HEALTH COMMITTEE

Tuesday 5 September 2006

Session 2

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HEALTH COMMITTEE
18th 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)
Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Ronnie Barnes (British Association of Social Workers)
Shona Barrie (Crown Office and Procurator Fiscal Service)
Alex Davidson (Association of Directors of Social Work)
George Graham (Association of Chief Police Officers in Scotland)
Paddy Healy (Royal College of Nursing Scotland)
Philip Shearer (Scottish Legal Aid Board)
Dr Neill Simpson (Royal College of Psychiatrists)
Dr John Starr (Royal College of Physicians of Edinburgh)
Adrian Ward (Law Society of Scotland)

CLERK TO THE COMMITTEE

Simon Watkins

SENIOR ASSISTANT CLERK

Graeme Elliott

ASSISTANT CLERK

David Simpson

LOCATION

Committee Room 1

Scottish Parliament

Health Committee

Tuesday 5 September 2006

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

Items in Private

The Convener (Roseanna Cunningham): I welcome everybody to the first meeting of the Health Committee after the summer recess. I hope that everybody had a good summer and is now ready for our work programme and raring to go.

The first item on our agenda is consideration of whether to take items in private, and I ask the committee to agree that items 4, 5 and 6 be held in private. Each is the kind of item that it has been our practice to hold in private. I ask the committee to agree to do that again today.

Members *indicated agreement*.

Adult Support and Protection (Scotland) Bill: Stage 1

14:01

The Convener: Item 2 on our agenda is the Adult Support and Protection (Scotland) Bill. We are at stage 1 and will take evidence today from two panels of witnesses. In the first panel, we have Shona Barrie from the Crown Office and Procurator Fiscal Service, George Graham from the Association of Chief Police Officers in Scotland and Adrian Ward from the Law Society of Scotland. Adrian has also made a personal submission to the committee. He gave evidence to the Justice and Home Affairs Committee in the first session of the Parliament when that committee considered the Adults with Incapacity (Scotland) Bill, so he has many years of experience in this area of the law. The fourth member of the panel is Philip Shearer from the Scottish Legal Aid Board. I welcome you all.

Committee members have received an issues paper that our adviser, Dr Alison Britton, has prepared. She is present at today's meeting but will not be taking part. We also have a paper from the Scottish Parliament information centre.

I will start by asking all members of the panel a very general question: is the legislation needed in the first place? Of the people who have responded to part 1 of the bill, the vast majority are generally in favour of the principles of the bill.

Shona Barrie (Crown Office and Procurator Fiscal Service): The legislation perhaps deals with circumstances that, as a prosecutor, I am unsighted on. When there is abuse in a criminal context, and when the prosecuting authorities and the police have been alerted and have become involved, criminal investigations and procedures all kick in. I suspect that others might be better placed than I am to tell you whether there is a need for the legislation and to tell you about any loopholes, but I take no issue with what is in the bill. Its aims of protection all seem highly worthy.

The Convener: Does the existing criminal law suffice to cover most of the issues that you think might arise in this particular context, or has the criminal law had some problems?

Shona Barrie: The gap at the moment, if there is one, might arise when there is insufficient evidence for there to be criminal proceedings. There might be rules and responsibilities to ensure the protection of people who are vulnerable for one reason or another, but the criminal system, and the higher standard of proof that it requires, might not be available.

The Convener: Are you comfortable with sanctions being taken out of the criminal law? We are applying sanctions to behaviour, but not the standard of proof that would normally apply, because the sanctions are being taken out of the criminal law.

Shona Barrie: I suppose that my department's interests are fairly narrow—we are considering the offence provisions that would follow breach of a banning order, and perhaps the offence provisions on obstruction. However, those offences fairly and squarely fall under criminal conduct—they are being made criminal offences. We have no issue with that whatsoever.

I suppose that we have parallels in the use of the Protection from Abuse (Scotland) Act 2001. A breach of an interdict brought under that act might be a criminal offence and would be brought to the attention of the procurator fiscal. Therefore, there appear to be parallels with existing legislation.

George Graham (Association of Chief Police Officers in Scotland): I do not disagree substantially with much of what Shona Barrie said. From the perspective of policing across Scotland, we very much welcome the bill's principles and provisions. However, it is difficult to predict or understand what the hidden incidence of exploitation and abuse might be. I think that there is a requirement at least to outline, in a public and legislative way, just how agencies would respond to situations of exploitation or abuse. From an ACPOS policing perspective, therefore, there is no doubt that the bill's provisions will enhance the protection of adults who may be seen to be vulnerable, so we welcome the bill.

The Convener: So you think that the bill will address an unmet need and plug a gap in provision.

George Graham: It is difficult to know exactly whether that is the case, but it may well be so. My view is that there is definitely an underreporting of the kind of incidents with which the bill is concerned. I agree with Shona Barrie that, if criminal acts take place, there is an awful lot of legislation and, indeed, common law that apply to them and to some of the abuse that is covered in the bill—for example, an incident could be criminal assault or simple theft. However, we just do not know what is taking place. There is an awful lot of behaviour that, whether or not there is proof, may just fall short of being criminal acts and which would indeed fall within the categories that the bill mentions. We therefore welcome the extra protection that the bill would allow.

Adrian Ward (Law Society of Scotland): I think that you are going to get a cumulative response, convener, because I agree with the first two responses. I would like briefly to answer your question in two parts, in relation to part 1 of the bill, which is on the protection of adults at risk, and part 2, on the proposed changes to the Adults with Incapacity (Scotland) Act 2000.

I strongly believe in the need for the bill for adults at risk of abuse. I first advocated such a need publicly at a conference of United Kingdom social work people in 1990. I said that there was a clear need for better awareness, better systems and better legislation to address the broad area of deprivation, exploitation and abuse. In my own practice, even in the past few weeks, I continue to see cases in which there is that need.

In a broader context, the bill covers the third of three areas. We have the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003, and the Adult Support and Protection (Scotland) Bill is just as necessary as the other two pieces of legislation. I urge the committee to watch out for whether we are leaving any gaps in the broad coverage of the great variety of needs that all these pieces of legislation look at. I have flagged up a concern that part 1 of the bill has narrowed to focusing on abuse, although issues of deprivation and exploitation remain significant.

It should also be borne in mind that the 2000 act deals with people who are considered incapable under its terms and that the 2003 act deals with people who are considered mentally disordered under its terms, but there are others who are vulnerable and who need protection. In addition, if the bill is enacted, some of the protections in it will better address some of the needs of people within the categories addressed by the 2000 and 2003 acts, so I welcome the bill. I am concerned that the bill has narrowed to focusing on abuse rather than maintain the wider picture with which the process started, and I fear that that may leave gaps. However, those aspects can be addressed during the bill's passage.

I believe that the proposed amendments to the 2000 act would be improvements and that they are necessary. Again, however, I have made submissions about how the proposed improvements can in turn be improved. The bill's improvements would not change the intention of the 2000 act, which we met to discuss when the Parliament started. The 2000 act was the Parliament's first major piece of legislation. Five or six years down the line, we have experience of working with it and we know the aspects that are causing unintended difficulties. As a general point, members of a unicameral legislature must be aware that, when we enter a new field, although we all try to get it right, a few years down the line this or that could be improved and that some things are not working out as well as they might.

The bill addresses two issues that cause problems in practice and problems for the people out there whom the legislation is meant to serve. First, the issues connected with getting all the reports marshalled and put before the court without any of them being more than 30 days old will be addressed by the bill. Those issues have been a source of many problems, some of which have been quite artificial, given that many of the people to whom the 2000 act applies have long-term conditions such as dementia. Secondly, the bill will deal with the issue of caution—it is spelled "caution" but pronounced "cayshun"—which is the guarantee bond. Tomorrow, a man is coming to see me who is his wife's financial guardian. He has a bill for £375, her estate is reduced to £22,000 and he wants to know what he can do about that. The current requirement is expensive and is a bother and I am not sure that it serves a useful purpose.

A third issue, which is not covered in the bill but is highlighted in my submission, is that I see a strong need for an improved and simplified optional renewal procedure. When the tutor dative procedure that was the precursor of the current system of guardianship was introduced, the first test case—in which I happened to be involved—introduced the concept of a time-limited appointment to ensure that the appointment was reviewed. In that case, the applicants voluntarily said, "Don't give us powers for life. Give us the powers for five years so that we are forced to review the situation." That intention was carried through into the legislation but is being largely defeated because the courts are increasingly aware of the costs and trouble associated with the renewal procedure, which is currently exactly the same as the procedure involved in granting the guardianship application in the first place.

I submit, and strongly urge, that the bill should be amended so that, in appropriate cases, the sheriff who grants the first order could say "I grant the application for five years but, in principle, this is a case in which a simplified renewal procedure would be appropriate." We would then have fewer lifelong appointments and more appointments that accord with the Parliament's intention that appointments should be reviewed. In appropriate cases, the review could then take place without substantial financial burden and intervention.

Subject to those comments, I welcome both those parts of the bill.

Philip Shearer (Scottish Legal Aid Board): The convener's question relates to a wider question of ministerial policy on which I do not think that it is appropriate for me to comment. The board's interest is in identifying operational legal aid implications of pieces of legislation. I will leave it at that for the time being, but I will be happy to answer any further questions that arise from that.

The Convener: Nanette Milne has questions for the panel about definitions.

Mrs Nanette Milne (North East Scotland) (Con): As all members of the panel will be aware, the bill defines adults at risk of abuse as people over 16

"who, because they are affected by disability, mental disorder, illness, infirmity or ageing, are … unable to protect themselves from abuse, or … more vulnerable to being abused than persons who are not so affected."

What are the panel's views on that? Is the definition adequate to cover the intended group of adults that the bill seeks to protect? Perhaps the members of the panel can take it in turns to answer that question.

The Convener: Feel free to jump in.

Adrian Ward: I will jump in first while the others are thinking.

My main concern is with the term "abuse". Between the earlier consultations and the bill, the scope of the provisions has been narrowed from people at risk of harm to people at risk of abuse. The bill deals with everything in terms of abuse, abused and abuser. Life is not as simple as that. People can be misguided. Sometimes, they may not do things very well and know it; sometimes, they think that what they are doing is for the best. I imagine that, when someone is trying to sort out a situation, the legislation will be there in the background. If one says that the legislation in the background addresses harm, it is much more likely to be well received by those to whom one is talking than if one says that the legislation labels them as an abuser. I would prefer the general feel of the legislation—I have made submissions about precise wording, but we are concerned with general principles here—to be widened beyond abuse so that it dealt with risk of harm.

Mrs Milne: Does the current definition adequately protect the people who are at risk?

Adrian Ward: The definition could be a bit wider. We should compare the proposed definition with the definition in the Scottish Law Commission's draft bill, which defined vulnerable adults as

"adults who for the time being are both—

(a) unable to safeguard their own welfare, property or financial affairs; and

(b) in one or more of the following categories—

(i) persons in need of care and attention by reason either of infirmity or of the effects of ageing;

(ii) persons suffering from illness or mental disorder;

(iii) persons substantially handicapped by disability."

I have made the specific suggestion that we should consider cross-definitions and that "disability" should include mental disability, physical disability and communication difficulties.

14:15

George Graham: I acknowledge the difficulty with the term from a policing perspective—I am talking about vulnerability, not necessarily abuse, although I acknowledge Adrian Ward's comments on the use of "harm" rather than "abuse". The precise difficulty is whether we would exclude certain categories of people from protection under the bill or whether we would have such a broad definition of vulnerability that it would start to infringe on people's rights. The challenge is to define clearly, or narrowly, what constitutes a vulnerable person, bearing in mind the difficulty that will arise if the definition remains too broad. I do not have a simple answer, but there is still some work to be done to narrow the definition. Professionals—certainly police professionals—would welcome a clear and agreed definition across agencies of who is vulnerable and who is covered by the bill.

The Convener: Does that mean that you agree with some of the evidence that we have had that the definition could be so broad that it might encompass individuals who would be outraged to be considered to be or designated as adults at risk and may feel that their right to make their own decisions is being overridden by an externally imposed definition? That is to view the matter from the individual's perspective, but is that the other side of what you are saying?

George Graham: That is exactly the point. A number of individuals would rightly take exception to interventions on their behalf when they would wish to make their own decisions about associations, friendships and families. That issue is played out in the ability to override a person's refusal to consent to an assessment, removal or banning order. If the category is too broad, that will make it difficult for professionals across the agencies to understand who falls within the definition. There is still some cross-agency work to be done on clarifying those definitions.

Shona Barrie: To pick up on the point about harm and abuse, abuse implies to me some kind of mens rea, and I wonder about acts of omission, such as a failure to obtain services.

The Convener: You will have to explain mens rea.

Shona Barrie: It is a criminal law concept and perhaps I should not use it in this context. It implies that there is—now I am struggling to give you a definition—criminal intent.

The Convener: It is not sufficient that there is an action, but there must be intent to cause a problem.

Adrian Ward: The discussion that we had on the Adults with Incapacity (Scotland) Act 2000 a few years ago is relevant here. There are two stages: the gateway for people who are not excluded from possible consideration under the legislation should be broad but, when there is to be an intervention, rigorous tests should come into play. That might be a way of squaring the circle that was causing concern.

As I said, the first step is that the definition that forms the gateway for somebody to be considered for protection under the legislation should not be too broad, but broad enough to ensure that we do not exclude anybody who might need the protection. Secondly, however, principles, requirements and limitations will come into play when we move on from that to any form of intervention to ensure that we intervene only when appropriate and necessary and when we cannot achieve the benefit without intervening.

The Convener: We need to avoid imposing an external behavioural norm that is not necessarily about abuse or even harm.

Adrian Ward: That comes at the second stage.

The Convener: That is what I mean. That is when the difficulty might arise, because it might be more convenient for an institution to define "adult at risk" in a way that is not necessarily the best for an individual.

Adrian Ward: I want to go back to where the question started. We are considering section 3, which is entitled "Adults at risk"—that is what the bill is all about. The definition can reasonably be fairly broad as long as there are strict tests to determine whether a procedure under the bill should be applied.

The Convener: I assume that Philip Shearer does not want to add anything at this stage.

Philip Shearer *indicated agreement*.

Dr Jean Turner (Strathkelvin and Bearsden) (Ind): The bill proposes to give a local authority officer the powers of investigation and powers to enter premises, for which there might be many triggers. I come from a general practice background and I know that there might be difficulties with the burden of proof. Will you give examples of what the triggers might be, to help to make it clearer how the provisions of the bill are to operate? A sheriff might grant a warrant for entry to premises, but that might intrude on an individual's privacy. I would have thought that a

degree of proof would be needed before that path could be taken. How many people would be involved in triggering the powers?

The Convener: That relates to Adrian Ward's point about the initial gateway and what happens further down the line when some kind of intervention is effected.

Adrian Ward: I hope that I have understood the question, which two examples might help to answer. First, the Mental Welfare Commission for Scotland carried out an investigation into the case of a Mr H. The first page of the investigation report sets out Mr H's circumstances after things had gone badly wrong. He was described as being

"very unkempt and malnourished and suffering from lice and scabies infestations."

His home was described as

"uninhabitable with the floor contaminated with urine and faeces. There was no food and no gas or electricity supply."

There are people living in such circumstances. That was the report of a case in which there was no early, effective intervention and things went wrong.

Secondly, I can tell you, with the consent of the family, about a case that came to me in the past few days of a young woman living in a place that, for her, was her home. An intruder—somebody else who lived in the same place—entered. Her clothing had been removed, although she was incapable of consenting to any such activity, and he had also removed his clothing. His intention was evident from an unopened condom lying in the premises.

We have to address not only the narrow issue of what went on there, but the lack of any effective response to it. The people in charge in the place where the woman lived decided that it was not necessary to tell her care worker what had happened, because nothing really serious had happened—it had been prevented before it could occur—so the care worker went to dress the woman the next morning not knowing what had happened the previous evening. The police were not told what had happened until about three days later. Two months down the line, they have not yet started to investigate.

Those examples show why we need not just legislation but more awareness of the issues and better systems for addressing them. People are living in totally unsatisfactory circumstances and such incidents are taking place.

People's home situations can be in some ways caring and in some ways harmful. The typical situation involves a person who has problems of one sort or another living at home with family, one member of which is the nominee for their Department for Work and Pensions benefits and has financial control. The person is an adult with normal sleep patterns, but they disrupt the family's television watching in the evening, so they are packed off to bed at 8 o'clock every evening. The family probably think that they are doing a good job, but are they? Do we need somebody to go into to the home to say that the family needs to do better? If such families are seriously resistant, do we need to consider more intervention? Those things might sound trivial, but if they form a lifelong pattern, they can be serious.

Dr Turner: I suppose that the difficulties are who from outside the home knows what is happening inside it and how things are triggered. In your submission, you say that there are laws that deal with the situation that you have described in which a person is harming himself or herself because of how they are living—I think that you mention a 1948 act.

Adrian Ward: Yes—I refer to section 47 of the National Assistance Act 1948. Currently, in the first scenario that I described, under the 1948 act somebody could be removed as a last resort. The bill proposes to repeal that provision without replacing it with a direct equivalent.

Dr Turner: So what should be done in such cases? You have highlighted more than one provision that will be removed—there is also a question about power of attorney. What should be done in such situations if those provisions are to be wiped out by the bill?

Adrian Ward: That is a policy issue on which it is not up to me to comment one way or the other. The Law Society of Scotland has supported the principle that, under the legislation, there should be no interventions without the consent of the person one is seeking to protect, except in limited circumstances, such as when there has been undue influence. That position is unlike the position under the 1948 act. The issue needs to be addressed, although it is not for me to address it. The committee might want to hear what local authorities and social work departments in particular have to say about it, as section 47 of the 1948 act continues to be used when people are found in circumstances such as those in the first example that I gave. That is a major policy issue that is ultimately for the Parliament rather than any of us who are giving evidence to consider. I simply want to highlight the fact that the issue exists. Some situations might be so bad that, although people will say that they want to stay the way they are, it should be possible to change things—there should be a mechanism for doing so. By flagging that up, I am speaking against a view that I have expressed and the Law Society's view; I am simply saying that the issue needs to be considered. That may not fully answer your question, but I wanted to make that point.

Shona Robison (Dundee East) (SNP): When you spoke about broad inclusion and rigorous tests, I understood that that was important, but it would be difficult to measure harm in the case that you highlighted involving a family, a failure to act and perhaps exploitation that would be difficult to prove—I refer to the person being put to bed at 8 o'clock. I wonder whether such cases would fall within the proposed legislation, which is very broad. From my own social work experience, I am worried that we could be talking about an awful lot of cases.

I thought from your original comments about rigorous tests that the legislation would be applied in cases in which harm and exploitation were a little more transparent and obvious. However, I wonder whether we need to consider the matter in much more depth because if such cases pass rigorous tests, I suppose that moral judgments will have to be made about what we believe is an appropriate way for a family to treat someone in their care.

The Convener: I would like to add to what has been said before Mr Ward comments on that. How can we assess situations in which somebody is sent round to put a person into bedclothes at 5, 6 or 7 o'clock at night in the expectation that they will be put to bed then? That frequently happens under local authority-delivered care because home care workers' timetables mean that they must start at such times.

The example that Adrian Ward gave us opens an enormous number of doors. If parents are to be taken to task for putting somebody to bed at 8 o'clock, does that mean that a local authority could equally be taken to task for precisely the same thing? I think that all of us have experience of that in relation to local authority care.

14:30

Adrian Ward: I gave examples in response to a question about when an investigation—even in the most informal sense of the word—would be triggered and someone would start to look at a situation. I was really talking about the gateway level; I am not saying that all the examples would warrant specific action under the bill when it is enacted. I was asked, "What are the potential danger signs that would trigger local authority action?" I am not saying that all my examples were of situations in which there should have to be intervention.

If the bill is enacted—in whatever form—there will be more times when it is kept in the background than occasions on which it is used; attempts will first be made to improve situations through discussion and persuasion. However, the powers will be in the back pocket and they need to be clearly understood and people need to know that they are there. Putting somebody to bed at a particular time may or may not be part of an acceptable regime. It may be a sign of a restrictive regime or one rather unfortunate aspect of a regime that is otherwise entirely satisfactory.

George Graham: I confess to being slightly confused and somewhat distracted by the examples. I wonder whether I could return to first principles and my reading of the power of investigation for local authorities. My understanding of the provision, at least from a policing perspective, is that it will allow a preliminary assessment to be made. It will address some of the existing gaps, when there is a suspicion, rumour or general belief that something is not right in a premises. Such situations are always difficult.

Under the bill, we would have the ability to investigate circumstances in which the suspicions have substance—we would form an understanding in the first instance of whether there were grounds to believe that further intervention was necessary. At the moment, there is a definite gap in that respect, even from the policing perspective. Where no authority exists for us to enter a house, a care home or any other establishment in which care is being given, we have no way of gaining entry other than through the subtle means that police officers and others use. The provision would fill the existing gap in the first assessment phase. Thereafter, an investigation would take place. For example, if there was evidence of criminality, physical abuse, drug taking or neglect, we would have powers to enter premises and the ability to intervene. I hope that that is helpful.

The Convener: A question occurs to me, albeit that it arises out of the slightly off-the-point issue of when somebody is put to bed. We are to have local authority investigators, but a huge amount of care is delivered via local authorities. How robust is the measure, given that we are putting the powers into the hands of local authority investigators? Surely for much of the time they will be investigating situations that are already under local authority control, given that those services are part and parcel of what local authorities deliver.

A comment about the 30 days for getting something before a sheriff was made in the opening statements—I forget who made it, but perhaps it was Adrian Ward. I think that that comes under the Adults with Incapacity (Scotland) Act 2000. At the moment, the bill will require a range of public bodies, including the Mental Welfare Commission, the Scottish Commission for the Regulation of Care and NHS boards, to co-operate where abuse is suspected or known. Do we need a mechanism that would allow for the

extra time that all that bureaucratic involvement will require? The truth, as anyone who deals with these things regularly knows, is that the minute we start to involve more than one organisation, the capacity for things to grind to a seeming halt is quite high. Does any panel member have a comment on that?

Adrian Ward: There are two issues. On local authorities monitoring local authorities, I cannot speak for local authorities, but perhaps some of your witnesses at later evidence sessions might be able to do so. I imagine that local authorities sometimes had the same issue in relation to child protection. I would have thought that they ought to be able to structure matters so that there is a reasonable distance between their investigative people and those whom they might need to investigate internally, but I think that the question of how they would handle that is one for local authorities.

In relation to the Adults with Incapacity (Scotland) Act 2000, there are proposals to soften the time limits so that we do not get caught out so easily. To which particular time limits are you referring?

The Convener: I am referring to section 5 of the bill, which places a requirement on various bodies to co-operate when abuse is known or suspected. When I see a long list of bodies, I immediately think—as many of us do—of the various files that are sitting in our constituency offices. We end up in a round robin scenario and get nowhere fast because so many people are involved.

Adrian Ward: Section 5 states that the requirement to co-operate is

"where such co-operation is likely to enable or assist the council to make inquires".

The answer may be that there might not be a requirement to co-operate if the co-operation is getting in the way rather than enabling or assisting. I am not sure that the matter would impact on any specific time limit in part 1 of the bill, but I could be wrong.

The Convener: Our experience is that the minute that we involve more than one agency, everything slows up. However, it is fair enough if you do not have a specific comment about that at this stage. We can explore the matter with other witnesses.

Does anyone else want to come in at this point? I am about to raise a more technical legal point about appeals and I do not want to move away from this subject before we have exhausted it.

Euan Robson (Roxburgh and Berwickshire) (LD): Before you move on to your more technical point, I will ask Mr Ward about the definition of abuse. I understand what he is saying about the broader—as he describes it—definition in the Scottish Law Commission's draft bill, which includes exploitation and deprivation.

Section 50 of the bill as introduced specifically mentions exploitation of an individual. It refers to

"any conduct which harms or exploits an individual"

If someone is deprived, they are presumably exploited. [*Interruption.*] I have started so I will finish. However, Mr Ward says that the definition should include deprivation or obstruction of provision to the individual—[*Interruption.*]

The Convener: I have been advised by the clerk that I must suspend the meeting because of the fire alarm, although we are not required to go anywhere. I am sorry about this.

14:38

Meeting suspended.

14:53

On resuming—

The Convener: I bring the meeting back to order. I am not sure where we were—were we in mid-Robson question? Sorry, Euan.

Euan Robson: Mr Ward talks in his submission about extending the definition of abuse to include deprivation and exploitation, but is that not effectively covered in the bill? Section 50(1) of the bill states that abuse

"includes any conduct which harms or exploits an individual".

It then states some particular ways in which abuse can be manifest. Is there a further issue that is missing from that definition? Is there a particular point that needs to be added to the definition in section 50(1)?

Adrian Ward: I refer you to the Law Society's submission on the specifics, which suggests the following definition:

"harm includes any conduct which harms or exploits an individual, and in particular includes – (a) physical harm, (b) psychological harm, (c) theft, fraud, embezzlement and extortion, (d) self-harm, (e) deprivation or obstruction of (i) provision of services to the individual, or (ii) the individual's family or social contacts, or (iii) the individual's activities, and (f) any other conduct which causes fear, alarm or distress or which dishonestly appropriates property."

That definition was devised by a committee of which I am a member and I adopt it. I think that you would accept that that definition is broader than what we have in the bill. It shifts the language from abuse towards harm.

The Convener: The bill introduces various types of protection orders. I ask the panel—I suspect that the question is really for Adrian Ward and

Shona Barrie—whether there should be an appeals process for all the orders. Could a failure to have an appeals process for all the orders constitute a human rights issue?

Adrian Ward: The simple answer is yes, but the practical problem is that some orders are of very short duration. How do we accommodate an appeal against an order that has effect for only a short period? However, in general, I would be happier with there being an appeals process. In some cases, an appeal might be run retrospectively; the case will be over, but there will still be a determination of what should have happened. That will not benefit the individual, but it will give useful guidance to those who are trying to operate difficult provisions in, by definition, difficult circumstances.

Shona Barrie: What Adrian Ward says about the duration of some of the orders is probably in point. I cannot claim to have sufficiently detailed knowledge of the European convention on human rights, but it is right to highlight the fact that there will be the competing considerations of the duties of the state and article 8 privacy issues. In practice, the duration of an order could make an appeal mechanism fairly meaningless in some scenarios.

I am not party to the thinking of those in the policy lead as to why it is just a temporary banning order that can be the subject of an appeal with the leave of the sheriff principal. I do not know whether anybody else here can inform me of the thinking behind that.

The Convener: No one else wants to comment. We can explore that question in a different session.

Helen Eadie (Dunfermline East) (Lab): My question is on the banning orders. The Scottish Parliament information centre briefing states:

"Banning orders attracted the most comment of all the protection orders".

The organisations that have questioned how effective banning orders would be include the Scottish Association for Mental Health, Age Concern Scotland, the Royal College of Physicians, Enable Scotland and the Angus adult protection committee.

I ask the panel to comment on how effective banning orders would be. In particular, I would like Adrian Ward to comment on his view that the term "banning order"

"is imprecise and unduly emotive, and should be amended to 'exclusion order'."

Section 19 provides that a sheriff can grant a banning order only if they believe that the adult at risk is likely to be "seriously abused" by another person. Adrian Ward says in his submission:

"In section 19, 'seriously' is undefined and unhelpful. The criterion should be that the 'abuse' justifies consideration of a 'banning order'."

I ask the panel to elaborate on how effective banning orders would be.

Adrian Ward: I believe that I am personally responsible for the concept in the bill that, sometimes, it is better to remove the person who is causing the problem rather than the victim. I remain of that view. There are occasions when it is unreasonable that the victim should have to leave home and it might be better that a clearly identified person who is causing the problem should be the one who is removed from the setting. That is a clear concept and one either agrees with it or disagrees with it.

The question whether what should be imposed is a "banning order" or an "exclusion order" is a matter of terminology. You will have picked up on the fact that I do not greatly like the terms "abuse", "abuser" and "banning orders". I prefer "harm", "risk of harm" and "exclusion orders". That is a matter of terminology. On the point about the term "seriously abused", it is difficult to argue about whether abuse is "serious abuse" or just "abuse". I would prefer a much more practical test, bearing in mind the minimum intervention principle and the ethos of the bill. Can one demonstrate that the order is justified? That is a more clear-cut question and an easier one to address. The decision will still have to be individual to the particular circumstances of each case—and these will be difficult cases. However, it would be most helpful to put the question directly to the person making the decision: is an order justified?

15:00

George Graham: I agree with the principle that Adrian Ward has been discussing, in that there will be circumstances in which it would be useful to remove the person's access to the individual. That very much follows civil interdict procedures. Often, we will ask for bail conditions on what individuals can do, which are fairly powerful means of preventing further harm or difficulty.

I accept that it is generally much easier to have the consent of the victim. The complexities may lie in instances where the person who is being harmed does not consent or agree to something. That could cause major difficulties. However, as a general concept, it would send a message to people to say that we can apply for the orders, irrespective of whether someone reports the matter—and enforcement might be difficult. We would want to send a message to potential abusers or to people who would harm vulnerable people that we would wish to do something about that. There is justification and value in the provision.

Helen Eadie: It is important that the committee is clear about the point at which the investigation might commence. What would be the trigger for an investigation?

The Convener: Have we not already covered that?

Helen Eadie: To some extent, I suppose, but I wondered about a victim who was living in fear of the consequences of their actions. Who else might be able to trigger an investigation if the victim cannot do so?

George Graham: One of the first things that we must recognise is that such situations can be particularly sensitive and emotive for the people who are subjected to harm, and indeed for those who are doing the harm. Some of the bill's principles to do with interagency working and the sensitivities of approaching such situations are sound. Across agencies, including social work, carers and the police investigative community, we would want to discuss and understand the implications of launching investigations.

We would want the police to lead in cases in which a crime has allegedly occurred, as they do with other criminal activity. We would wish to be sensitive and to use trained and skilled investigators in the same way that we do in relation to child protection, working across agencies and understanding the potential for the investigation itself to cause greater harm than the harm that we seek to prevent or redress.

There is no easy solution. The ultimate aim is to have agencies working together with an understanding of the proper definitions, which we have already talked about, and of reducing harm and preventing further harm, which is the ultimate aim. That is what I think the bill is trying to outline. That is as close as I can get to a clear answer about how we would approach the sensitivities involved. I hope that that answer helps in some way.

Helen Eadie: It does. Thank you.

The Convener: Section 32 starts:

"The sheriff must not make a protection order if the sheriff knows that the affected adult at risk has refused to consent to the granting of the order."

However, that section goes on to allow the sheriff to set that aside if he

"reasonably believes that the affected adult at risk has been unduly pressurised".

There is then a definition of "unduly pressurised". Is there any comment from the panel about that definition or about any difficulties that might arise under such circumstances?

If we ask questions and you really do not have any comment, please say so. In this area, there will no doubt be "on the one hand" and "on the other hand" opinions.

Adrian Ward: In our submission, we suggest that the phrase "unduly pressurised" be amended to "unduly influenced or pressurised", mainly because undue influence has been developed and is understood as a legal concept. It expresses the idea of someone taking advantage of an individual's susceptibility in such a way as to disadvantage them. Because we lawyers know what undue influence means, we would prefer it if the word "influenced" was added.

The Convener: So you are saying that sheriffs would feel on much firmer ground if the wording reflected the concept of undue influence as well as undue pressure.

Adrian Ward: Yes. They would be able to address a known concept and apply the tests that relate to it.

We also suggest that undue influence or pressure can be exercised not just by individuals but by families and other groups of people. Even though one member of a group might be the prime abuser, another person might exercise undue influence. As a result, references to "person" should be followed by the phrase

"(or persons who include a person)".

Dr Turner: Anyone who breached a banning order would not be able to access legal aid.

The Convener: Indeed. They would not be able to use legal aid to secure representation or seek advice.

Philip Shearer: We have made it clear in our submission that that is clearly a matter for ministers and whatever their policy intention might be. However, the proposed approach has a certain symmetry with current provisions for custody appearances as a result of interdicts under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or the Protection from Abuse (Scotland) Act 2001, which are funded under assistance by way of representation, rather than by civil or criminal legal aid. A mechanism could be developed in that respect; in any case, we have drawn the matter to the attention of our Scottish Executive colleagues, and are waiting to hear about their policy intention.

The Convener: Jean Turner will now ask questions on intervention and guardianship orders.

Dr Turner: Earlier, Adrian Ward referred to time-limited appointments and suggested that renewing guardianship orders should be made easier. After all, the process costs £2,000 to £3,000, which has implications for people's estates. Moreover, the current approach involves the harrowing business of sorting out financial matters, gathering

depositions and medical reports and so on. I wonder whether the witnesses could expand on that issue.

Adrian Ward: The current procedure for renewing a guardianship order is exactly the same as the procedure for applying for one. Indeed, the procedure for interventions and guardianship orders is the same. In all cases, one requires two medical reports, one of which must be from a consultant, and a third report from the mental health officer, if one seeks welfare powers, or from another suitable person. None of those reports must be more than 30 days old when the application is submitted.

It can be very difficult to co-ordinate and put together applications. I have a member of staff who is extremely good at that job, and she spends a lot of time on the phone to this or that doctor. In managing the timetable for this process, we must also be aware that, when we give notice to the local authority in welfare cases for which we are about to submit an application, the MHO's report must be produced within 21 days. You can imagine what happens: we might give notice too soon, which means that the mental health officer's report is getting older and older while we are chasing up the doctors who might, for perfectly good reasons, not have got round to sending in their reports. The process is cumbersome and expensive and means that the adult is subjected to a lot of investigation and assessment by three different people.

The Adults with Incapacity (Scotland) Act 2000 envisaged that the norm would be for a guardian to be appointed for three years in the first instance and for five years thereafter, but the empirical evidence is that those are not the averages. Many applications for guardianship have been granted for longer periods. Indeed, many are now granted for the remainder of the adult's life. That is understandable and justifiable when one considers the trouble and expense of renewing in individual cases, but it is not really what was originally intended by the Parliament in the act. As I said in my introductory remarks, I have come quite firmly to the view that although there must be cases in which the whole panoply of reports and procedures should not be required in order to renew an order, it would be better not to leave such an appointment running for a lifetime. The answer would be to have an optional simplified renewal process.

The 2000 act allows the sheriff to call for further information on any application that is before him. If a sheriff who was presented with a simplified renewal application had cause not to be entirely happy with it, he could still say that he wanted more information before he granted it. That provision would remain. It is not something that the sheriff would have to apply; it is something that would be available to him. If the sheriff was satisfied that it was appropriate to grant a renewal, he could do so with less cost and less trouble.

Importantly, if the process were reasonably simple, people could probably go through it without legal advice or assistance. I am rather disappointed at the extent to which people have not had the confidence to operate the procedures of the 2000 act without legal assistance. In many respects, our act is not so very different from German legislation, where the Betreuungsgesetz 1990 includes forms of guardianship. In Germany, about 80 per cent of applications are handled by members of the public. Although they sometimes need the assistance of voluntary bodies, they do not have to use lawyers. I hope that the role of lawyers will shift so that they become involved only in cases in which their input is necessary, rather than in all initial and renewal applications. If we can make the renewals process a bit simpler, we might begin to move in that direction.

The Convener: Before we wind up our questions to the first panel, I want to ask Philip Shearer about the availability of legal aid in its broadest sense, which we have had a question about. Are there any other areas in the bill in relation to which that might become an issue?

Philip Shearer: In general, with civil proceedings that involve private individuals in the sheriff court or the Court of Session, civil legal aid is available, subject to financial eligibility and merits tests. With criminal prosecutions in the sheriff court, the High Court or the district court, the accused can obtain criminal legal aid, subject to the usual test.

Custody appearances are slightly different because they fall into an area in which, at present, there would be no coverage. In general, it seems that legal aid will be available, subject to the current statutory framework.

The Convener: So you do not envisage that there will be any problems.

Philip Shearer: No, although if further issues come to the committee's attention as the evidence sessions unfold, I will be quite happy to consider them.

The Convener: I thank the panel very much. I ask its members to swap with their successors.

The members of the second panel are Alex Davidson, who is from the Association of Directors of Social Work; Ronnie Barnes, who is from the British Association of Social Workers; Paddy Healy, who is from the Royal College of Nursing Scotland; Dr John Starr, who is from the Royal College of Physicians of Edinburgh; and Dr Neill

Simpson, who is from the Royal College of Psychiatrists.

I seek a brief answer from members of the panel to the question that I put to the previous panel. The majority of respondents to our call for written evidence were in favour of the general principles of the bill, although they may have concerns about aspects of it. Do you agree that there is a need for additional legislation in the area, or are you concerned about unnecessary overloading?

15:15

Alex Davidson (Association of Directors of Social Work): The Association of Directors of Social Work very much welcomes the bill. There are occasions—not large in number—when we seriously lack the mechanisms to enable us to take action in this area. That is highlighted by the work of the Mental Welfare Commission for Scotland, which could give chapter and verse about such occasions in addition to the example that has been cited. There have been occasions when we have had difficulty gaining access to people's homes and engaging with families and carers on the sort of issues that previous witnesses have highlighted.

We recognise that there are concerns about human rights aspects of the bill. However, the experience that we have in child protection work and other work to do with caring for people enables us to strike the right balance when it comes to intervening in people's lives, especially in a multi-agency context with the help of other professionals and agencies. Adrian Ward touched on some of the issues relating to the language of abuse. Risk and harm are concepts that local authority practitioners of social work now have at the core of their practice. We take seriously the language of child protection. In the main, good professional assessment based on people's judgment works very well, when done properly and using the right means.

Ronnie Barnes (British Association of Social Workers): The British Association of Social Workers in Scotland warmly welcomes the introduction of the bill, which is much needed, for three principal reasons. First, the current legislation that deals with mental health and with adults with incapacity is inadequate for dealing with many of the situations that we in social work come across. Secondly, the creation of interagency protocols and practice guidance to ensure that there is consistent adult support and protection across Scotland, through the introduction of adult protection committees, is an important plank of the legislation. Thirdly, notwithstanding the concerns that exist about how they will be enacted, the additional powers in the bill are important, especially for us in social work. In certain circumstances, it is difficult for us to get over the threshold.

Paddy Healy (Royal College of Nursing Scotland): The Royal College of Nursing Scotland also welcomes the bill. For a long time, nurses have been at the forefront of caring for older people, which is my particular interest, and have felt disempowered in many respects because there are very few channels through which they can bring abuse to light. Given changes in demography and the group of clients whom nurses will commonly come up against, the bill provides nurses with an opportunity to support and protect older people, in particular.

Dr John Starr (Royal College of Physicians of Edinburgh): The Royal College of Physicians of Edinburgh also welcomes the proposed legislation. We see it as complementary to both the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adults with Incapacity (Scotland) Act 2000. The bill fills a gap in relation to issues of autonomy. There are people who lack autonomy because they lack will—for example, if they have suffered a catastrophic event such as a subarachnoid haemorrhage and are unable to frame wishes—and there are people who lack autonomy because of a lack of mental capacity. There are also situations in which people have both will and mental capacity but lack autonomy because they are unable to act for themselves and are in dependent relationships. In relation to those circumstances, there is a gap in the legislation. The bill is also complementary because it strengthens the other elements of the 2000 act. Having said that, I think that the bill raises two areas of concern: the definition of "vulnerable adult" and certain operational issues.

Dr Neill Simpson (Royal College of Psychiatrists): The Scottish division of the Royal College of Psychiatrists also welcomes the bill and sees it as complementary to existing legislation. It will provide protection for vulnerable adults who are not covered by the provisions of existing legislation.

The Convener: Dr Starr has led Nanette Milne straight to her question about definitions.

Mrs Milne: It is clear that Dr Starr does not think that section 3 adequately covers the group of people whom the bill is intended to protect.

Dr Starr: There are difficulties with the definition. One of our concerns is that if aging people are covered in the definition when infirmity and disability are already included, what does that mean? I look in the mirror each day and look at photographs of myself and I see that I am aging. The definition needs to be similar to those in the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland)

Act 2003. In the 2003 act, "mental disorder" is clearly and rigorously defined and "incapacity" is rigorously defined in the 2000 act. In the bill, however, what is meant by an "adult at risk" seems far more nebulous.

We suggest that one of the tests should be of autonomy and whether a lack of autonomy makes people vulnerable so that they are dependent on other people. That lack of autonomy could lead to positive acts against them—we heard about direct harm—or neglect. Either way, we should identify an impairment of their autonomy. We would welcome some sort of framing of an autonomy test, which would complement what is in the other acts.

The Convener: Does anyone else want to comment on the definitions of an adult at risk of abuse and the word "abuse" in those circumstances?

Dr Simpson: I share the view that aging in itself should not be part of the definition.

The Convener: We probably all concur.

Dr Simpson: Although the Royal College of Psychiatrists did not specifically address the issue, as has been said, mental disorders are finely defined and disability is defined. Infirmity is not very well defined in medicine whereas autonomy as a principle of medical ethics is well understood in health services.

Ronnie Barnes: Without getting into the detail of what the words might mean, we need to ensure that we do not miss people out and that the description ensures that the kind of people we know we should protect are included. We should not use a form of words that excludes people from consideration.

Mrs Milne: Do any of you think that using the word "abuse" in the bill is negative?

Dr Starr: We have moved away from using the word abuse and I am sure that that is also true for social work colleagues. The reason is that when we are dealing with such situations of dependency, we have to work with both the person who provides the care and the person who is dependent—and potentially being abused. We do not want legal frameworks to be a big stick in the background because that is not how we work—we want to open up dialogue. Introducing pejorative terms such as abuse is unhelpful. We should think more in terms of neglect—a carer might not be doing as well as they could and we could help them to improve the care that they provide. That is the point towards which we try to work.

Often, people are in on-going relationships and, whatever legal framework we have, we must recognise that such relationships are a core part of their life. There are already issues about power in such relationships and it is not helpful to go in with a big stick because we would then introduce yet another aspect of power.

The Convener: Perhaps Alex Davidson and Ronnie Barnes should comment. It strikes me that abuse carries a sense of malign intent whereas a great deal of what we are talking about could be classified as benign neglect. Do you share that concern?

Alex Davidson: Yes. We have watched the development of the bill and have had concerns about some of the language—for example, we have worried about the possibility that "vulnerable adults" might be seen to equate to "disabled adults"—and have made representations about those issues.

The move from talking about child abuse to child protection occurred because the focus was on the protection of children, which involved multi-agency work, good assessment, good protocols and work around the key elements of risk and harm. That cluster of elements must be gathered together if good decisions are to be made, and parents, family carers and, where appropriate, the children or adults concerned should be involved. We have to recognise that the work that we do has to be in that family context or in the context of the wider network of caring organisations. We have to engage with people in order to make those assessments.

Adrian Ward described the situation well. The first and second stages of what we do are important.

Ronnie Barnes: As I said earlier, we have to ensure that we do not miss people. People can find themselves in vulnerable situations for temporary periods and we would not want those situations to be ignored because we were definitely talking about particular kinds of abuse. Legislation is precise, and if it is worded incorrectly, people will be missed. The bill that we are discussing offers us a once-in-a-generation opportunity to include those who are currently excluded from provisions in other legislation.

Shona Robison: Are you, therefore, suggesting that the term "abuse" be changed?

Ronnie Barnes: I think that it should be qualified. Adrian Ward's description of abuse was quite expansive and embraced the main tenets that we would like to see in the bill.

Paddy Healy: The notion of neglect—whether intentional or unintentional neglect—has been removed, to some extent. However, that notion is important in light of the things that we see in the media about older people, particularly when they are in hospital.

The core of the bill addresses the issue of people who live in the community. It is not all-inclusive, although I think that it is meant to be. If we do not recognise the notion of neglect, there will be loopholes that people will slip through.

The notion of intended neglect is also important with regard to the definition.

The Convener: It occurs to me that all this has a resource implication. It might be that the social workers or the general practitioners are best placed to answer my question. When you start talking about having protection orders and removal orders, you must also think about places that people can go to. If we are going to widen the definition so far that we will be intervening in more people's lives, there will be a huge resource implication to do with places to take people to. If we are so concerned about people being neglected that we want to take them away from the circumstances that they are in—I am deliberately not using the word abuse—there has to be somewhere for them to go. Given that social workers effectively work at the sharp end of that provision and GPs often end up being the first port of call in this regard, I would like to know their feelings about the situation that I have described.

15:30

Alex Davidson: Before we deal with that question, I would like to finish dealing with the question of risk and harm.

We have not responded on the general definitions. That is largely because we see things such as neglect, physical harm and forms of abuse in our current work. We are not surprised by that. For us, the definition of the term "abuse" captures all those features, so we have not mentioned that specifically. However, we need to hold on to the element of risk and harm. Perhaps the ADSW could work with others to flesh that out, but that element is central to our thinking when we investigate allegations of so-called abuse or when we think that people need protection.

The bill has resource implications for us. The removal orders will test us. We will need to consider forms of accommodation that are fit for purpose and right for the kind of people with whom we might deal. We do not have ready solutions to those issues—we will have to work with our housing and health colleagues on that. Hospital may not be the right place for some people. Issues may arise about the kind of accommodation that we need. However, those issues are not new for us. We are already challenged by such issues in relation to the policy in "The same as you? A review of services for people with learning disabilities", which has implications for people with learning disabilities when there is a family breakdown. Our traditional response would have been to put such people in hospital, but that is not available now. The challenge to local authorities is to consider what the response should be. Should the response be through the homelessness or care elements? Local authorities throughout Scotland are considering how to manage that kind of interaction with the work that we do. The bill has implications, but the issues are not new to us and we would find solutions to them.

The Convener: I express some doubt about that, because many of us take the view that we do not have solutions to our present problems, never mind adding new ones.

Ronnie Barnes: I support what Alex Davidson says. At present, we are faced with situations in which we must consider the resource implications of our work. I guess that the launch of the legislation will have implications, because when the public become more aware that abuse is not to be tolerated, we can expect an increase in the number of referrals of people who are being abused. We will have to consider what to do about that, because we cannot ignore it. We cannot go a certain distance and then no further. Committee members, as legislators, must consider the possible resource implications. We can help you with what we think the implications will be as a result of the provision of places of safety, if that is the term that describes what we are looking for. We need to consider where those places might be and what we might have to do to have a sufficient number of them to meet the demand that we might expect.

The Convener: It would be useful for the committee to have an estimate of that and an estimate of the potential number of people that we are talking about. At present, we do not really have that.

I ask Dr Starr whether he wants to say anything on the matter from his perspective.

Dr Starr: I should say that I am a physician, so it is kind of you to invite me to appear as a general practitioner. Although we work closely with our GP colleagues, I do not think that I could speak directly for them.

We can raise important resource issues, particularly to do with hospitals. The Adults with Incapacity (Scotland) Act 2000 does not involve removing people, so accommodation is not an issue but, under the Mental Health (Care and Treatment) (Scotland) Act 2003, which has a power of removal, hospital managers have an obligation to provide accommodation. If we were to use hospitals as so-called places of safety, we would have to have similar provision in the bill. However, hospitals are not a good place for that, particularly when we consider that as soon as a

person goes into hospital, the level of their autonomy plummets. They might have been put to bed at 8 o'clock in their house, but when they go to hospital, they will be put to bed at 7 o'clock and woken at 6 o'clock in the morning. We need to consider what accommodation and services are available and decide which option is best for the person who is to be removed. The issue of removal requires a balance. We need to decide on resources and on the level of risk of harm at which someone's autonomy can be affected. That is when we would have to generate numbers. That is a difficult question.

Shona Robison: I presume that, in some cases, it would be better for a person to remain in their home, but that raises even bigger questions about resources, because if the carer is excluded from the home while investigations are carried out, or at the conclusion of investigations, provision will have to be made for other carers to go into the home as and when required. It is not just about care home beds or places of safety physically outwith the home but resources going into the home to maintain the person there. Do you agree that that would have to be included?

Dr Starr: I agree. The people we are talking about, who may well be so-called abusing their dependent relatives or kin, are also providing a phenomenal amount of care. They are doing a good job. It is a balance. That is why there is a difficulty with using pejorative words such as abuse in these situations. I can speak locally when I say that, at present, that kind of care would not be readily available for many people who are in that situation. That is an issue when we consider banning or exclusion orders and it is an issue of the threshold at which the more serious parts of the bill come into play and we start excluding or removing people from homes. The idea of serious abuse needs to be defined. It needs some sort of individual consideration of what is best for the person. We would like to think about it in terms of autonomy, as well as issues of harm.

Helen Eadie: In the context of inquiries and investigations, section 4 of the bill places a duty and obligation on local authorities to investigate the well-being of an adult. How do you see that additional regulation interacting with the existing powers of the Mental Welfare Commission, the care commission and local authorities? What would be the complexities in that?

Alex Davidson: I start with a quote from *Community Care* on the recent investigation into services in Cornwall. The director of social work said that

"councils have responsibility without power in relation to adult protection."

The bill would give local authorities some power to co-ordinate investigations in a way that we are generally not able to at the moment. Being able to have that interagency work that Ronnie Barnes talked about codified through adult protection committees and so on would give us a lead to the multi-agency approach that is evidently needed in this area.

It is about the risk and harm notion. It is weighing up whether, in the case of the person who is going to bed at 6 o'clock, there are other indicators. Where does the person come from? Which other agencies that are involved can tell us things about the family? If a complaint has come from a neighbour, what are neighbours saying about the family? Are police colleagues finding things? Are housing colleagues turning up things as they do routine visits, for example finding a household that they would describe as dirty? It is about multi-agency working with the individuals in the home. As Ronnie Barnes says, what we do not have at the moment is the power to be in that home. The bill will enable us to act in relation to understanding what the problems and issues are—not going in with the fixed idea that this is abuse, but understanding what has led to the situation and what might be done about it. It is about bringing resources to bear; resources are important. It may be that more formal and strengthened home care is required—for example, cleaning someone's home. That would involve environmental health and other agencies. There is a cluster of issues that we can begin to weigh up, in a measured way, around a table with other professionals. Hopefully, the family carers and service users would be involved in that process.

Dr Simpson: When a social worker comes to me with a case that they are concerned about, I would say that under present legislation it all depends on whether the adult has capacity. Have they been assessed for the capacity to make decisions? In many such situations, there is no access to do that assessment. I would then have to say that, under the Adults with Incapacity (Scotland) Act 2000, we cannot do anything until the person has had their decision-making capacity assessed. What legal framework do we have for enforcing that assessment? At the moment, it would have to be the Mental Health (Care and Treatment) (Scotland) Act 2003. We would be faced with the prospect of having to admit somebody to a psychiatric unit for assessment under a short-term detention certificate, simply in order to assess whether they had decision-making capacity, in order for the rest of the provision to be made. In practice, that does not happen, but that is the only legal framework that we have at the moment for doing that.

Ronnie Barnes: My local authority already operates within interagency guidelines and we

expect the bill to give us additional powers that will provide the range of measures that we need in the toolkit with which we operate. We already assess people; none of what is in the bill will take away from good social work assessment, in which we still expect to engage people.

Some of the more significant powers are powers of last resort and not of first resort. We will find that where we are stopped at the threshold and cannot gain access to people who we know are at risk at the moment, the bill will give us power to access those people. We will exercise that power with all the professional discretion with which we always exercise our powers; that will not change.

Dr Simpson: I will comment on abuse and show why the concept is not always helpful; indeed, such treatment is not always malicious. I was asked to see somebody with Down's syndrome because her health appeared to be deteriorating. It emerged that her health was deteriorating because her mother, who was the primary carer, was developing Alzheimer's disease. When I first saw the mother, she was still capable of acting as the main carer, but her dementia progressed to the stage at which her daughter suffered significant neglect. As the mother became more demented, she became less and less willing to co-operate with social care provision to maintain her daughter's health. I assessed whether the daughter had decision-making capacity and we were prepared to apply for an intervention order if necessary. In other cases, the individual might not have impaired decision-making capacity, but in such cases, there is no provision for assessing and protecting them at present.

The Convener: Alex Davidson welcomed adult protection committees at the start. On the basis of your initial comments, I take it that you do not expect more bureaucracy to develop via those committees. Would it help to limit the number of members of those committees? If you have never thought about that, you can go away and think about it.

Alex Davidson: I have thought about and discussed the question. Locally, many of the same people from the police, social work departments and education services who are members of child protection committees are likely to be members of adult protection committees. That raises resource issues and other matters. However, that should come back to local decision making about who appropriate members are and getting that right; the situation in the Western Isles will be different from that in South Lanarkshire. It is important to weigh up that issue and give it due recognition.

I have issues about governance. We argue in our submission that we need to give ownership of the system to more than the director of social work or chief social work officer, because it is not a social work issue, but a local authority issue. A committee involves engagement with others. The governance issues should be given strongly to the chief constable—and his deputes at divisional level in Strathclyde—and to chief officers in the health service and local authorities. That will ensure that ownership is clear and that we do not fall into the trap of seeing such tasks as social work issues that do not affect others, as with child protection.

Dr Starr: We say in our submission that we are concerned that there is no maximum number of people a local authority could co-opt on to an adult protection committee. As has been mentioned, local authorities may well be involved in part of the care structure that is being investigated. Given that, it is unreasonable for a local authority to have the power to co-opt a number of members that could outnumber those who are members by right. We felt that a limit was appropriate.

The Convener: We can explore that.

Does Helen Eadie have another question?

Helen Eadie: I will stick with inquiries and investigations. What level of evidence would trigger a formal investigation? That is a bit of a judgment call.

15:45

Paddy Healy: One of the things that I have been looking at, and about which I am currently writing a proposal, is identifying appropriate predictors of what might warrant a carer or a service becoming involved. Predictors would be a means of being proactive rather than reactive. The research has already clearly identified a number of likely predictors that, if a person is scoring highly on them, should put up a flag for a service provider. I am advocating a screening tool that would indicate that services need to investigate further if people are scoring highly. It would be at that point that social work colleagues would be able to say that there was definitely a case for intervention, but it seems to me that there are already predictors, in certain situations, that show that people are likely to be at risk of abuse. One way of deciding the trigger would be to look at the predictors.

The Convener: That, frankly, was as clear as mud to me. It does not actually tell me anything. Unless we get into a long explanation of what predictors are and how they are arrived at, I do not find that particularly helpful and it seems that other members feel the same. Is there a better explanation of what that all means?

Paddy Healy: If you are asking what would trigger me to go in to investigate something happening, then something would need to happen.

For instance, if a nurse went in to do a nursing assessment and found as part of that assessment that there were things that needed to be looked for that would indicate that some kind of abuse was going on, the nurse could use that information to make other services aware that abuse could be going on in that situation.

The Convener: What about if a neighbour phones up? That is what we are really trying to get at. What level of flagging up by anybody, officially or unofficially, is liable to trigger an intervention? There is a danger that it could become a mechanism by which a lot of busybodies get involved, but sometimes busybodies save communities and save people. I think that you know what I am trying to say. At what level do you actually go in officially? What might actually bring that on us?

Alex Davidson: Ronnie Barnes might want to comment on that. We did some work across Scottish local authorities to review issues arising from the Borders inquiry and to look at people whom we deemed vulnerable, with a question mark about what that meant, and we now have a fair bit of evidence about what that means.

I can give an example from my own patch of what a normal route might be. A local councillor came and told me about a family that he knew. He had had some advice from neighbours that their daughter had been seen raiding dustbins looking for food, had not been well dressed and looked quite dishevelled. There was a degree of poverty about the household and I found out when I talked to housing officers that there had been some concerns about the quality of the environment there. We listened to what other professionals, including the local GP and nursing staff, had to say—and it can sometimes be difficult to get that evidence—but there was a degree of nous involved in dealing with the case, and I suspected that much more was wrong than simply that the family were not eating well.

When we finally managed to get entry to the house, by a long and convoluted process, we found the mother's health deteriorating—in fact, she died soon afterwards—and we were forced to respond to have the young woman rescued from what she was involved in. We subsequently found that she had been sexually abused and that there had been financial exploitation. When we got the initial information about that family and when we rounded up what we knew about the circumstances of that young woman and her mother, I had a sense that something was not right in that household.

That is one example and we could give you many others from the auditing that we have done in each local authority in Scotland on the back of the Borders report. We do not have a touch on families' lives because we are not providing services. We do not know what is happening behind people's doors. A social worker will begin to weigh up with others the anecdotal evidence that comes in and get a sense of what they know, which enables them to take the next step. It is not a science, but there is a form of art about it. People begin to understand that, and I suppose that that is what has happened in child protection. People begin to develop the skills of understanding what is happening and recognising the indicators. That is the kind of work that is being done. For instance, we now know the indicators of child sexual abuse and we can see schools, education services and other authorities beginning to understand that world. That is what we do.

Ronnie Barnes: We are already building up a body of knowledge and expertise about what we now call adult protection. Ten years ago, most local authorities operated within what we called elder abuse guidelines. In my day job, we started to think that we needed to review that title because we were talking not only about older people but all vulnerable adults. In England at that time, the Department of Health published "No secrets: guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse", which compelled all local authorities and health authorities to work together on interagency practices and protocols on adult protection. From that, the same situation has emerged in Scotland. The bill will crystallise what people are beginning to develop already. In the Lothians and Borders, where I work, we already have interagency guidelines and are already involved in such work. We are looking forward to the bill giving us the additional powers that will enable us to act in situations in which we cannot act at the moment.

I can think of a case in which we tried to gain access to an older woman living with her son, who repeatedly refused access. When we finally got through the door, we found that the old woman was dead on the floor and covered with blankets. Can you imagine what that was like for the social worker who was involved? They did not have the powers to intervene and get through the door at an earlier stage. If you want it to be put graphically, the new powers will ensure that there are fewer such circumstances rather than more of them. That is at the extreme, but the extremes are important to know.

Mr Duncan McNeil (Greenock and Inverclyde) (Lab): Does the bill give more than just greater access? Does it give the opportunities that Paddy Healy mentioned as part of child protection assessment? In the examples that have been given, access was not enough, because it always happened too late, when the abuse had occurred and the vulnerable person was raking through the

bins. Will the bill be more effective than just providing greater access? Will vulnerability become part of assessment? If there are any obvious signs of financial, physical or other abuse, will there be an assessment not only of a person's physical needs in and around the house, but of their vulnerability and whether they need protection? At what point will that take place?

Ronnie Barnes: Good practice that enables us to avoid some such circumstances already exists in what we now call adult protection. To point up the need for the bill, we are talking about the extreme circumstances in which legislation is needed. There will always be extreme circumstances, but that does not take away from the good, solid practice that improves people's lives simply through the work that is already going on. The fact is that there is a limit and the bill will allow us to go beyond the current limit.

Dr Simpson: The bill authorises access to health records. At present, the guidance on medical records from the General Medical Council is that we should not share information with other organisations unless there is a justification for doing so and vulnerable adults policies provide a justification. The guidance also states that we should normally have the consent of the person whose records they are, but in many situations of vulnerability we cannot obtain consent. At present, many doctors are uncertain about whether they have any legal protection for sharing medical records with their social work colleagues and the fact that the bill provides statutory authorisation to do so will be helpful for doctors.

The Convener: I thank the witnesses for giving evidence. As I say to everybody else, if anything that you wish you had communicated occurs to you afterwards, please get in touch with the committee clerks, who will ensure that we are apprised of it.

We can deal with agenda item 3 fairly quickly. There is a paper from the clerks on the committee's future approach to considering the bill. It includes a revised schedule of meetings and witnesses and the arrangements for our fact-finding visits on 19 September, when committee members will meet those who might be determined to be adults at risk of abuse. I do not want the committee to discuss those meetings, but to agree the paper or raise questions about what is outlined. If committee members have no questions about the paper, are they agreed that the meetings and witnesses should be as indicated in the paper?

Members *indicated agreement*.

The Convener: That ends the committee's business in public. I ask the people who are in the public gallery to leave and ask for the sound system to be switched off so that we can move into private.

15:56

Meeting continued in private until 16:44.

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