope that what I have said has made clear the reasons why I am asking the committee to vote against the amendment. The Executive has done much to incorporate the principles into the bill. I believe that the effect of the amendment would be to undermine Parliament’s role in making legislation and would pass much of that responsibility to the courts. I hope that we all agree that that is not a proper approach in our new Parliament.

Although I have not addressed in detail the more minor deficiencies, there are sufficient reasons for me to urge members to reject the amendment. In short, amendment 56 represents good intentions, but would result in bad law. I urge members to vote against it.

**Shona Robison:** In light of the fact that the issues are mainly about wording, it is unfortunate that the Executive did not take the opportunity to lodge an amendment that would put it in a secure position legally. I am still at a bit of a loss to understand why that was.

If we took the argument about wording to its logical conclusion, we would never have a set of general principles in any act of Parliament, because there could always be such a debate. For example, in the Regulation of Care (Scotland) Act 2001, what does “independent” mean? How are care services or safety and welfare defined? In spite of that, the Regulation of Care (Scotland) Act 2001 contains general principles. We must be careful not to tie ourselves up in so many knots that the slightest possibility of legal challenge in the future denies us the opportunity of ever including a statement of general principles in a bill. On that basis, I press amendment 56.

09:45

**The Convener:** The question is, that amendment 56 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**

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

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

*Amendment 56 disagreed to.*

### **Section 1—Regulations as respects charging for social care**

**The Convener:** Amendment 41 is grouped with amendments 42, 44, 50, 51, 52, 53 and 55.

**Hugh Henry:** This is a large and important group of amendments. I hope that the committee will forgive me for making a long and detailed explanation.

I am aware that doubts have recently been raised about the timetable and the affordability of the policy of free personal care. To end any uncertainty, it was vital that we made our position clear. Yesterday, Malcolm Chisholm announced that full implementation of the care development group’s recommendations will be delivered from 1 July 2002. The three-month extension will allow local authorities and other providers to ensure that the right assessment and delivery mechanisms are in place to secure smooth and effective implementation.

The implementation steering group that the Executive set up to advise on the practical and technical challenges of delivering the new policy on the ground has been working with local authorities and others across Scotland. The decision to take slightly longer is based on the views that front-line staff have given. It would be irresponsible not to listen to those views. We all recognise the importance of implementing the policy as quickly as possible. However, it is equally important to ensure that current services are not put under further pressure and individuals are not unduly troubled by trying to do all that needs to be done in too short a time scale.

I believe that the new timetable is fair, sensible and workable. That is key to successful implementation for those who deliver care and those who receive it. I hope that the committee will also welcome Malcolm Chisholm's confirmation that the amounts for personal and nursing care that the care development group recommended will be delivered. For those who meet the costs of their care in care homes, the rates that will be paid from 1 July 2002 will be £145 per week for personal care and, for those who need nursing care, a further £65. Also from 1 July, those who need personal care at home will no longer be charged for those services.

We also announced yesterday that discussions with the Department for Work and Pensions and other Whitehall departments have been concluded. It is clear that the DWP does not accept the care development group's recommendation on attendance allowance and that there was little prospect of that position changing in time to meet the key implementation dates that are ahead of us.

We have therefore decided to press ahead with delivery of the policy. The public and the front-line staff need to know where they stand. I can confirm that we will fund the policy, as I have just described, from within the overall £250 million that has been allocated for the next two financial years. The new timetable, which is based solely on the advice of the implementation steering group, dictates that there are sufficient resources to deliver on our commitment to free personal and nursing care and still provide significant new investment in community services. Our top priority is to ensure that, when policy is put into practice, it is done effectively and sustainably. I hope that the committee will support a revised timetable for implementation.

I now turn to amendment 41 and the other amendments in the group, which the Executive has lodged in direct response to the wishes of the committee and the Parliament at stage 1 for the bill to make express reference to free personal care. That fulfils the commitment that Malcolm

Chisholm made to the committee at stage 1.

The main points of interest in the amendments are the inclusion of the definition of personal care and the specification of types of care activity in the new schedule that amendment 55 proposes to introduce. I will deal with the definition first. As Shona Robison indicated, the Regulation of Care (Scotland) Act 2001 already contains a definition of personal care. The definition is expressed in general terms and states:

"'personal care' means care which relates to the day to day physical tasks and needs of the person cared for ... and to mental processes related to those tasks".

It includes eating and washing as specific examples.

That definition is to be complemented by the list of services in the proposed new schedule. The definition is expressed in general terms and the list is specific. Items in the list may fall within the definition, but we do not define personal care by reference to the list. The list is based wholly on the recommendations of the care development group for the definition of personal care.

We have not sought to deviate in any way from the breadth or scope of the items that are contained in the suggested definition. However, we have had to ensure that the terminology is precise enough for legal interpretation. That is why some elements of the list in the new schedule—for example, oral hygiene and catheter or stoma care—are set out in more detail than in the care development group's original list.

Having included the definition of personal care as set out in the Regulation of Care (Scotland) Act 2001, we have had to take care not to duplicate in the schedule any aspects of personal care that are already clearly defined in the 2001 act. That is why help with washing and with eating, which are included as express examples in the definition in the 2001 act, have been left out of the new schedule.

I hope that the committee will be able to agree that the definition and the new schedule are comprehensive and accord fully with the recommendations of the care development group.

On the procedure for regulations under section 1 and the power to amend the new schedule by order, we have responded to the committee's concerns by lodging amendments 50 to 53, which will ensure that the relevant order or regulation-making powers will be subject to affirmative procedure.

However, we were not of the same mind as the committee on whether the ability to amend the list of items of care should be confined to making additions. Therefore, the powers in proposed new section 1(A2), which would be introduced by



amendment 41, will allow ministers to add to and otherwise amend the list by order. That degree of flexibility is needed to allow for clarification of what care is to be free. We may need to clarify the specification to respond to the development of different practice in different areas and to ensure a level playing field. Clarification can equally mean spelling out what is included in the list and what is not. We hope that the assurance that any such amendment would be subject to the approval of the Parliament by affirmative procedure will be considered sufficient safeguard.

Amendment 42 is minor but essential. It will ensure that the requirement in amendment 41—that local authorities shall not charge for the element of social care that is specified in that amendment—cannot be overridden by regulations made under section 1(1).

Amendment 44 is similarly needed as a consequence of amendment 41. It ensures that section 87 of the Social Work (Scotland) Act 1968, which deals with charging, interacts properly with the new provisions and does not require a charge to be made when the bill, or regulations that are made under it, make different provisions for charging or provision for not charging.

I ask the committee to support these important amendments and I move amendment 41.

**The Convener:** Thank you, minister. The committee will welcome your comments and the commitment to the policy that Malcolm Chisholm gave yesterday. The Convention of Scottish Local Authorities and others have told the committee that they have questions about the implementation period. It is unfortunate that we have to go ahead without the assistance of the DWP, but it is important that we proceed in a responsible manner. We all want the bill to be successful.

**Nicola Sturgeon (Glasgow) (SNP):** I have three questions for the minister. The first relates to the reasons that have been given for the delay in the provision of free personal care. Malcolm Chisholm said yesterday—Hugh Henry has repeated it today—that the Executive wanted to give local authorities and other providers of care more time to ensure that the right assessment and delivery mechanisms were in place. Yesterday, COSLA issued a statement saying that it had not been consulted on the matter by the Executive and casting doubt on the reasons that the Executive had given for the three-month delay.

Meanwhile, it has been announced that the Department for Work and Pensions has refused to continue the attendance allowance payments, which leaves a £23 million funding gap that—very conveniently—can be partly filled by a three-month delay in the implementation of policy. Yesterday, the minister somewhat insensitively described that

as a happy coincidence. There is nothing happy about a three-month delay in the provision of free personal care. Would not it be better for the Scottish Executive to be honest about the reasons for the delay in the implementation of its policy, which are that the Department for Work and Pensions has quite unacceptably refused to transfer money that came from Scottish taxpayers to the Scottish Executive to allow the policy to be properly funded?

**Hugh Henry:** The Executive has been honest. The recommendation for the delay came from the implementation steering group. We had no input into that. The recommendation came from professionals and was based on their assessment of the difficulties that local authorities face in implementing the policy.

Nicola Sturgeon says that COSLA has doubts and feels that it has not been consulted. I spoke to the president of COSLA yesterday. His concern is that COSLA was not consulted prior to the announcement that was made yesterday. However, Malcolm Chisholm made it clear that it was proper to provide the information to Parliament, which he did in answer to a question and in the knowledge that I would be at this meeting this morning. COSLA's concern was that it had not been consulted. Nevertheless, the steering group, which consisted of officials including the director of the social work and housing services department of West Dunbartonshire Council, spoke to several authorities. COSLA was not involved in the formal process. I have spoken to Pat Watters about the development of communication between COSLA and the Executive on this and other matters.

The delay was not sought by the Executive and it was not influenced by the Executive. The decision was made solely on the basis of professional advice. It would be both irresponsible and foolish of us to ignore the advice of people who know what the consequences would be of trying to implement the policy in local authorities. I would rather listen to those who know how the system works than to those who have political points to make and are not familiar with the consequences of decisions that are made here or elsewhere.

**Nicola Sturgeon:** My second question on the consequences of decisions is about funding. I am sure that the minister would agree that, given the uncertainty that there has been over the past few days—and a longer period than that—it is crucial that people have absolute confidence in the funding package that is available for the policy. It is crucial that people are confident that there can be no further delays to implementation.

10:00

Malcolm Chisholm confirmed yesterday that £250 million would be available over the next two years to fund the policy. The care development group said that the policy would cost £250 million over two years—£125 million a year—if attendance allowance continued to be paid. We know now that that money will not continue to be paid, which means that an extra £46 million over two years is required to fill that gap.

The three-month delay will, by my calculations, save the Scottish Executive about £36 million which—by anyone's calculations—leaves the funding package £10 million short. That might not be a huge sum of money but, given the uncertainties surrounding the policy, it is crucial that people know where every penny is coming from and are confident that the policy will be implemented in full.

Will the minister comment on Malcolm Chisholm's rather bizarre—to my mind—comment on the radio this morning that even if people got only £90 a week, they would be better off than they are just now? That seemed to me to cast doubt about whether people would continue to get the full amount that the care development group recommended.

**Hugh Henry:** I certainly cannot comment on a radio interview for which I do not have the details. Malcolm Chisholm and the First Minister have made it clear—as I will—that the funding package is in place, that we are ready to proceed and that the resources are available. There is no doubt whatever that the process will start and that funding is in place.

**Nicola Sturgeon:** Do you accept that, on the basis of the calculation that I just mentioned, there still seems to be a gap in the funding package? With the best will in the world, that still leaves doubt in people's minds about the long-term financial viability of the policy.

**Hugh Henry:** I do not see the logic of that argument. Nicola Sturgeon is perhaps trying to put doubt in people's minds. We have said clearly that the funding is available and that the process will start. Nicola Sturgeon is suggesting that there might be delays or doubt; we are not. The money is there; the process will go ahead and members in the Parliament casting doubt on that does not help anyone.

**Nicola Sturgeon:** This is my last question; I said that I would ask three.

**The Convener:** You have asked four questions.

**Nicola Sturgeon:** I have not placed doubt in people's minds; the Scottish Executive has placed doubt in people's minds over the past few days.

My last question refers to the dispute between the Parliament and the Department for Work and Pensions. The care development group made it clear that the attendance allowance money should continue to be available. The Minister for Health and Community Care and the former First Minister have said on numerous occasions that this is a battle that they intended to win. The Parliament has made clear its view on the matter. Given the importance of the issue and the amount of money that is involved, it strikes me as strange that the Scottish Executive reached a point at which it simply backed down.

Will the minister tell us why the matter was not referred to the joint ministerial committee? Given the concordat between the Scottish Executive and the then Department of Social Security, it would normally be the case that unresolved disputes between the Scottish Parliament and Westminster would be referred to that committee. It seems to me that the Executive could have gone ahead with the policy to avoid further delay and still referred the dispute to the joint ministerial committee to force a decision that would be in the interests of the Scottish Parliament and the people of Scotland, instead of backing down in the face of Westminster opposition.

**Hugh Henry:** I do not see the matter like that. There was never a dispute per se. We raised with Westminster the point that there are financial consequences of the actions that the Scottish Parliament takes. We decided to proceed in this way and to make payments that would affect people's benefits. We did that with full knowledge of the consequences.

We then said to the Department for Work and Pensions that there were clearly implications because of the effect on benefits. We did not want to know whether the department would adjust the benefit system because I want—and, I think, the Parliament wants—a unified benefits system within the United Kingdom to continue. Nothing should be done to undermine that. We wanted to know whether money could be adjusted back to us in other ways as a result of the process.

There were constructive discussions between the Executive and the DWP to see whether there were other ways of doing that, but no ways could be identified. If Westminster makes a decision that has financial consequences for Scotland, we get money as a result. However, the system does not easily adjust the money that comes to Scotland to compensate us for the consequences of our own actions. We examined whether additional payments could be made, but there were no mechanisms by which that could be done. Constructive and amicable discussions took place and we decided that we could not wait any longer before proceeding with the policy. We have had to

accept that the decision has not gone in our favour. That is a responsible position.

**Nicola Sturgeon:** You have not exhausted the procedures.

**The Convener:** I want to ask a more technical question. Nicola Sturgeon suggested that you could continue with a twin-track approach of implementation and negotiation so that the DWP situation did not hold you back. I understand that the implementation group is examining the question of how contracts are set up with care homes and so on. Would factors such as whether the attendance allowance was still being paid have to be known? Would the route by which the money came in have an implication for implementation? How would the situation be affected by the money's being recycled? Could you have continued to have negotiations while proceeding with implementation?

**Hugh Henry:** I am advised that that would have been possible.

**Nicola Sturgeon:** The next question is: why did you not do that? This is an important matter of principle, as the Deputy Minister for Health and Community Care has said. We are talking about money that is paid by Scottish taxpayers to the UK Treasury for social security payments to people in Scotland—the money comes from Scotland in the first place. However, before the procedures that were laid down in the concordats for relations between the Scottish Parliament and Westminster had been exhausted, the Scottish Executive chucked in the towel; although the minister has just admitted that the Executive could have implemented free personal care while ensuring that it fought Scotland's corner. That beggars belief.

**Hugh Henry:** It is not a question of chucking in the towel; it is a question of how long we should keep arguing about something we know will not be resolved. We concluded that there would be no point in taking the matter further. We were not going to bring about any change in the benefits system and I do not think that we should have asked for that, because it would cause chaos. The Barnett formula works well for Scotland. We raised with Westminster an issue that was a consequence of a decision that we made and that had financial repercussions for us. We tried to persuade the Treasury that some financial adjustment to reflect that fact would be preferable. The Treasury did not accept that view and—because of the way in which the system of finance in the UK works—that was not easily identified.

We should consider the matter in the context of how well Scotland has done in the past few years in terms of the money that is allocated to us by the UK Government. That money has allowed

unprecedented public expenditure in Scotland and has meant that we have been able to make decisions such as that which we made on free personal care. There is no point in starting an artificial dispute over the benefits system. We have tried our best to get extra money, but that has not worked. We need to move on and ensure that free personal care is a success.

**Margaret Jamieson (Kilmarnock and Loudoun) (Lab):** When COSLA gave evidence at stage 1, Jim Dickie indicated that COSLA's view was that the time scale was far too short. I am concerned that COSLA will come along and claim that it was not part of the consultation. COSLA was adamant in its evidence that there was not sufficient detail for it to carry out the assessments that it would need to do before 1 April.

The convener has just indicated that she received a letter from the COSLA spokesperson on health improvement in community care, Councillor Ronnie McColl. That letter is unclear about COSLA's position. Mr McColl says that there will need to be clarification of the approach before the time scale can be met. If that is not the same as requesting a delay then I do not know where COSLA is coming from. COSLA needs to get its act together and clarify its position on the issue.

At the end of the day, we require council employees and other partners to ensure that all the assessments are carried out. I for one would prefer the delay that the Executive has suggested, in order that we get assessment right from day one, rather than have individuals come back for further reassessment or go through appeals.

On funding, we all need to remember who decided that we were going to go down the road of free personal care; it was the Parliament. If some of us around the table forgot that there would be financial consequences, that is tough. We live in the real world. We have made a commitment and the money has been found to take us up to 2004. There will be a comprehensive spending review during that time. It will be for us to make the case that we require further funding to ensure that free personal care continues.

Nicola Sturgeon needs to get real. Such things cost money and hard choices must be made. Her party never comes up with the sums. She asked for three questions today and took five.

I ask the minister to reiterate that the comprehensive spending review will provide us with another opportunity to increase the funding stream for Scotland.

**Hugh Henry:** It is not for me to comment on Margaret Jamieson's points about COSLA—they can be taken up directly with COSLA. However, in my conversation with Pat Watters, he repeated

Margaret Jamieson's point that COSLA believed that the process could not be implemented within the time scale and that delay was inevitable.

COSLA's concerns and disappointment came about because it felt that we should have spoken to it before we made the announcement yesterday. That is an entirely separate matter, which is not just about free personal care—it is about general issues. Ministers and the Executive are responsible first to Parliament and then to all the partner agencies beyond Parliament. However, COSLA is an important part of making the process work properly. I pay tribute to those in local government who work tirelessly to try and make the process work without problems. Free personal care is not an easy system to implement and there are major concerns. We already have overstretched social work departments, but I am impressed by their determination to do what they can to make the process work properly.

Margaret Jamieson is right to remind us that the Executive is implementing the will of the Parliament. I presume that Parliament has considered all the financial consequences of implementing the policy. The Executive has done what it was charged with doing and has worked hard to ensure that the funding package is available to support the will of Parliament.

As far as the comprehensive spending review is concerned, we are confident that we will do well from the review. Services such as health and education will be battling to get their fair share of what the review brings. We already have a significantly higher public spending base to work from than we did when the Parliament was created in 1999. I am confident that through good management of the economy by our UK Government we will continue to do well from the comprehensive spending review.

10:15

**Mary Scanlon (Highlands and Islands) (Con):** I will be brief because I have lost my voice. I will have to whisper. The care development group, which was about the implementation of free personal care, had no concerns when it reported in August. What has changed in the five months between August and January to make implementation no longer practical?

**Hugh Henry:** Shall I answer that question while Mary Scanlon recovers?

**The Convener:** She can build up for the next one.

**Hugh Henry:** The implementation steering group was set up as part of the process of examining how to implement in practice the principal decisions that we took. What has changed is that the chair of that group—the

director of social work and housing in West Dunbartonshire Council—and her colleagues have taken soundings from a number of quarters. From the evidence that she has gathered from throughout Scotland, she has concluded that it would not be possible to move ahead without some chaos. The Executive, per se, was not part of that process—the recommendation came from the chair of the implementation steering group. Yesterday, she made it clear that she was not influenced, nor was she approached or asked by the Executive to recommend a delay.

Pat Watters repeated to me yesterday that implementation could not have gone ahead smoothly. As Margaret Jamieson said, Jim Dickie also said that on behalf of the Convention of Scottish Local Authorities. We were possibly overambitious about our time scale, but rather than introduce the system early and have to solve problems, we would prefer to do it properly and avoid problems.

**Mary Scanlon:** On 1 July, will the whole of personal care be implemented or—because the minister used the word “chaos”—is it likely to be a staged implementation? Hugh Henry talked quite a bit about the definition. It is unlikely that one person would fulfil all the criteria that are set out in the definition. I have been asked whether someone who meets four of the six or seven criteria will still receive free personal care. Is that the case?

**Hugh Henry:** I will deal first with the question on definition. If someone qualifies under any aspect of the definition, they will be eligible to receive free personal care.

**Mary Scanlon:** Even if they meet just one of the criteria?

**Hugh Henry:** Yes. Free personal care will be implemented in full from 1 July.

**Mr McAllion:** The Health and Community Care Committee is obviously not privy to the negotiations that went on between the Scottish Executive and the Department for Work and Pensions, nor is it privy to what goes on at joint ministerial committees. In what he said this morning, the minister appeared to imply that if Scotland chooses to go its own way on any policy, it will be on its own financially. Has that become a basic principle—an iron law, even—of devolution, or are resource transfers when there are policy differences between Scotland and the UK still on the agenda for future negotiation with Westminster?

**Hugh Henry:** Health, education and other issues will continue to be raised and negotiated with Westminster. We have in several areas already taken our own decisions and we live with the financial consequences—for example, on the

McCrone decision on teachers' pay and conditions, for which we find the money. In the case of personal care, we identified an impact on the benefit system as a result of our decision. We pointed that out to the UK Government. We did not easily identify a way of getting a resource transfer. That will not stop us in future from trying to get as much money as we can for Scotland from the UK Government, whether under the Barnett formula or any other mechanism.

On free personal care, we had to conclude that there was no point in dragging negotiations on. We did not think that we were getting anywhere with them. We were more concerned with concentrating on getting the policy up and running properly. It is a complex policy. That is where our attention was focused.

**Mr McAllion:** Will you clarify the position of the DWP? Did it say that attendance allowance would not be made available in Scotland because Scotland is meant to pay for personal care costs, because people would already have their personal care costs met and because the public sector would therefore be paying twice for the same thing? On the other hand, was the DWP not prepared to fund free personal care because Scotland was going down a different road?

**Hugh Henry:** No—it is because of the way in which the benefits system works. The same would happen if a payment for personal care was made in England. Such a payment affects eligibility for attendance allowance. Nursing care is different. If we had been providing free nursing care, that would have had no effect on attendance allowance. We chose to go further and to provide free personal care. England and Wales are considering free nursing care. Attendance allowance is therefore not affected.

The decision is purely because the benefits system is unified. There is no flexibility in the benefits system to vire money back to Scotland as a result of the decisions that we have made. In the same way, if local authorities in England decided to pay for free personal care, the benefits system would not allow central Government to pay local authorities in England that decided to do that.

We have been trying to get something over and above the financial agreements because we are being left to pick up a bigger bill because of our decision. We took the opportunity to try to get more money out of Westminster, but it did not work.

**Shona Robison:** The minister seems to be arguing that the free personal care policy was somehow an alternative to attendance allowance. However, it was supposed to be a top-up to the £55 attendance allowance. It was not, as laid out, meant to be an alternative. I am a bit confused.

Surely, if one really wants to ensure the integrity of the UK system, there is an anomaly. Is not it the case that, because of the distinction that is being made—which requires some explanation—people in England who receive free nursing care will continue to receive attendance allowance, while people in Scotland will not continue to receive attendance allowance? Does not that change the benefits system north and south of the border?

**Hugh Henry:** A person in Scotland who is in a care home and receives only nursing care will continue to receive attendance allowance in the same way as he or she would in England. There is no difference.

**Shona Robison:** There is, because the definitions are different.

**The Convener:** Let the minister answer.

**Hugh Henry:** The difference for us is that we have decided to pay for free personal care. A person who gets free personal and free nursing care will not receive attendance allowance because of the free personal care. It is for us to define nursing care and personal care. If we had wanted to go down the route of free nursing care and change the definitions—as has perhaps happened elsewhere—it would have been open to us to do that.

On Shona Robison's first point, she says that she is confused. I am a bit confused because she said that she thought that free personal care was supposed to be a top-up. She seems to be suggesting that she voted for a policy without knowing the implications of what she voted on. It was clear to me that, if we introduced free personal care, attendance allowance would be lost. That seems to have come as news to Shona Robison, but it was a clear implication of the way in which the UK benefits system works.

People will get the full amount. The Executive and the Parliament will pay the full amount—no one will lose. The difference is that the compensation of attendance allowance will not be available as part of that process. The top line will still be the same. It is unfortunate that the way in which the benefits system works and the impact that that would have were not explained properly to Shona Robison—or that someone did not do some proper research.

**Shona Robison:** The difference, minister, is that I have read the care development group report and I know that it said that free personal care would be a top-up to the £55 attendance allowance. As you are contradicting what the care development group said, perhaps you should read the report and get your facts right.

In England, there is a fairly wide definition of nursing care that includes elements of personal

care. Are you saying that if we had defined nursing care in some other way, attendance allowance could have continued to be paid? Some people in England receive many elements of personal care and will still receive attendance allowance. As I asked before, does not that undermine the benefits system because there are two differing policies operating north and south of the border although people are receiving similar care packages?

**Hugh Henry:** We do not have two separate systems operating as far as the benefits system is concerned.

**Shona Robison:** Yes you do.

**Hugh Henry:** We could sit here all day saying, "Yes you do," and, "No we don't," but that would take us no further forward.

One benefits system operates. The definitions of nursing and personal care are in the benefit regulations. In England, it has been decided to extend the definition of nursing care as far as possible within the rules. We have chosen not to do that but to consider the inclusion of free personal care. If England included personal care, people in England would also lose attendance allowance.

**Shona Robison:** Says who?

**Hugh Henry:** The benefits system is still a unified system. There is no difference.

**Dorothy-Grace Elder (Glasgow) (SNP):** I would like you to spell out the situation a bit further, minister. Are you saying that someone in England who receives a small amount of nursing care—the taking of their temperature, for example—but mainly receives personal care will retain their attendance allowance?

**Hugh Henry:** No. If they received personal care in a care home in England and a payment was made by a local authority, central Government or another public source, they would lose their attendance allowance. The same situation would apply in Scotland: if someone in a Scottish care home did not receive care that was paid for by a public source, they would continue to receive an attendance allowance.

**Dorothy-Grace Elder:** I know that, but, if that person in England received even a minor input of nursing care, would they retain the attendance allowance while the person in Scotland would not?

**Hugh Henry:** I am not familiar with the English system, but, as far as I am aware, that person in England would retain the attendance allowance.

**Dorothy-Grace Elder:** That is what I thought.

**Hugh Henry:** It is the same on both sides, though. The rules are the same.

**Dorothy-Grace Elder:** They are not. Minor but essential care such as the taking of a temperature is nursing care but the remaining 99 per cent of the care of the person would be personal care as defined in the bill. However, in the situation that we described, the person in England would retain their attendance allowance.

**Hugh Henry:** The person in England would retain the attendance allowance if they qualified under the attendance allowance scheme in the same way that a person in Scotland would continue to receive attendance allowance if they qualified. The difference is that, in Scotland, we are making a payment out of public funds for free personal care that disqualifies people from the receipt of attendance allowance. If someone in England were to receive a payment from a local authority, central Government or another public source for free personal care, they, too, would lose their attendance allowance. Someone in Scotland who received only nursing care would continue to receive their attendance allowance.

**Dorothy-Grace Elder:** You will agree that there is a good deal of mixing of nursing care and personal care. The difference can sometimes come down to an act as small as the taking of a temperature.

In reply to Mary Scanlon, you made a strong commitment that, from 1 July, the policy will be implemented in full. Are you giving us a categorical assurance that every person in Scotland who qualifies under the criteria set out in the bill will receive free personal care from that date?

10:30

**Hugh Henry:** The system will be implemented in full. There might well be people who qualify but who do not claim until a later date, and they will not get free personal care until such time as they make their claim. For example, those who are self-funders and are in homes will have the payments made in full whether or not they are assessed. An assessment will need to be done for anyone new coming into the system. Such people will receive the appropriate payments from the date of the assessment decision.

The starting date depends only on the advice of the implementation steering group. Alexis Jay said yesterday that the implementation steering group will make sure that everything that is needed is in place and that those responsible for the technical implementation are working on it. As far as the Executive is concerned, the rules and the money will be in place on 1 July.

**Dorothy-Grace Elder:** Therefore you do not anticipate any other serious delay, such as we will have from April to July.

**Hugh Henry:** Not on the basis of the advice that we have been given by the professionals. I cannot speak for them and I do not know whether they will come back in a couple of months and say that they have come across something that was not considered previously. They told us yesterday that they will be able to deliver on 1 July. The Executive has said that it will have the money and the system in place on 1 July. I am not aware of anything that will prevent that from happening.

**The Convener:** Okay, let us wrap up the discussion of amendment 41. Do you wish to wind up?

**Hugh Henry:** As I said before, this is a large and important group of amendments. The amendments provide a clear indication as to what social care will be free and provide for regulations relevant to charging for social care to be made by affirmative resolution. We have responded positively and I ask members to support the amendments.

*Amendment 41 agreed to.*

*Amendment 42 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 57 is grouped with amendment 58.

**Mr McAllion:** Amendments 57 and 58 are lodged on behalf of Community Care Providers Scotland, which asked me to stress that they are probing amendments. They are not intended to wreck the bill or cause any possible further delay in the implementation of free personal care for the elderly. During discussion of the first set of amendments, I expressed concern about the possibility of the courts rather than Parliament deciding on the extension of free personal care to younger disabled adults. However, that concern does not mean that I am not in favour of such an extension, as I am.

The purpose of amendments 57 and 58 is to flush out the position of the Executive on the question of extending free personal care to younger disabled adults. You will recall that chapter 9 of the Royal Commission on Long Term Care for the Elderly report states that its recommendations can apply in general to all adults with disabilities who might need long-term care. However, the royal commission's remit was to examine the feasibility and budget implications of free personal care for the over-65s only. The Executive's care development group examined in greater detail aspects of implementation for over-65s only.

To date, no similar exercise has been carried out on the implications of free personal care for younger disabled adults. That causes difficulties for all younger disabled adults. However, it causes

particular difficulties for people, such as those with dementia for example, who happen to be 63 and might be charged for their care, depending upon their means, while a person with the same illness but is 65 will not be charged, regardless of their means.

Although people under 65 have access to social security benefits such as disability living allowance, such benefits are not necessarily intended to cover the cost of personal care; rather, they are designed to assist with the additional living costs that are borne by people who have a long-term illness or disability. Amendments 57 and 58 try to get the Executive to justify its decision to exclude younger disabled adults from free personal care and to get the Executive to agree to put in motion a research study on free personal care for younger disabled adults, which would give that group of Scots an indication of what the Executive is thinking and what plans it has to address their needs.

I move amendment 57.

**Hugh Henry:** I understand John McAllion's views on free personal care, and I know that he has consistently argued for them. The Executive's position has consistently been that we would consider the implications of the royal commission to which John McAllion referred, and that at some point we would examine the Executive's policy on long-term care for those under 65.

I emphasise that that is not a commitment to extend the policy of free personal care. The issues that affect younger disabled people are not merely an extension of those that are relevant for older people, as there are differences. As was highlighted in the royal commission's report, young disabled people have a range of needs, embracing education, training and work, as well as long-term care, and the interrelationship of all those is complex.

Malcolm Chisholm said to Parliament in previous discussions on personal care that the Executive's priority since it adopted the policy has been to deliver free nursing and personal care for older people. We have been concentrating our effort on that and that is where the available resources—as John McAllion said, there are resource implications—have been directed. We believe that it is right to address the needs of the largest care group as a priority. The policy now needs to be implemented and monitored before we take any decisions on other groups. We need time to see how it beds down in practice. As Malcolm Chisholm said,

"it would be unwise to try to start everything simultaneously, as that would make more expensive what is already, by any reckoning, quite an expensive policy."—[*Official Report*, Health and Community Care Committee, 7 November 2001; c 2182.]

However, I acknowledge the points that John McAllion made. The Executive will honour its commitment to consider the position of other care groups, such as the younger disabled. I give the committee an assurance that work will be undertaken to improve our knowledge and understanding of the needs of younger people and the range and quantity of care services that are provided for them, with a view to informing our future policy decisions in this area. I am sure that Parliament wants that work to be done before it makes any decisions. We will attempt to obtain that information. We will be happy to work with local authorities and the voluntary sector in undertaking that work.

John McAllion said that amendment 57 is a probing amendment. There are some technical and legal implications of that amendment but, as he does not intend to press it, I will leave the matter for the moment.

**The Convener:** I call Dorothy-Grace Elder, followed by Mary Scanlon.

**Dorothy-Grace Elder:** I had not asked to speak. You must have misinterpreted a hand signal. However, I will say that I was pleased with the latter part of the minister's announcement.

**Mary Scanlon:** If free personal care for the elderly will not be available to those who are under 60 or 65, will that withstand a challenge under article 14 of the European convention on human rights?

**Hugh Henry:** I cannot say what decision the European justice system will make. We believe that the system that we are introducing is as robust as we can make it. We have attempted to be very specific in our definitions. I hope that the system is comprehensive and robust, but I cannot speculate about what might or might not happen in the European justice system in the future.

**The Convener:** Are there any other comments? If there are none, does John McAllion wish to press amendment 57?

**Mr McAllion:** No. I just wish to thank the minister for his answer. I think that everybody on the committee accepts that there have to be priorities in the budget and that the Parliament cannot take a sensible decision on the extension of free personal care until work has been done on its implications and, most important, the cost of implementing such a decision.

I am encouraged by the minister's reassurance that the Executive will undertake work to identify younger people's needs and services. As long as it keeps the Health and Community Care Committee fully informed of progress on that, I am happy to withdraw or not move my amendments.

*Amendment 57, by agreement, withdrawn.*

**The Convener:** Amendment 43 is grouped with amendments 48 and 49.

**Hugh Henry:** The implementation process for free personal care is still under discussion. It is not yet entirely clear what the contractual arrangements between individuals, care homes and local authorities will need to be for the policy to be implemented in a manageable way. It is clear that, as with their own clients, who are fully funded by the state, local authorities will not provide care at their own hand for the bulk of self-funders in care homes; local authorities will secure provision of nursing and personal care through independent sector care homes.

The Social Work (Scotland) Act 1968 requires local authorities either to provide care at their own hand or to secure provision of care, and the bill needs to cover both options. It was clarified in discussion of amendment 41 that both options will have to be covered in new subsection (A1) by the use of these words:

"a local authority are not to charge for social care provided by them (or the provision of which is secured by them)".

Amendments 43 and 48 cover both direct provision and secured provision in the power to regulate what social care is to be charged for and in the definition of social care itself.

Amendment 49 is technical and consequential to the amendment to the definition of social care.

I move amendment 43.

*Amendment 43 agreed to.*

*Amendment 58 not moved.*

*Amendment 44 moved—[Hugh Henry]—and agreed to.*

**The Convener:** Amendment 45 is grouped on its own.

**Hugh Henry:** Amendment 45 adds a new subsection to section 1. It provides for regulations to make transitional provisions for people who are already in care homes. Those provisions modify local authorities' responsibilities to assess people's care needs. That is required to allow authorities to begin funding the personal and nursing care costs of self-funders who are already resident in care homes without needing to assess their care needs. That was a recommendation of the care development group, which recognised that many current self-funders might never have been subject to a local authority assessment of need. There is no requirement on self-funders in care homes to interact with the local authority at all.

The CDG took the view that, if the requirement for an assessment applied from day one, before a



person in a care home was eligible for free nursing or personal care, it would be impossible for local authorities to cope with assessing or reassessing the 8,000 or so self-funders in a short space of time, which could lead to confusion and delays. The group therefore concluded that the most sensitive way in which to deal with individuals who were already in homes was to provide them with free personal or nursing care without first requiring a needs assessment, rather than leaving them in a state of uncertainty about their position. To do that, the local authority's duty to assess before providing care has to be modified in such cases, and amendment 45 enables that modification to be made.

The Executive has still to settle on a date after which those entering care homes will be obliged to have their needs assessed before becoming eligible for free nursing and personal care. We are awaiting advice from the implementation steering group on progress towards implementation before deciding on that.

The interim measures will therefore have a relatively short life, and provision of free care on the basis of assessed need will soon become the norm.

I move amendment 45.

*Amendment 45 agreed to.*

*Section 1, as amended, agreed to.*

## **Section 2—Accommodation provided under 1968 Act**

**The Convener:** Amendment 46 is grouped with amendment 47.

**Hugh Henry:** Amendments 46 and 47 are both technical amendments to section 2, which is itself rather technical. Section 2 provides for regulations to determine what is and what is not to be regarded as accommodation for the purpose of charging under section 87 of the 1968 act and under the definition of social care that is used by the charging provisions in section 1.

Amendment 46 clarifies that that power extends to those sections of the National Assistance Act 1948 that provide the regime for charging for accommodation. The charging regime is applied by section 87 of the 1968 act. The amendment is required to make clear that the modification of the term "accommodation" applies not just to the provisions of section 87 of the 1968 act but to the relevant sections of the 1948 act that interact with that section.

Amendment 47 extends that power to define "accommodation" in such a way as to cover provision made not only under the Social Work (Scotland) Act 1968, but under section 7 of the Mental Health (Scotland) Act 1984. The powers to

regulate charging for care under section 1 of the bill are to apply to residential accommodation provided under section 7 of the 1984 act as well as under the 1968 act, as the definition of social care in section 19 of the bill makes clear. Section 2 of the bill should therefore include such a reference to accommodation provided under section 7 of the 1984 act. Amendment 47 provides that reference.

I move amendment 46.

*Amendment 46 agreed to.*

*Amendment 47 moved—[Hugh Henry]—and agreed to.*

*Section 2, as amended, agreed to.*

*Section 3 agreed to.*

**The Convener:** That is as far as we are going with the bill today. Thank you, minister, for your attendance and information.

That brings to an end the public business of today's meeting. We will have a short comfort break for members.

10:46

*Meeting adjourned until 10:54 and thereafter continued in private until 11:23.*



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:

**Friday 25 January 2002**

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  
0131 228 4181 Fax 0131 622 7017

**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 CF1 2BZ  
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

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

**Accredited Agents**  
(see Yellow Pages)

and through good booksellers