HEALTH COMMITTEE

Tuesday 25 April 2006

Session 2

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CONTENTS

Tuesday 25 April 2006

HEALTH COMMITTEE
10th Meeting 2006, Session 2

CONVENER

*Roseanna Cunningham (Perth) (SNP)

DEPUTY CONVENER

*Janis Hughes (Glasgow Rutherglen) (Lab)

COMMITTEE MEMBERS

Helen Eadie (Dunfermline East) (Lab)
*Kate Maclean (Dundee West) (Lab)
*Mr Duncan McNeil (Greenock and Inverclyde) (Lab)
*Mrs Nanette Milne (North East Scotland) (Con)
*Shona Robison (Dundee East) (SNP)
*Euan Robson (Roxburgh and Berwickshire) (LD
*Dr Jean Turner (Strathkelvin and Bearsden) (Ind)

COMMITTEE SUBSTITUTES

Mr Kenneth Macintosh (Eastwood) (Lab)
Mr Stewart Maxwell (West of Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Anne MacLeod (Scottish Executive Health Department)
Chris Naldrett (Scottish Executive Health Department)
Jude Payne (Scottish Parliament Directorate of Access and Information)

CLERKS TO THE COMMITTEE

Lynn Tullis
Simon Watkins

SENIOR ASSISTANT CLERK

Graeme Elliott

ASSISTANT CLERK

David Simpson

LOCATION

Committee Room 5

Scottish Parliament

Health Committee

Tuesday 25 April 2006

[THE CONVENER *opened the meeting at 14:00*]

Interests

The Convener (Roseanna Cunningham): Under agenda item 1, I welcome our new member, Euan Robson, who has been the substitute member for the Liberal Democrats and has now become a permanent member, and invite him to make a declaration of interests.

Euan Robson (Roxburgh and Berwickshire) (LD): I have no interests relevant to the remit of the committee.

The Convener: Euan has advised me that he is still on the Communities Committee and, sadly, there will be a clash in his business this afternoon. At a certain point, he will have to absent himself to go to the Communities Committee meeting.

Euan Robson: I apologise.

The Convener: You might or might not feel that that is something to be welcomed.

Adult Support and Protection (Scotland) Bill

The Convener: Item 2 is on the Adult Support and Protection (Scotland) Bill. Prior to commencing our consideration of the bill, we will hear a briefing from the Scottish Parliament information centre on the content and policy background. I welcome Jude Payne, who is a senior research specialist in SPICe. He has produced two briefing notes, which members have already had circulated to them along with the bill, the policy memorandum and the explanatory notes. Jude hopes to be able to answer questions about aspects of the bill, but the briefing might highlight issues that members want to raise with the Executive in due course. A more detailed briefing and an opportunity to ask further questions of the bill team will take place prior to stage 1. This briefing is almost like a pre-pre-briefing.

Jude Payne (Scottish Parliament Directorate of Access and Information): I have been asked to provide members with a brief overview of the measures proposed in the bill, the background to them and some of the issues that have been raised during the consultation process. I stress that this overview is based on my interpretation of the bill, following work that I have undertaken for the SPICe briefings and conversations that I have had with Executive officials. Members of the bill team will have the opportunity to discuss the bill with the committee and I am sure that they will clarify any issues raised.

The substantive provisions in the bill are contained in parts 1 to 3. I propose to discuss each part in turn; if there are any issues that members want to discuss, we can do so before I move on to the next part.

Part 1 of the bill concerns the protection of adults at risk of abuse. In the past, such adults have been described as “vulnerable”, but that term did not find favour with a number of respondents to the Executive’s most recent consultation. One respondent felt that it focused too much on people’s disabilities rather than their abilities and so asked the Executive to come up with a different term to describe adults in that position. The Executive has come up with the term “adults at risk of abuse”. However, given that that is a new term, I will use it along with the word “vulnerable”, in the context that others have used it.

Traditionally, vulnerability has been associated with mental disorder. The current legal definition of mental disorder can be found in the Mental Health (Care and Treatment) (Scotland) Act 2003, which I will call the mental health act for short. The definition includes mental illness and learning

disability. The problem with using the term "mental disorder" to describe vulnerability is that it does not cover all the groups that the Executive hopes to protect through the measures that it proposes in the bill.

The policy background to this part of the bill can be traced back to the work of the Scottish Law Commission, which in 1997 published a position paper and a draft vulnerable adults bill, which followed on from a discussion paper in 1993. It recommended a new legislative framework, with a variety of measures aimed at protecting all adults who are vulnerable, not just those who have a mental disorder. Many of the proposals in the bill are based on those recommendations and were consulted on by the Executive in 2001.

Further impetus for change came with the high-profile Borders inquiry into long-term abuse of a woman with learning disabilities by her primary carer and others. The SPICe briefing provides further background to that. The inquiry reports found significant gaps in the protection offered by various agencies as well as a misunderstanding of the statutory powers available to them. In addition, it was considered that there were gaps in the legislative framework and it was recommended that the Executive introduce a vulnerable adults bill to complement existing legislation Last year, the Executive published a further consultation and it has set up a steering group, with representatives of key stakeholders, which has discussed and provided views on the major issues connected with the bill.

It is also envisaged that, should the bill be passed, the steering group will continue to have a role—for example, in developing codes of practice to run alongside the bill's measures. Certainly, key stakeholders have played a part in the development of the policy, but what is less clear from the documents that accompany the bill is the extent to which the groups that the Executive seeks to protect—for example, older people—have been included in that process.

It is important to note in relation to the bill's consultation process the existence of the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) Scotland Act 2003. The Executive considers that the bill's proposals will complement both those pieces of legislation. The policy memorandum provides details of the current statutory powers that are available to public authorities. Most of those are associated with mental disorder and are contained in the 2003 act. They include powers to enter premises and to remove people with a mental disorder who are at risk. There are also provisions in the National Assistance Act 1948 and the Social Work (Scotland) Act 1968. In addition, limited common-law powers of entry without warrant are available to the police.

Given the current powers, it has been argued that sufficient legislation is in place and that what the Executive seeks to do through the bill could be achieved by improving guidance on current procedures and/or amending existing legislation. However, the Executive notes in the policy memorandum that it did consider such options and gives a variety of reasons why it rejected them. Principally, it came back to the problem that current legislation does not cover all the groups that the Executive seeks to protect. The Executive argues that there is a need for a bill to complement the provisions in the 2003 act and the 2000 act.

I will move on to the proposals in part 1 of the bill. Section 1 sets out the general principle of part 1, which is that a person may intervene or authorise an intervention in an adult's affairs only where they are satisfied that the intervention will provide benefit to the adult and is the least restrictive option available. Section 2 states that a public body, when performing functions under this part of the bill, should have regard not only to the principle in section 1, but to the wishes of the adult at risk and of others with an interest in the adult's welfare. In addition, such bodies have to provide as much information and support as the adult at risk needs to ensure that they can fully participate in any proceedings under the bill. Public bodies would include local authorities, the Mental Welfare Commission, the public guardian and the relevant national health service board.

Those sections could be regarded as the Executive's attempt to respond to concerns that were raised with it and the Scottish Law Commission that the use of interventions such as removal orders and banning orders would constitute significant interventions in the life of an adult that may contravene article 8 of the European convention on human rights on the right to autonomy and privacy. It should be noted that the Scottish Law Commission contended that the public interest in protecting adults at risk of abuse or harm outweighed any temporary disruption to an individual's autonomy and privacy. Nevertheless, it stated that no intervention should take place without the consent of the vulnerable adult, unless the adult had a mental disorder or was subject to undue pressure.

Most of the respondents to the Executive's 2001 consultation agreed with the Scottish Law Commission as long as there were appropriate safeguards and that "undue pressure" was further clarified. The Executive has proposed in section 32 that a sheriff cannot grant an application for an order under the bill if the adult at risk does not give their consent. However, it is also proposed that the

sheriff or the person carrying out the order can ignore the refusal to consent if they reasonably believe that the adult at risk appears to be under undue pressure to refuse consent. What constitutes "undue pressure" is clarified in section 32. However, as far as I am aware, that clarification was not previously consulted on, though I presume that it was discussed in the steering group. It may be interesting to ascertain whether it meets the concerns of those that wanted more information on what "undue pressure" would mean in practice.

Section 3 defines an adult at risk as a person aged 16 or over

"who, because they are affected by disability, mental disorder, illness, infirmity or ageing, are—

(a) unable to protect themselves from abuse, or

(b) more vulnerable to being abused than persons who are not so affected."

The definition can be regarded as the culmination of work to gather opinions by the Scottish Law Commission and the two Executive consultations. However, the definition is different from that proposed by the Scottish Law Commission, which was consulted on in 2001, and different from the revised version in the Executive's 2005 consultation. Presumably, the definition was discussed in the steering group, but it is difficult to make an assessment of how popular or otherwise it may be with stakeholders.

Section 50 defines the term "abuse" for part 1 of the bill. As far as I am aware, the Scottish Law Commission did not propose such a definition, but the Executive did in its 2001 consultation and then produced a revised version in 2005. Again, the proposal in the bill is different from both of those. Despite that, it is possible to see that the Executive has taken on board some of the comments it received. In 2001 and 2005, the Executive tried to find a statement that defined abuse. However, some respondents to the latest consultation suggested that as well as a statement, there should be a list of behaviours that illustrates what is meant by the term "abuse", which the Executive has taken forward in the bill.

Section 4 proposes a duty on local authorities to make inquiries about an adult's well-being, property or financial affairs, where the person falls within the definition of an adult at risk, and the council knows or believes that it might have to intervene to protect the adult from abuse.

Section 5 requires all relevant public bodies to co-operate with one another where abuse is known or suspected and to report any concerns to the local authority. For the respondents to the Executive's consultation, the issue was whether local authorities should take the lead in such inquiries. Just over 50 per cent of respondents were in favour, but there were some concerns. Some respondents thought that if there had been a criminal offence, the police should make such inquiries. Although some could see a role for local authorities in issues concerning the welfare of the adult, they did not necessarily believe that such a role would be appropriate in cases involving finances or property.

The bill proposes to allow a local authority officer to have powers of investigation when they are making inquiries into cases that involve adults at risk. Those include powers of entry to investigate premises, to take along any other persons reasonably required for the visit, to conduct private interviews with the adult at risk, and to inspect records. In addition, health professionals will be able to conduct a medical examination on the adult at risk.

If an officer cannot gain entry to the premises, they will be able to apply to a sheriff for a warrant for entry. It is important to note that nothing in the bill would allow interviews or medical examinations to take place without the consent of the adult at risk.

When carrying out an investigation, if it is not possible to hold either a private interview or medical examination in the premises being visited, it is proposed that a local authority should be able to apply to a sheriff for an assessment order to facilitate that. As with all orders under part 1 of the bill, the sheriff can appoint a person known as a safeguarder, whose role it will be to represent the interest of the adult during the process. In addition, and again as with all other orders under the bill, a sheriff will not be able to grant an order without the consent of the adult at risk unless they are under undue pressure.

The bill also proposes that a sheriff will be able to grant a removal order, which will allow the removal of an adult at risk to a specified place while investigations take place. To grant the order, a sheriff will need to be satisfied that the adult concerned is at risk and is likely to be seriously abused if they are not removed. Such an order can be made for up to seven days.

The final order proposed in the bill is a banning order. Under the bill, a local authority will be able to apply to a sheriff for a banning order on the person or persons abusing the adult at risk. The Executive considers that the use of a banning order should be a last resort. The banning order would specify the place from which the person is banned and the length of time—up to a period of six months—for which they are banned. An application could be made by the adult at risk or someone acting on their behalf, any other person who is occupying the property from which the individual concerned will be banned, or, under certain circumstances, the local authority. The bill

will also allow a sheriff to grant a temporary banning order while they consider an application for a full banning order.

One of the reasons for banning orders is that the Executive does not believe that the adult at risk should always have to be inconvenienced when they are the ones that have been abused, for example by being removed from where they live. The proposal for banning orders received significant support during the consultation. However, some respondents were concerned about what would happen if the abuser was also a vulnerable person or adult at risk. Others were concerned about the unintended consequences that a banning order could have on the victim. For example, one respondent proposed a scenario in which the abuser was the primary carer of the adult, living in the adult's home. They were concerned that excluding the primary carer could result in the adult being placed into other accommodation against their wishes, so they wanted assurances that if a banning order was granted, a package of care would be put in place to allow the person to remain in their own home.

14:15

In addition to the orders, the Executive proposes that each local authority must establish an adult protection committee to

"take a strategic overview in jointly managing adult protection policies, systems and procedures at a local level".

In carrying out their functions, adult protection committees would be required to co-operate with a range of public bodies to safeguard adults at risk. Those would include the relevant local authority, the Scottish Commission for the Regulation of Care, the relevant national health service board, the chief constable of the relevant police force and any other public body specified by Scottish ministers. The bill proposes that each local authority will be responsible for appointing an independent convener of the adult protection committee and its other members, which will require to include a variety of public bodies.

Last year, the Executive proposed that adult protection committees should not just have the functions that are proposed in the bill, but should take the lead in investigations. Although in favour of the committees in general, respondents were less sure about their taking the lead in investigations, as it was felt that such a role would overlap with those of existing agencies. Therefore, the Executive has not taken forward that proposal. Most respondents were in favour of giving the committees a statutory basis to ensure consistency across the country.

The bill contains two further provisions in part 1. First, it proposes that Scottish ministers should prepare and publish a code of practice, which will contain guidance on the operation of the various protection measures. As I stated earlier, the Executive proposes that the steering group will support the development of the code, but there is little information in the documents that accompany the bill about what would be contained in the code. The bill proposes that local authorities, their officials and health professionals will be required to have regard to the code. Secondly, the bill will make it an offence to prevent from carrying out their duties under part 1 or obstruct any authorised person.

A number of issues arise from part 1 of the bill that the committee may wish to consider. The Executive believes that the measures outlined in the bill should be complemented by other interventions for which statute is not required, such as mediation. The Executive considers that mediation would be useful in cases in which the abused and perpetrator live together and want to continue to do so. It consulted on whether mediation should be offered in all such cases, but most respondents considered that it should be offered on a case-by-case basis only.

There was further discussion in the consultation responses of who should provide mediation services. Some respondents were in favour of that resting with local authorities; others wished voluntary organisations to provide them; while others still suggested that the adult protection committees should have a role in their provision. However, the policy memorandum makes no further comment on how mediation will be delivered.

Another issue concerns the financial assessment of the costs associated with the measures proposed in part 1, the detail of which is contained in the financial memorandum. The Executive has estimated that the measures will cost £13 million to local government as a whole. The bill team advised me that the Executive expects to provide some funding to meet the additional costs that have been identified, but it has not clarified exactly how much that will be.

As I said, the bill proposes that an adult be defined as a person aged 16 or over. However, some bodies, particularly youth organisations, have pointed out that the Protection of Children (Scotland) Act 2003—sometimes known as POCSA—stipulates that a child is aged under 18. The Executive points out that the definition of an adult in the bill mirrors that in the Adults with Incapacity (Scotland) Act 2000. However, some organisations believe that it is important for any legislation for adults at risk to dovetail with POCSA.

It might also be of interest to the committee to know that the Executive originally included in the vulnerable adults consultation proposals for a list covering those people who have been disqualified from working with vulnerable adults, similar to that covering those who have been disqualified from working with children under POCSA. That has not been covered in the bill. Instead, it is being consulted on as part of the Executive's response to the recommendations of the Bichard report. I understand that those proposals will be introduced through another bill.

Kate Maclean (Dundee West) (Lab): How many respondents were unhappy about the word "vulnerable" being used? My understanding of the definition of that word is that it does not necessarily refer to a disability. It could mean something quite different. How many respondents expressed the opinion that the name of the bill should be changed?

Jude Payne: You would probably need to ask the bill team that. I do not think that the team discussed that in their analysis, although I picked up on the issue when reading through some of the responses.

Kate Maclean: I imagine that the reference to "illness" in the definition of "adults at risk" in section 3 covers mental illness. Does it include alcoholism, drug addiction or other such conditions?

Jude Payne: That is another point that needs to be clarified. I should point out that the definition also includes "mental disorder", which presumably would cover mental illness.

Kate Maclean: Right. Would the reference to "abuse" in section 3(1)(a) cover cases in which a person was prevented from seeking necessary medical intervention, financial advice, counselling or other help?

Jude Payne: The bill refers to "psychological abuse" and to

"theft, fraud, embezzlement and extortion".

However, I do not think that that answers your question. We will need to discuss that with the Executive.

The Convener: Kate, are you suggesting that the term "abuse" should be extended to cover the denial of provision of certain services?

Kate Maclean: I was wondering whether "abuse" covered cases in which an adult was persuaded not to seek—or was prevented from seeking—medical intervention or certain financial help that they need. I had a particular constituency situation in mind.

Janis Hughes (Glasgow Rutherglen) (Lab): Towards the end of your briefing, Jude, you mentioned the bill's definition of the age of a child. The committee has discussed that very issue in other guises, because it appears that the age is not uniform across various pieces of legislation. Did you say that the bill aims to be consistent with POCSA?

Jude Payne: No.

Janis Hughes: What did you say needs to be done in that respect?

Jude Payne: The Executive has argued that the definition of "adult" is the same as that in the Adults with Incapacity (Scotland) Act 2000. However, those who feel that adult protection measures should dovetail with POCSA have argued that there should be uniformity between this bill and that legislation. It all comes back to your important point about the definition of the age of a child not being uniform across all legislation.

Janis Hughes: What would be the downside if this bill did not dovetail with POCSA?

Jude Payne: I am not sure. We would have to ask witnesses about their concerns on that matter. I imagine that the Executive will argue that it is up to agencies to use the most appropriate measures and legislation.

Janis Hughes: And, of course, the relevant age will change depending on the legislation.

Jude Payne: Yes.

Dr Jean Turner (Strathkelvin and Bearsden) (Ind): I, too, was worried about the definition of a child's age.

I agree that, from a practical point of view, there needs to be legislation on this matter, but I think that it will give rise to a lot of difficulties. For example, if two vulnerable people or adults at risk lived together, one of them might tell fibs about the other. I do not know how officials would sort that out. Moreover, would such cases involve the local authority, general practitioners, nurses or anyone else? I simply wonder how the legislation can be implemented.

The Convener: Jean, I wonder whether you could ask a question that Jude Payne has a reasonable chance of being able to answer.

Dr Turner: The bill might well cover the issue that I raised, but I found it difficult to see where.

Jude Payne: Some respondents raised exactly that issue in the previous consultation, but you will need to ask the bill team about it.

Dr Turner: I suppose that it all depends on evidence.

Kate Maclean touched on the issue of property. I know of a constituency case in which a person was put in a vulnerable position because their

house was taken over and sold while they were in hospital. People have also been released from hospital to find that their homes have been cleared out and all their personal belongings removed. If the local authority was involved in such an action, would that make it an abuser?

Jude Payne: What I can say is that the definition of abuse includes

"any other conduct which causes fear, alarm or distress or which dishonestly appropriates property."

Kate Maclean: On page 15 of your briefing there are three definitions of "vulnerable". The third one is the one that I favour and the one with which most people agreed—52 per cent of respondents favoured it—but it appears that it has not been used.

Jude Payne: That is one of the issues that I identified.

Shona Robison (Dundee East) (SNP): You mentioned the discussion about undue pressure. Am I right in understanding that work is still being done on that, or did you say that there is a definition in the bill?

Jude Payne: There is a definition.

Shona Robison: What page is it on?

Jude Payne: It is in section 32. It is more of a clarification of what can constitute undue pressure; that is how it is explained in the policy memorandum. You will find it on page 12 of the bill.

The Convener: It will be a matter of the facts and circumstances in each case.

Shona Robison: Yes. That will be quite a tricky one, I think.

The Convener: Very tricky.

Shona Robison: You mentioned that feedback from the consultation raised the issue of what would happen if the main carer was removed and a package of care was required to allow a person to remain in their own home. There is nothing about that in the bill. Has there been any feedback from the bill team to suggest that that issue would be covered in guidance, or is that something that we should explore with the bill team?

Jude Payne: I have not had any conversations with the bill team about that. It is something you could discuss with them. That might be an issue that they would want to cover in the code of practice.

Shona Robison: There would need to be something quite firm in the code of practice about that, otherwise someone might be left without a choice because their main carer had been removed.

Jude Payne: The groups that were most concerned about that were representative bodies of older people.

Shona Robison: That is the sort of situation in which it is most likely to happen.

Mrs Nanette Milne (North East Scotland) (Con): The bill feels like a minefield. The paragraph at the bottom of page 3 of your briefing refers to the suggestion that the provisions would enable

"significant interventions into the life of an adult",

which might contravene the ECHR. What is your feeling about that?

Jude Payne: I could not comment on that. All I was trying to demonstrate by including that was that the matter was raised with the Scottish Law Commission, which responded in its 1997 report. The Scottish Law Commission felt that the benefits of acting outweighed any other factors. That is one of the reasons why the provisions to do with undue pressure were brought in. The same is true of much of the bill: it applies unless the person is under undue pressure.

Mrs Milne: Is there no feeling that opinions have changed since 1997?

Jude Payne: The impression that I got from reading the consultation responses was that people are generally happy with that kind of proposal as long as there are safeguards and the meaning of phrases such as "undue pressure" is clarified further. As far as I could gauge, the Scottish Law Commission's recommendations went down fairly well across the spectrum of different bodies.

Mrs Milne: I got the feeling that there is quite a lot of negativity about the need for legislation and that there have been suggestions that it might be better to amend existing legislation, but you are saying that the general consensus still appears to be in favour of legislation?

Jude Payne: Yes. The analysis of the 2001 consultation responses showed that most respondents were pretty much in favour of what the Scottish Law Commission came up with. However, there are organisations that believe that there is already sufficient legislation and that all that is needed is some amendment to procedures and guidance, but the Executive argues that that will not necessarily help the situation because it does not cover everybody it is seeking to protect.

14:30

Mrs Milne: I just wonder about the practicalities of the situation. Proving psychological abuse, in particular, is difficult.

The Convener: There are a lot of issues about definitions. At this stage, I want to know how the bill sits with criminal law. What standard of proof is being applied? Will the legislation operate wholly in the civil sphere? If so, what is the balance of probabilities?

What is proposed is effectively quasi-criminal procedure, but other than arrest for breach of a banning order, there is no discussion of that. If there is sufficient evidence either to remove an adult at risk or to seek to impose a banning order on someone who is suspected of abusing that adult, what are the fiscal's office and the police doing at the same time? What is the interplay between those parties? How does a banning order differ from a straightforward interdict? I do not understand that. Must a criminal prosecution be pending for such measures to be taken, or will the bill become a substitute for criminal action?

The proposal that the bill be used instead of the criminal law might concern a great many people. What consideration was given to attaching bail conditions instead of imposing banning orders? Banning orders are no more likely to be honoured or otherwise than an interdict or a bail condition. If interdicts and bail conditions are breached, will banning orders not be breached just as often?

My concern is that the criminal law will no longer be used in such circumstances, that the bill will end up being the principal legislation and that instead of people being dealt with under criminal law, they will be dealt with under a completely different set of processes.

I am unclear about the balance between deciding to remove the adult who is at risk and imposing a banning order on the person who is suspected of carrying out the abuse. How would that decision be arrived at? These are quasi-judicial questions. It is unclear to me whether the relationship between civil and criminal law was discussed or consulted on.

Jude Payne: One of the things I noted was that a lot of the organisations that responded were voluntary organisations, local authorities, national health service boards and so on. I do not remember there being a significant Law Society submission, for example, but I could find that out.

The Convener: If somebody has enough evidence to take to a sheriff to seek a banning order, why would they not go to the police and look for a prosecution? A banning order could then become part and parcel of that process, but it is not written that way in the bill. Euan Robson wants to get away quickly, so I will let him in.

Euan Robson: To be fair, there are sections of the bill, such as "Police duties after arrest" and what happens when a person is brought—

The Convener: But that depends on the breach of a banning order.

Euan Robson: Yes, but a power of arrest is attached to the banning order. Do you remember the discussions about domestic abuse and the attachment of a power of arrest? The very fact that a power of arrest is attached enables the police to remove an individual. It is a more subtle process than simple arrest followed by a move straight to the sheriff.

The Convener: I appreciate that, but as I recall from the committee discussions about attaching an arrest power to interdict in respect of domestic violence, the final decision was the simplest and most straightforward way to deal with the problem. If we simply attach the power of arrest to the interdict, we get away from a whole load of ancillary questions that would bedevil specific legislation.

My question is what is the difference between a banning order and an interdict when we can already attach a power of arrest to an interdict. I am seeking simplicity in legislation.

Euan Robson: It would be very helpful to have a comparison between the domestic abuse situation and what is proposed in the bill. Perhaps we could have a table with the information side by side, to show the stages that victims and those who are arrested go through. It would be instructive to compare the two procedures.

The Convener: We will need rather more significant legal input than we have had until now, so that things can be clarified.

Shona Robison: Your point has been clarified, convener; it is about the power of arrest.

Euan Robson: I heard Jude Payne say that some people are proposing that a list be specified within the body of the statute. For what purpose was that proposed? Was it to define abuse?

Jude Payne: It was a list of people who would be disqualified.

Euan Robson: Of course, yes. I am so sorry. The difficulty is that once a list is written, we run the risk of leaving someone off of it because we cannot envisage future circumstances or—

The Convener: But the list is not part of the bill. It will not come before the committee.

Jude Payne: Part 2 is quite technical, so I will not say everything that I was going to say. Instead, I will give you examples of the kind of things the Executive is looking to progress.

The Adults with Incapacity (Scotland) Act 2000 allows nominated persons to make decisions on behalf of adults who may lack the capacity to do

so themselves on welfare and the management of finances and property.

Under the 2000 act, several agencies are involved in supervising those who take decisions on behalf of an adult. The act also set up the office of the public guardian, which has a supervisory role over those who are appointed to manage the property or financial affairs of an adult who lacks the capacity to do so themselves. It also keeps registers of attorneys, people who can access an adult's funds, guardians and intervention orders. Local authorities are responsible for the welfare of adults who lack capacity, while the Mental Welfare Commission for Scotland protects the interests of adults who lack capacity as a result of mental disorder.

The Executive commissioned a two-year research programme to monitor the act's implementation. It found that the act was working well, although problems were identified in some areas. During the second session of Parliament, the Justice 2 Committee has been monitoring implementation of the act and, in correspondence following the publication of the research programme, the Deputy Minister for Justice accepted that some legislative changes might be required.

In August 2005, the Executive published a consultation on the 2000 act in which it proposed changes aimed at simplifying and streamlining the protections for adults with incapacity. There was broad agreement with what was proposed in the consultation, and in December 2005 the Deputy Minister for Justice advised the Justice 2 Committee that the Executive would seek a suitable vehicle to amend several areas of the 2000 act. The first area is connected with an adult's nearest relative. Members will remember their discussion on the Human Tissue (Scotland) Bill.

Under the 2000 act, an adult's nearest relative, in a hierarchy of relatives, has the right to receive information and intimation of certain applications. However, section 4 of that act allows an adult with incapacity to apply to the Court of Session or a sheriff for an order to displace the nearest relative. In other words, the order can change the nearest relative to another in the hierarchy, dictate that no person will be a nearest relative, or restrict the information to be provided to the nearest relative.

Such an order is important when the nearest relative might have abused or harmed the adult with incapacity in some way, but the limitation is in the fact that only the adult with incapacity can apply for an order, which might not be possible. Thus, section 52 of the bill proposes that any person who claims an interest in the adult's property, financial affairs or personal welfare may apply to have the nearest relative displaced. It also provides that a court may make an order different from the one applied for, such as naming a different person from the one specified in the application.

The second set of proposals concerns powers of attorney. Under the 2000 act, individuals can arrange for their welfare to be safeguarded and their affairs to be properly managed should their capacity deteriorate in future. That can be done by giving another person, for example a relative, carer, professional or trusted friend, power of attorney to look after some or all of an adult's property and financial affairs—otherwise known as continuing powers—or to make specific decisions about their personal welfare, including medical treatment, which is known as welfare powers. All continuing and welfare powers of attorney must be registered with the public guardian. More than 64,000 powers have been registered since the 2000 act came into force, but the Executive believes that a number of changes would help to enhance take-up even more.

Those powers are discussed in greater detail in the policy memorandum and the briefing, but I shall provide the committee with an example. One area concerns when the powers of attorney become operational. Essentially, welfare powers of attorney, and financial powers where specified, become operational at the point the granter becomes incapacitated. Continuing powers can continue or start on incapacity. However, unless it is specifically stated in the authorisation document, there is no requirement for the attorney to obtain evidence that the adult has lost the ability to have control over their own affairs, for example through obtaining a medical certificate. That has caused concern among some groups. The Executive was sympathetic to that, but did not agree that a medical certificate should have to be produced before the attorney takes control of the granter's affairs because it believed that it was a matter for the person who is granting the powers of attorney to dictate at what point the powers should come into effect. Instead, the bill proposes a check in the system so that all continuing and welfare powers of attorney becoming operational on incapacity must contain a statement to the effect that the granter had considered how incapacity should be determined.

The next key area of the 2000 act that the bill seeks to amend is in connection with intromission with funds—IWF—which is the means by which an individual family member, friend or carer can have the legal authority to access and manage the day-to-day finances of someone who lacks the ability to do so for themselves, for example to pay household bills on behalf of the adult with incapacity. Under the 2000 act, individuals—normally relatives or carers—can apply to the public guardian to gain access to the funds of an

adult incapable of managing those funds. The application must be accompanied by a medical certificate stating that the adult is incapable of managing their finances. The application must also be countersigned by someone from a specified group—for example a councillor, teacher or minister of religion—who has known the applicant for at least two years and who also knows the adult with incapacity. Following a number of checks, the public guardian can issue a certificate of authority to the applicant, who then becomes known as the withdrawer.

The Executive originally thought that around 20,000 people a year could benefit from IWF. It is now queried how that 20,000 was arrived at. The uptake is currently only 200 a year and the Executive contends that there are many adults who could be taking advantage of the measures but are not. The Executive therefore intends to streamline the process. The proposals are discussed in more detail in the briefing and in the policy memorandum, but one example regards the countersigning regime. The Executive found a number of problems with the regime. Principally, it considered that the existing range of countersignatures is too narrow and inaccessible to many people and that it is based on an outdated perception of the attributes that are attached to members of the specified groups, such as teachers, councillors and ministers.

Section 54 of the bill proposes a number of changes, including the removal of the requirement for the countersignatory to be a member of a specified group, the reduction from two years to one year of the specified period that a countersignatory must have known the applicant, and the removal of the requirement that the countersignatory should know the adult with incapacity. The Executive's consultation discussed proposals similar to those and 80 per cent of respondents were in favour of them. However, there were concerns that the countersignatory could be anyone, so there were calls that the countersignatory should have to give details of themselves. I do not believe that that is included in the bill—the committee might wish to clarify that with the Executive.

A number of other measures regarding intermission with funds are proposed in the bill, but I do not propose to go into them now. There is a measure for joint and reserve withdrawers, should a withdrawer temporarily or permanently be unable to continue, and there are provisions for the renewal of authority to intromit with funds.

The final set of provisions in part 2 concerns intervention and guardianship orders. Intervention orders usually relate to a one-off or time-limited action or decision on behalf of an adult who is not capable of taking the action or making the decision. Guardianship orders are intended to deal with longer-term help or continuous management for three years or more. Both types of order can cover financial, property and welfare matters. The Executive notes that between April 2002 and December 2005, around 520 intervention orders and 2,350 guardianship orders were granted.

14:45

Guardianship and intervention orders, which are granted by a sheriff following a court hearing, must be registered with the public guardian. Under the 2000 act, applications for both types of order must be accompanied by two medical reports of incapacity that relate to the specific decision-making powers requested. Other reports are required for financial affairs and welfare matters. The purposes of the reports are to establish the appropriateness of the order that is being sought and the suitability of the person who is named to act as guardian or intervener. Under the 2000 act, reports for both orders must be lodged no more than 30 days before the date on which the application is lodged with the court. In cases of financial guardianship or intervention, the sheriff can require the guardian or intervener to find caution—

The Convener: It is pronounced "cayshun".

Jude Payne: That is an insurance that is designed to safeguard the estate of the adult with incapacity against any loss resulting from the actions of someone who acts on his or her behalf.

The Executive proposes a number of amendments to the 2000 act in that regard. First, it accepts that there can be difficulties in finding and funding caution. Under the act, sheriffs have general discretion to dispense with caution but, in practice, that rarely happens, so the bill proposes to provide for a specific discretion by stating that sheriffs may require caution to be found.

Another area is medical certificates. As I have mentioned, applications for both types of order must be accompanied by two medical certificates. However, if the cause of incapacity is mental disorder, it is necessary that one of them must be signed by a medical practitioner who is approved under the Mental Health (Care and Treatment) (Scotland) Act 2003. The Executive states that obtaining a report from an approved medical practitioner can be difficult and significant additional costs can be incurred, particularly in cases in which the adult lives outside Scotland.

The bill proposes a regulatory provision that will give the Scottish ministers the power to prescribe new classes of medical practitioner so that if or when appropriate new qualifications or training are available, they can be taken account of. The bill proposes that people who are the subject of an

application for an intervention or guardianship order and who do not live in Scotland can be examined by a medical practitioner in the country in which they live. It is proposed that a suitably qualified local practitioner would visit them and prepare a report after consulting the Mental Welfare Commission.

A number of other amendments that the bill proposes, including the extension of the period of interim guardianship orders and of the 30-day limit for reports, are discussed in the policy memorandum and the briefing.

The Convener: Thank you. Can you shed any light on the reasoning behind the decision to send the bill to the Health Committee when the Justice 2 Committee has already examined aspects of the part of law in question? You do not have to answer that. I am bound to say that I am astonished by the decision that has been made.

Kate Maclean: I assume that the bill has been sent to us simply because it is Andy Kerr's bill, but we would have to take evidence from law officers and the Law Society of Scotland. I cannot imagine that any health professionals would want to come and give evidence on the bill. It should be considered by a justice committee. I sat on the Justice and Home Affairs Committee—of which Roseanna Cunningham was the convener—when it considered the Adults with Incapacity (Scotland) Bill. Any amendments to the Adults with Incapacity (Scotland) Act 2000 must be considered by a justice committee; they cannot possibly be considered by us.

The Convener: The bill has been sent to us for consideration and I do not think that anything can be done about that at this late stage, so we will just have to try to deal with it. When we discuss our forward work programme later, we can discuss how to handle the bill because it will pose difficulties. I am not comfortable about being the only qualified lawyer in the committee. I feel that responsibility would always fall to me, unless we get some form of specialist advice; perhaps we can discuss that separately.

Does anyone have any specific questions on part 2 that they think Jude Payne will be able to answer?

Mrs Milne: I would like to be reminded of the definition of incapacity; in fact, I am not sure that I ever knew what it was. If someone is diagnosed as not having capacity, how can they then have the capacity to decide on their relatives' hierarchy? Is it the case that capacity is an issue that applies only in certain contexts?

The Convener: As with the signing of a power of attorney, for example, it is assumed that it is done before the onset of incapacity—unless there is a crisis, in which case a different process is followed.

Dr Turner: Quite often, a person who sets up power of attorney is not mentally incapacitated but has reached a stage at which they do not want to organise their affairs. Will such people need to provide medical certificates? When I read the briefing, I thought that they would not need to provide them, but what Jude Payne said suggested that a medical certificate will always be required.

The Convener: Anyone can sign a power of attorney for any reason. A person might do so before going off to spend six months trekking to the north pole, so that someone can deal with matters while they are away. They do not need a medical certificate in such circumstances. Jean Turner's question is valid, but I do not think that Jude Payne can respond to it. The officials will have to answer such questions.

Dr Turner: I agree.

The Convener: I thank Jude Payne. We will discuss the bill further when we consider our work programme.

Subordinate Legislation

National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2006 (SSI 2006/149)

14:51

The Convener: We move to item 3, rather later than I anticipated. Members expressed interest in policies that relate to prescribing and other national health service drug charges, so we invited Scottish Executive officials to explain the changes that are being made by the National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2006. Anne MacLeod and Chris Naldrett, who are from the Scottish Executive Health Department, will give a little background to the regulations. The Subordinate Legislation Committee made no comment on the regulations and no motion to annul has been lodged. I invite the officials to make a short opening statement—I emphasise the word "short". After that, members may ask questions.

Chris Naldrett (Scottish Executive Health Department): I will be brief. Members will have heard this before, but it is worth recapping. Prescription charges have been levied since 1952, apart from a three-year period, and have raised about £44 million per year during the past few years. The charges do not relate to the prescribed costs or to the medicines, but are simply a contribution to the service that is provided. That information is set out in the current consultation document on prescription charges.

As members know, charges for drugs and appliances are a devolved matter. The primary legislation that enables ministers to make and recover charges is in section 69 and schedule 11 of the National Health Service (Scotland) Act 1978. The matter is governed by regulations. The principal regulations, which underlie the amendment regulations that the committee is considering, provide for the recovery of charges for drugs and appliances—dental and optical charges are covered by separate regulations—and provide for exemptions on the grounds of age and medical condition. Low income is dealt with by separate regulations.

Charges are reviewed annually as a matter of course. For a number of years and under numerous Administrations, the policy in Scotland has been to keep the rate of increase below the rate of inflation. That remains the approach and the National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2006 provide for an increase of 2.3 per cent, in increasing the prescription charge from £6.50 to £6.65. The same—or slightly lower—rate of increase is applied to the cost of pre-payment certificates and to other items that are listed, such as elastic hosiery, fabric supports and wigs. However, a further change is made in relation to wigs.

In addition to the increase in the prescription charge, after its annual review, I will mention three other amendments. First, there is the amendment of the definition of "prescription form". That was made necessary by changes to the supply of domiciliary oxygen services in England, where the use of a prescription provision system has been withdrawn but is being continued transitionally on the basis of a new arrangement whereby independent suppliers provide oxygen services. It is an ordering system, not a prescription system. We had to change the definition in our regulations to ensure that people who come to Scotland on holiday or whatever, not with a prescription form but with something different, can still get access to the oxygen that they require.

The second amendment will reduce the charge of supply for a modacrylic wig from £53.90 to £6.65. The third amendment is also concerned with the provision of wigs. The regulation exemption provisions have been adjusted so that the exemption conditions now apply for the supply of wigs as well as the supply of drugs and medicines. Hitherto, that was not the case.

As you will appreciate, all the changes were effective from 1 April.

The Convener: Are there any questions?

Dr Turner: When someone has a quarterly pre-payment certificate, why is the prescription always a little bit dearer? You probably cannot do anything about that. Patients who have difficulty in finding even a few pounds more might take a prescription out again and it will cost them more. It is not as if it is a loan or anything like that. I have always wondered why it is slightly dearer.

Chris Naldrett: My knowledge does not go back that far.

Anne MacLeod (Scottish Executive Health Department): The four-monthly pre-payment certificate is beneficial in cost terms if a person has more than five items on prescription over the four-month period. The difference between it and the 12-monthly certificate is that the 12-monthly certificate gives a person a cost benefit if they have more than 14 items on prescription in a 12-month period. That is just the way in which the provision has been made.

The four-monthly certificate costs just over what someone would pay for five prescriptions, so that if

someone had six prescriptions over that period they would pay less than they would otherwise pay on a per-item basis. It is not matter of a percentage discount or anything like that; it is a question of multiples of the prescription charge and a cut-off point below what someone would pay for six prescriptions. That is how it works. Obviously, the standard could be reconsidered but it has been applied throughout Great Britain since pre-payment certificates were introduced.

Dr Turner: Thank you. In practice, people usually buy quarterly pre-payment certificates because they cannot afford the yearly one. The amount of money is small, but not for people who do not have a lot of money.

Anne MacLeod: The cost benefit depends on how the prescribing periods are worked out. It is feasible to buy a four-monthly certificate, have a dispensing on the same day and then—in the case of someone who has two-monthly prescriptions—have two more lots of prescriptions in the same period. The benefit also depends on the number of prescription items that the person has.

Dr Turner: Of course. I understand that.

Anne MacLeod: The benefit varies from patient to patient.

Shona Robison: This is probably as much a comment as a question. At a time when a consultation process is going on that could lead to major changes to prescription charges—whether in the rate or in the way in which they are delivered—it seems unhelpful that regulations are being introduced that could be subject to major change within a short period of time. I presume that that is what the second paragraph in the Executive note is getting at when it states:

"It is now proposed to consolidate by July 2006, when further amendments will require to be inserted into the 2001 regulations."

Do you mean that you will make changes in the light of the outcome of the consultation?

15:00

Chris Naldrett: No. The principal regulations are amended every year; other amendments also take place regularly. The instrument is purely a consolidation of current amendments. Any changes that result from the consultation exercise, which is due to complete at the end of this week, will not be available in July. As the consultation document says, the changes are likely to be complex and their implementation will therefore be phased in over a period of time. The view is that this is a case of business as usual. The consultation is happening in the background, but it is not impeding the normal review process.

Shona Robison: There is not much of a sense of urgency, then.

Chris Naldrett: I could not comment on that.

The Convener: Are you involved in the consultation?

Chris Naldrett: Yes.

The Convener: Can you give us some clues on how it is going in terms of responses and so forth?

Chris Naldrett: Yes. There have been 80 responses so far.

The Convener: Will you remind me of the deadline?

Chris Naldrett: It is the end of this week—30 April. We have issued notifications to one or two people to give them an extension. We have also gone through the list of people who requested applications and identified those from whom it would be beneficial to have a response. We have written to them to remind them of the deadline and to say that their contribution would be valued.

We have appointed an independent company to prepare a summary and analysis of the results. We have also asked it to set up focus groups, where appropriate, if there are gaps in the information that is given in the responses. This afternoon, I will look at tenders for another exercise in which we will undertake user surveys to assess public awareness and attitudes. We will bring together those three streams. At this stage of a consultation, 80 responses is probably about normal.

The Convener: Right. As there are no other questions, and having held the debate on SSI 2006/149, we must decide whether we wish to make a recommendation to the Parliament on the instrument. No motion to annul has been lodged. Are we agreed not to make any recommendation on SSI 2006/149?

Members *indicated agreement*.

Functions of Health Boards (Scotland) Amendment Order 2006 (SSI 2006/132)

Sight Testing (Examination and Prescription) Amendment (Scotland) Regulations 2006 (SSI 2006/134)

National Health Service (Primary Medical Services Performers Lists) (Scotland) Amendment Regulations 2006 (SSI 2006/136)

National Health Service (Service Committees and Tribunal) Scotland Amendment Regulations 2006 (SSI 2006/139)

National Health Service (Pharmaceutical Services) (Scotland) Amendment Regulations 2006 (SSI 2006/143)

Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Amendment Rules 2006 (SSI 2006/171)

Mental Health (Relevant Health Board for Patients Detained in Conditions of Excessive Security) (Scotland) Regulations 2006 (SSI 2006/172)

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment (No 2) Regulations 2006 (SSI 2006/183)

The Convener: We have a further eight instruments to consider under the negative procedure: SSIs 2006/132, 2006/134, 2006/136, 2006/139, 2006/143, 2006/171, 2006/172 and 2006/183. The Subordinate Legislation Committee made no comment on any of the instruments other than to raise one query on SSI 2006/136 and to express a reservation on SSI 2006/139. The committee has resolved both matters in its correspondence with the Executive. No member has commented on the instruments and no motion to annul has been lodged. Are we agreed not to make any recommendation on the instruments?

Members *indicated agreement*.

The Convener: Thank you. That ends the meeting in public session.

15:03

Meeting continued in private until 15:40.

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