HEALTH COMMITTEE

Tuesday 19 December 2006

Session 2

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CONTENTS

Tuesday 19 December 2006

HEALTH COMMITTEE
29th 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)
Dave Petrie (Highlands and Islands) (Con)
Margaret Smith (Edinburgh West) (LD)
Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Barbara Brown (Scottish Executive Justice Department)
Lewis Macdonald (Deputy Minister for Health and Community Care)

CLERKS TO THE COMMITTEE

Karen O'Hanlon
Simon Watkins

ASSISTANT CLERK

David Simpson

LOCATION

Committee Room 4

Scottish Parliament

Health Committee

Tuesday 19 December 2006

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

Subordinate Legislation

Health Protection Agency (Scottish Health Functions) Order 2006 (SSI 2006/559)

Feeding Stuffs (Scotland) and the Feed (Hygiene and Enforcement) (Scotland) Amendment Regulations 2006 (SSI 2006/578)

Fishery Products (Official Controls Charges) (Scotland) Regulations 2006 (SSI 2006/579)

Meat (Official Controls Charges) (Scotland) Regulations 2006 (SSI 2006/580)

The Convener (Roseanna Cunningham): Good afternoon, everybody, and welcome to this afternoon's meeting of the Health Committee. We have received no apologies.

We are asked to consider four negative instruments. The Subordinate Legislation Committee raised no points on the instruments, no comments have been received from committee members and no motions to annul have been lodged. Do members agree that the committee does not wish to make any recommendation on the instruments?

Members *indicated agreement*.

Adult Support and Protection (Scotland) Bill: Stage 2

14:01

The Convener: We will hear evidence this afternoon from the Deputy Minister for Health and Community Care on Executive amendments to parts 2 to 4 of the Adult Support and Protection (Scotland) Bill. As members are aware, the deputy minister has lodged a number of amendments to parts 2 to 4 that introduce significant material that was not discussed by the committee during stage 1 consideration. The prize for the longest-ever amendment in the history of the Scottish Parliament goes to the Executive for its amendment 107, which is a 15-page amendment to part 2 of the bill. It proposes to replace totally part 3 of the Adults with Incapacity (Scotland) Act 2000, which deals with the financial affairs of an adult with incapacity. I hope that everybody has caught up with what amendment 107 is about.

In order for the committee to be briefed fully on the content of the amendments, we have arranged an evidence session with the deputy minister; we will then go on immediately to consider formally parts 2 to 4 of the bill. I welcome to the meeting the deputy minister, who has brought assorted officials with him. Members will note that we are not bothering with nameplates for the officials. If the minister wishes one of them to comment, I ask him to introduce them at that point. I understand that he wants to pause briefly between his explanation of the amendments to part 2 and his explanation of the amendments to part 3 to swap over the assorted officials—that will be fine. Members will have an opportunity to ask the deputy minister questions after each of his explanations, rather than save them all up to the end.

Lewis Macdonald (Deputy Minister for Health and Community Care): I am grateful for the opportunity to offer some explanation. The focus of discussion on the Adult Support and Protection (Scotland) Bill at stage 1 was very much on part 1, which the committee dealt with at stage 2 last week. However, the content of the other parts of the bill is also important, and I was grateful for the committee's general support for that content at stage 1.

Most of what I want to say is about part 2 of the bill, which deals with the Adults with Incapacity (Scotland) Act 2000. That significant piece of legislation was one of the first acts passed by the Scottish Parliament. I know that the convener, Kate Maclean and Euan Robson were all involved with the 2000 act as members of the relevant committee at the time. Through the changes proposed in the Adult Support and Protection

(Scotland) Bill, we seek to ensure that the 2000 act meets fully its objectives to protect adults who lack capacity and to support their families and carers. There is nothing in either the bill as introduced or today's amendments that deviates from those policy intentions. Indeed, the aim is to simplify and streamline the 2000 act's provisions and to improve access to them.

I will comment in a moment on the long amendment 107, which the convener mentioned. It seeks to replace part 3 of the 2000 act, so it is clearly an important amendment, but there are important provisions in our other amendments too, a number of which relate to part 2 of the 2000 act, on powers of attorney. There is no need for major changes to those powers, but the bill contains a number of procedural refinements and we have lodged further amendments in a similar vein. They clarify that only a solicitor who is in practice can sign the certificate that is to accompany registration of a welfare or continuing power of attorney, and they add a requirement for a similar certificate to accompany a document that revokes a power of attorney. That will provide confirmation that the person understands what he or she is doing and will streamline the process for notifying powers of attorney to the Mental Welfare Commission for Scotland and local authorities. The need for streamlining stems simply from the large number of powers of attorney that are being registered. There have been more than 18,000 so far this year, which is a good measure of the success of the 2000 act, but we need to streamline the process as far as possible.

The second set of amendments is on the intromission with funds scheme in part 3 of the 2000 act. As you mentioned, convener, amendment 107 appears rather daunting, but I hope that it does not daunt the committee too much. Its intention is to make the legislation easier to understand and to work with, both for the Parliament and for those who deal with the legislation in practical terms. Part 3 of the 2000 act allows an individual to apply to the public guardian for the authority to access funds for an adult's day-to-day living expenses. The application is supported by a medical certificate that confirms the adult's incapacity to make decisions about funds. The public guardian gives the applicant a certificate of authority, which sets out how much money can be accessed and for what purposes.

I am sure that members agree that that innovative scheme was intended as a way of helping many adults of modest means to manage day-to-day living expenses. In practice, however, take-up has been lower than expected. The bill seeks to change the scheme to make it easier to use. The amendments add to the changes that are made by sections 54 to 59 of the bill, which include more flexible arrangements for countersigning applications; more flexibility for the public guardian to authorise movement of an adult's funds between different accounts; the power for the public guardian to authorise banks to release information about an adult's account to enable an application to be progressed; the extension of the scheme to include organisations as well as individuals, which will help adults who do not have immediate family or friends to help; provision for joint and reserve withdrawers; and streamlined arrangements for renewal and for the transition from full financial guardianship to the scheme.

Those changes to part 3 of the 2000 act were in the bill as introduced, so the committee has already considered them at stage 1. I am sure that members agree that they form a substantial raft of provisions. They are all reincorporated in amendment 107. The committee has an explanatory note on amendment 107, which identifies both the provisions that are already in the bill and the new provisions in amendment 107, which contains a redraft of part 3 of the 2000 act.

The effect of the first new provision is to authorise the opening of a new account in the adult's name when either they do not have an account or their account is not suitable for the required purpose. That is key to improving access to the scheme. We made it clear in the policy memorandum that we would lodge such an amendment at stage 2. The new provision avoids the need for an application to be made to the sheriff to have an account opened.

Amendment 107 also seeks to refine the provisions that allow organisations to apply for authority under part 3 of the 2000 act. In particular, it removes the requirement for an organisation to have an "authorised office"—experience suggests that that is operationally unnecessary and unhelpful. The amendment also removes the provision that ministers may make regulations that specify the matters on which an organisation must satisfy the public guardian. Again, we do not think that that provision is helpful. Instead, we will include a general provision to the effect that the public guardian must be satisfied that an applicant is a fit and proper person to intromit with an adult's funds. We will be able to issue guidance for the public guardian on how she should use her discretion in that matter.

The amendment expands the provisions dealing with the withdrawal and transfer of funds, to ensure greater flexibility and to make it clear that authority can be given to deal with standing orders and direct debits in an adult's account. Those are very practical provisions. The amendment also contains a new provision that allows the public guardian to authorise the use of a third account for

withdrawals and transfers so as to make the best use of an adult's money.

When we introduced the bill, we included a range of changes to part 3 of the Adults with Incapacity (Scotland) Act 2000, and we acknowledged that we needed to do something to make part 3 more accessible and to encourage take up. We then wanted to make further amendments. When we considered the totality of those amendments, it seemed sensible to take the opportunity to leave out the provisions in the Adult Support and Protection (Scotland) Bill that were intended to amend part 3 of the 2000 act, and to replace the whole of part 3 of the 2000 act with a newly drafted part 3, which we hope is more accessible and comprehensible. If we had cobbled the amendments together, a person reading the legislation would have had to go through several different sources of information. In essence, that is what amendment 107 is about.

We have also lodged a number of procedural amendments to do with guardianship, which is covered by the provisions in part 6 of the 2000 act. I am happy to say more about any of our amendments if that would be helpful.

The Convener: Following that introduction to the amendments to part 2 of the bill, do members have any questions?

Euan Robson (Roxburgh and Berwickshire) (LD): I want to ask about the main amendment—amendment 107—and in particular about proposed new section 27A of the 2000 act, which deals with the countersigning of applications. Proposed new section 27A(1)(b)(iii) refers to

"a solicitor acting on behalf of the adult or any other person mentioned in this paragraph in relation to any matter under this Act",

but it does not refer to anybody employed by the solicitor. I think that I understand why the solicitor who is acting on behalf of the adult should not be involved, but does the present wording mean that the solicitor can simply call in their secretary, their junior clerk or whomever and say, "Sign this"?

I do not seek an instant answer—although, if there is an instant answer, that would be fine—but could the matter be looked into?

I also want to ask about proposed new section 27F, on the referral of an application to a sheriff. Subsection (2) of the proposed new section says that the sheriff's decision is final. Of course, a final decision has to be taken somewhere, but I presume that the proposed new provision has been checked against the requirements of the European convention on human rights.

Lewis Macdonald: The answer to your final question is yes—the subsection has been checked against the ECHR.

Barbara Brown is the branch head dealing with this policy and I ask her to answer your first question.

Barbara Brown (Scottish Executive Justice Department): I have to confess that we have not thought of the situation in which a solicitor has an employee who might want to countersign. However, the person who countersigns must know the applicant, and must have known them for more than a year. That is the important point. Perhaps I have not understood the question.

Euan Robson: The applicant will have been in and out of the office for more than a year—for 18 months, perhaps. An employee might therefore have met the applicant on a number of occasions and might be said to qualify as having known them for a year. However, it might be inappropriate for that employee of the solicitor to countersign. It is a small point, but perhaps you could take it away and consider it.

Barbara Brown: The person would have to say in their application how they had come to know the applicant. The public guardian would probably pick up that the person was an employee of the solicitor, and might raise a query.

14:15

The Convener: I understand that you wish to swap your officials round at this point, minister. I do not know how the officials feel about being dealt out like a hand of cards.

Lewis Macdonald: It is all part of our focus on increased physical activity, health and fitness in the civil service.

The Convener: I was actually wondering about the Health Department's salaries bill.

We now move on to evidence in respect of parts 3 and 4—I understand that the plan is to deal with them together. We will hear from the deputy minister first. If committee members wish to ask questions at the end, it would be useful if they caught my eye.

Lewis Macdonald: The existing legislation—the Mental Health (Care and Treatment) (Scotland) Act 2003—was groundbreaking legislation, as members know. There was no equivalent legislation in other parts of the United Kingdom at the time, and community-based orders, which were provided for in the 2003 act, did not have a parallel elsewhere in the UK. The 2003 act left in place the provisions of the UK Mental Health Act 1983 in relation to powers for escorting patients between jurisdictions until such time as new powers could be provided for in the legislation of other UK jurisdictions.

The opportunity is now being taken to amend the 2003 act to reflect the fact that UK ministers are taking through the Westminster Parliament the Mental Health Bill, which will deliver the necessary equivalent changes for England and Wales. That bill introduces provisions that will operate in a similar way to community-based compulsory treatment orders—CTOs—in Scotland under the 2003 act. We seek to amend the 2003 act to allow for the reception of patients subject to such orders upon their transfer into Scotland.

There is already a regulation-making power under section 309 of the 2003 act regarding absconding by patients who are subject to corresponding measures in other jurisdictions. However, the 2003 act requires to be amended in order to put beyond doubt the fact that the powers of the person, or persons, escorting the patient in other parts of the UK continue once they arrive in Scotland. Our intention is to allow for the co-ordination of amendments to mental health legislation in Scotland and elsewhere in the UK in relation to the cross-border escorting of patients.

Accordingly, other amendments provide for the repeal of the provisions of the 1983 act that are still in force in Scotland and which contain a power to take patients into custody. Instead, there will be a power for escorts to convey, retake and restrain patients, when required, as if the escorts were within their own jurisdiction. The offence of inducing or assisting a patient to abscond from another part of the UK will also be introduced. As a result of our amendments, which essentially constitute a tidying-up exercise, those measures will be provided for in Scottish legislation.

Other amendments deal with mentally disordered offenders, including prisoners on remand, who are made subject to an assessment order if the court considers it likely that they have a mental disorder and might be in need of hospital treatment. A problem was identified with the practice around the existing provisions, the effect of which is to require such a prisoner, in summary proceedings, to plead at their first appearance in court despite the fact that they might not be medically fit to do so. The provisions of amendment 129 are intended to address those circumstances. The court will be able to adjourn the first calling without calling on the accused to plead at that stage.

Amendment 101 relates to the criteria for the discharge back to prison of patients who are on hospital directions and transfer for treatment directions. That amendment is a further tidying-up exercise to ensure that, if a prisoner can be treated and can continue to accept medication in prison, that should be provided for, rather than unnecessarily keeping them in a hospital setting when it is no longer required.

Our amendments contain tidying-up or streamlining measures, reflecting the fact that legislation elsewhere in the United Kingdom is changing, as well as taking account of lessons learned from practice since the 2003 act came into force.

The Convener: Thank you for that, minister. There are no questions. That concludes that evidence-taking session. I understand that you need to swap some of your officials over again. We will allow a few minutes for that before moving on to the next item on the agenda.

Item 3 is day 2 of our consideration of the Adult Support and Protection (Scotland) Bill at stage 2. We have set a deadline of dealing with parts 2 to 4 today, which will complete our consideration of the bill at stage 2. I will not rewelcome everyone, but the minister might like to introduce the officials who are with him.

Lewis Macdonald: I am happy to do so. Barbara Brown, who has spoken already, is head of the relevant branch in the civil justice division and Frances MacQueen deals with policy in the same area. Matt Lynch is a parliamentary draftsman and Alison Fraser is from the office of the solicitor to the Scottish Executive.

Sections 51 and 52 agreed to.

Section 53—Powers of attorney

The Convener: Group 25 relates to powers of attorney and certificates by solicitors. Amendment 82, in the name of the minister, is grouped with amendments 83 to 89 and 93.

Lewis Macdonald: Given that I mentioned the purpose of the amendments in this group in my earlier remarks, I will be fairly brief. Among other things, they will provide that a continuing or welfare power of attorney must incorporate a certificate in the prescribed form by a solicitor or by another member of a prescribed class. They will put it beyond doubt that, for the purpose of providing a certificate under sections 15 and 16 of the Adults with Incapacity (Scotland) Act 2000, a solicitor must be someone who is eligible to practise in Scotland under section 4 of the Solicitors (Scotland) Act 1980.

I move amendment 82.

Amendment 82 agreed to.

Amendments 83 to 89 moved—[Lewis Macdonald]—and agreed to.

The Convener: We move to group 26, which is on consent to medical treatment. Amendment 90, in the name of the minister, is grouped with amendments 96 and 106.

Lewis Macdonald: Amendments 90, 96 and 106 relate to schedule 2's repeal of section 47(8) of the 2000 act and consequential amendments to sections 53(2)(c) and 61(4) of the bill. The amendments are clarificatory and seek to put it beyond doubt that an attorney or a guardian cannot consent to treatment that is not authorised under section 47(2) of the 2000 act. The amendments will not alter the current position; they will simply clarify it. Amendment 106 is intended to improve the readability of section 47(2) of the 2000 act.

I move amendment 90.

Amendment 90 agreed to.

The Convener: We move to group 27, which is on powers of attorney, notification and revocation. Amendment 91, in the name of the minister, is grouped with amendment 92.

Lewis Macdonald: Amendment 91 relates to section 53, which amends section 19(2) of the 2000 act, which sets out that the public guardian should notify the Mental Welfare Commission for Scotland and the relevant local authority of the registration of a welfare power of attorney. At the moment, a copy of that power of attorney should be sent to the Mental Welfare Commission. Amendment 91 will ensure that one will also be sent to the local authority and, because of the sheer number of powers of attorney, will provide that that can be done electronically rather than in hard copy, although a hard copy will be sent if requested.

Amendment 92 makes a change that relates to the revocation of powers of attorney, so that some consistency can be achieved in that area.

I move amendment 91.

Amendment 91 agreed to.

Amendments 92 and 93 moved—[Lewis Macdonald]—and agreed to.

Section 53, as amended, agreed to.

Section 54—Applications for authority to intromit with funds

The Convener: Group 28 is on revision of part 3 of the Adults with Incapacity (Scotland) Act 2000, accounts and funds. As I have been reminded, the group contains the big amendment 107, in the name of the minister, which is grouped with amendments 108 to 112.

Lewis Macdonald: As has been said, the amendments will replace part 3 of the 2000 act, which allows an individual to apply to the public guardian for the authority to access funds for an adult's day-to-day living expenses. As I have mentioned, we seek to break down barriers to greater uptake of the facility for people to access the scheme and to intromit with funds. The bill goes some of the way down that road, but amendment 107 will add to that by comprehensively redrafting part 3 of the 2000 act. The other amendments in the group will simply remove from the bill existing provisions that relate to part 3 of the 2000 act.

I move amendment 107.

Amendment 107 agreed to.

Section 54, as amended, agreed to.

Section 55—Removal of restrictions on divulging information about incapable adult's funds

Amendment 108 moved—[Lewis Macdonald]—and agreed to.

Section 56—Joint and reserve withdrawers

Amendment 109 moved—[Lewis Macdonald]—and agreed to.

Section 57—Renewal of authority to intromit with funds

Amendment 110 moved—[Lewis Macdonald]—and agreed to.

Section 58—Withdrawal and transfer of funds

Amendment 111 moved—[Lewis Macdonald]—and agreed to.

Section 59—Transition from guardian to withdrawer

Amendment 112 moved—[Lewis Macdonald]—and agreed to.

Section 60—Intervention orders

The Convener: Group 29 is on guardianship and intervention hearings. Amendment 132, in the name of Shona Robison, is grouped with amendment 136.

Shona Robison (Dundee East) (SNP): The two amendments relate to the independent advocate's role and would give them the right in statute to be present at guardianship hearings. In the Mental Health (Care and Treatment) (Scotland) Act 2003, the independent advocate's role is recognised and, in general, extends to participation in tribunals. However, such basic provision does not exist in the 2000 act and sheriffs sometimes deny independent advocates representation of patients at guardianship hearings. That was brought to my attention by Dundee Independent Advocacy Support, for which I thank it. Several cases were referred to that service—some at the behest of the Mental Welfare Commission for Scotland—and it

was asked to support patients in respect of whom a guardianship application was being made. The process became problematic when, having supported the patient up to the hearing stage, the service was not considered to have a locus in proceedings.

The 2000 act's code of practice says that it is good practice to involve an independent advocacy project to represent the adult's interests in their assessment and care management. However, that is only in the code of practice and evidence shows that it is not happening at some hearings. That is the basis for the amendments, which would put into statute the right of the advocate to be present, to ensure that it is not left to the discretion of the sheriff.

I move amendment 132.

14:30

Lewis Macdonald: I am interested in Shona Robison's account of experience and practice. I was not aware of the information that she has given.

Shona Robison mentioned the code of practice, which is important. It is also important to say that section 1 of the Adults with Incapacity (Scotland) Act 2000 contains the fundamental principle that any views that the adult is able to express are taken account of in proceedings that affect them. As we discussed last week, section 2 of the bill lays out the same fundamental principle. Our view is that that principle means that the sheriff is already obliged in an application for an intervention or guardianship order to take account of any view that the adult has expressed.

Under section 3 of the 2000 act, the sheriff must consider whether someone should be appointed to safeguard the interests of the adult with incapacity, and the duties of the safeguarder include conveying the views of the adult to the sheriff. In addition, there is a further power in section 3 of the 2000 act to appoint someone else in addition to the safeguarder specifically to convey the adult's views.

In our view, the existing legislation already contains what is required to ensure that the adult's views are taken into account. However, I acknowledge that what Shona Robison is suggesting might clarify the position by drawing attention to the possibility of the adult taking advantage of the provisions to have an independent advocate. That might be helpful to the court, particularly where it has taken a different course. On that basis, I am happy to accept Shona Robison's amendments.

Shona Robison: I am pleased that the minister has accepted the principle and agrees that there should be no room for misunderstanding and that everyone can be represented if they so wish.

Amendment 132 agreed to.

The Convener: We come to group 30, which relates to guardianship and intervention orders. I caution everybody that "caution" is pronounced "cayshun". Amendment 113, in the name of the minister, is grouped with amendments 114, 117 to 120 and 123 to 125.

Lewis Macdonald: I might be tempted to say that the amendments are about "not caution", because they are intended to allow a sheriff to permit forms of security other than caution to be deposited with the public guardian. In guardianship and intervention orders, a sheriff might require the intervener or guardian to take out insurance known as a bond of caution to safeguard the estate of the adult from any loss due to the actions of the guardian or intervener. That can be quite expensive, and when the value of the estate is small the cost can be disproportionate. In some situations, another form of security, such as the guardian consigning a sum of money into court, would be acceptable, particularly in cases where the estate is not large. Amendment 113 will allow that to happen.

I move amendment 113.

Amendment 113 agreed to.

Amendment 114 moved—[Lewis Macdonald]—and agreed to.

Section 60, as amended, agreed to.

Section 61—Guardianship orders

The Convener: Group 31 is on guardianship orders and relates to reports and relevant medical practitioners. Amendment 94, in the name of the minister, is grouped with amendments 135 and 95.

Lewis Macdonald: Amendment 94 is a drafting amendment. It relates to a point that was made at stage 1—that the reference to "condition" in proposed new section 57(3B) of the Adults with Incapacity (Scotland) Act 2000, which would be introduced by section 61(1), is not entirely apt because an improvement in an adult's condition would not necessarily have an impact on their ability to make decisions on their own behalf.

Amendment 95 also responds to a point that was made at stage 1 and is essentially technical.

I suspect that Nanette Milne would concede that amendment 135 is essentially a drafting amendment, too. I am less happy with it, however, because what it is designed to do is not strictly necessary. The provision that the amendment would change deals with situations when an application is made in respect of an adult who is

not living in Scotland. For instance, a person might go to live abroad with members of their family but still have property in Scotland that needs to be managed. The bill will currently ensure that, in such a situation, the doctor who provides the medical report has proper qualifications that are recognised in the country where the adult is living and considered to be equivalent to qualifications that are recognised here. The use of the word "present" in the bill reflects that intention and is consistent with the drafting in proposed new section 57(6B) of the 2000 act, which deals with the situation in which an adult is "not present in Scotland". The point is that the doctor's qualifications need to be recognised in the place where the adult is living—the bill as drafted should cover that. On that basis, I hope that Nanette Milne will be content not to move amendment 135.

I move amendment 94.

Mrs Nanette Milne (North East Scotland) (Con): As the minister said, amendment 135 is designed to determine that, if the person is resident outwith Scotland, the medical practitioner should have qualifications in the place where the patient has been "examined and assessed".

The minister has given an assurance that that is covered by the bill, but the Law Society of Scotland has told me that that is probably not the case. The bill does not ensure that at least one of the practitioners holds qualifications that are recognised in the place where the adult is present, and the Law Society feels that it would be clearer, more precise and more relevant to ensure that the qualifications are held in the place where the adult is examined and assessed.

Lewis Macdonald: I reiterate that we would wish to resist amendment 135. In addition to the drafting point that I made, changing "present" to "examined and assessed" would change the emphasis from the place where the adult is living to the place where the examination occurs. In the vast majority of cases, they will be the same place, but we want to maintain the emphasis on the place of residence. Nanette Milne's amendment 135 would undermine that, so I continue to urge the committee to resist it.

The Convener: Let me just flag up to Nanette Milne that we will not vote on amendment 135 for a bit, so she can keep her decision in reserve.

Amendment 94 agreed to.

The Convener: We move to group 32, on guardianship orders and interim guardians. Amendment 133, in the name of Nanette Milne, is grouped with amendment 134.

Mrs Milne: Amendment 133 would allow extension of the appointment of an interim guardian by motion on cause shown, which would allow interim guardians to remain appointed when a guardian is not yet appointed and when the three-month appointment period that is currently specified has expired. At the moment, there is no provision to allow sheriffs to extend the appointment period of an interim guardian beyond three months. Sheriffs have drawn attention to the problems that will be caused by the lack of such a provision.

I move amendment 133.

Lewis Macdonald: I recognise the importance of the point that Nanette Milne makes, but the bill allows the maximum appointment period, which has been three months, to be extended to six months. We think that it is important that the arrangement should not be open-ended. We take the view that there should still be an upper limit and that people should not be left in an uncertain position for an indefinite period. I therefore ask Nanette Milne to seek to withdraw amendment 133 and not to move amendment 134, on the basis that the bill makes provision for a six-month maximum appointment period.

The Convener: I ask Nanette Milne to wind up and to say whether she will press or withdraw amendment 133.

Mrs Milne: I am reassured that there can be an extension beyond the three months that is currently allowed. It is fair enough to have a finite limit of six months. I seek to withdraw the amendment.

Amendment 133, by agreement, withdrawn.

Amendments 134 and 135 not moved.

Amendment 95 moved—[Lewis Macdonald]—and agreed to.

Amendment 136 moved—[Shona Robison]—and agreed to.

The Convener: Group 33 is on renewal of guardianship orders. Amendment 115, in the name of the minister, is grouped with amendment 137.

Lewis Macdonald: The amendments in group 33 are about streamlining the process for renewal of guardianship while ensuring that the adult's interests are still protected. The renewal process that is proposed in amendment 137 involves an application to the sheriff, in prescribed form, accompanied by a medical report, in prescribed form, of an examination and assessment that has been carried out not more than 30 days prior to the lodging of the renewal application form.

If the person's incapacity is by reason of mental disorder, the report should come from a medical practitioner who has experience in that field. For renewals of welfare guardianships, the application will also be accompanied by a report that has

been provided by a mental health officer or, in cases where the lack of capacity is due to the person's inability to communicate, by the chief social work officer. The report will give an opinion on the appropriateness of continuing the guardianship, which will include reference to the continuing suitability of the guardian.

For renewals of financial appointments, the application will be accompanied by a report by the public guardian, which will give an opinion on the conduct of the guardianship to date and on the continuing suitability of the guardian. A sheriff could, of course, make a decision without a hearing, but if the sheriff is not satisfied by the information that has been provided, he or she will still be able to call for further reports or to hold a hearing.

I move amendment 115.

Amendment 115 agreed to.

Amendments 137, 117, 118, 96, 119 and 120 moved—[Lewis Macdonald]—and agreed to.

The Convener: Group 34 is on recall of powers of the guardian. Amendment 121, in the name of the minister, is grouped with amendments 122 and 97.

Lewis Macdonald: The amendments in the group represent the other substantive change that we propose to make in relation to guardianship. Amendment 121 will remove the current prohibition on local authorities recalling a welfare guardianship when the chief social work officer is the guardian. The change will ensure that there are no barriers or delays in recalling guardianship when it is no longer needed. The local authority will be able to recall the guardianship at its own instance or on the application of another person.

14:45

Accompanying that, amendment 122 will ensure independent scrutiny of the process. The local authority will have to intimate the proposed recall to the Mental Welfare Commission and to the public guardian, as well as to the adult, the adult's nearest relative, their primary carer and anyone else who has an interest. If any objections are received, the local authority will have to remit the matter for consideration by a sheriff. Amendment 97, which is related, will address an unintended consequence of a provision in proposed new section 75A of the 2000 act.

I move amendment 121.

Euan Robson: With regard to amendment 122, which will mean that objections trigger a referral to the sheriff, I presume that nothing is implied that suggests that there cannot be negotiation if an objection is received.

Lewis Macdonald: Nothing would prevent a discussion to avoid the process leading automatically to a referral.

Amendment 121 agreed to.

The Convener: I remind members that the process is not really about questions and answers to the minister. If committee members wish to make a contribution, it should be a contribution to a debate and not to a question-and-answer session. The minister may deal with any points that are raised when he winds up.

Amendments 122 to 124, 97 and 125, in the name of the minister, have all been debated.

Lewis Macdonald: Moved.

The Convener: You are a little fast, minister. I was just about to invite you to move the amendments en bloc.

Amendments 122 to 124, 97 and 125 moved—[Lewis Macdonald]—and agreed to.

The Convener: Group 35 is on transitional guardians. Amendment 138, in the name of Nanette Milne, is grouped with amendment 98.

Mrs Milne: Amendment 138 aims to avoid the risk that some adults may lose their guardians because the requirement to renew is not specifically drawn to the guardian's attention, and also to acknowledge that guardianship exists for the benefit of the adult rather than for the benefit of the guardian.

Originally, it was proposed that transitional guardianships would be time limited, but that was not provided for in the Adults with Incapacity (Scotland) Act 2000. Transitional guardians were generally aware that appointments continued as guardianships under the 2000 act, because there was publicity about that. Their correct understanding at present is that the appointments will continue indefinitely, sometimes for the lifetime of the person to whom the guardianship applies.

There are good policy reasons for the introduction of a time limit. A problem should not arise in relation to financial appointments, which are under the supervision of the office of the public guardian, which can be relied on to notify transitional financial guardians of their renewal requirements. However, there is cause for concern in relation to guardians who have welfare, rather than financial, powers. Although under the 2000 act, those guardians ought to be under the supervision of local authorities, some have little or no contact with the relevant local authority and it is not certain that authorities have recorded properly all such transitional welfare appointments. The practical purpose of amendment 138 is to ensure that all transitional guardians, including those who have welfare responsibilities, are told about the

change, and to ensure that no adult who needs a guardian inadvertently loses their guardian because of a failure to notify. Such a situation would contravene the basic purpose of the 2000 act, which is to ensure that adequate provision and protection are in place for adults with incapacity who require them.

I move amendment 138.

Lewis Macdonald: I accept the purpose behind amendment 138, but I am not sure that, technically, it would achieve what is intended. I am sure that the intention is that the public guardian, in the case of financial guardianships, and the local authority, in the case of welfare guardianships, will do the notifying, but that is not entirely clear. Also, the amendment refers to a

"person who has become a guardian to an adult by virtue of this schedule",

which is slightly ambiguous. I suspect that only guardians who are still guardians under mechanisms that date from before the 2000 act came into force are intended to be covered, but that is not entirely clear from the drafting.

If Nanette Milne is prepared to seek leave to withdraw amendment 138 today, I will be happy to lodge an alternative at stage 3. I think that we can draft an amendment that will technically achieve the objectives that Nanette Milne has set out to achieve.

Mrs Milne: The point needs to be addressed. However, in view of what the minister has said, I seek leave to withdraw amendment 138.

Amendment 138, by agreement, withdrawn.

Lewis Macdonald: Do I require to move amendment 98 now, convener? It is in the same group.

The Convener: If you will just let me get there, minister. I thought that I was going pretty fast, but you are trying to go faster.

Amendment 98 moved—[Lewis Macdonald]—and agreed to.

Section 61, as amended, agreed to.

After section 61

The Convener: Group 36 is on the public guardian's power to obtain records. Amendment 99, in the name of the minister, is the only amendment in the group.

Lewis Macdonald: Amendment 99 will strengthen the public guardian's powers to investigate complaints about proxies under the 2000 act and to look into circumstances where the property or financial affairs of an adult seem to be at risk. It will give the public guardian power to require proxies or former proxies to provide their records or other relevant information and it will require banks and other financial institutions to provide relevant information.

I move amendment 99.

Amendment 99 agreed to.

Sections 62 and 63 agreed to.

Section 64—Adjustments between councils in relation to social services etc

The Convener: We move to group 37, which is minor technical amendments. Amendment 100, in the name of the minister, is grouped with amendments 39, 40, 130, 27, 102 to 104 and 41 to 43.

Lewis Macdonald: The amendments in the group are as the convener described them. If required to do so, I will be happy to elaborate on any of them.

I move amendment 100.

Amendment 100 agreed to.

Section 64, as amended, agreed to.

Sections 65 to 67 agreed to.

After section 67

The Convener: Group 38 is on revocation of hospital directions and transfer for treatment directions. Amendment 101, in the name of the minister, is the only amendment in the group.

Lewis Macdonald: We move on to the part of the bill that relates to mental health. There may therefore have to be a slight reshuffling of staff.

The Convener: I am sorry, minister. Please go ahead.

Lewis Macdonald: As the convener said, amendment 101 relates to the revocation of hospital directions and transfer for treatment directions. It will add an additional test to the criteria for revocation in circumstances where the decision maker is not satisfied that it continues to be necessary for the patient to be subject to the direction. The effect of the new test will be that, where the patient has a mental disorder and continues to require treatment, and where it is not necessary to detain the patient in hospital in order to protect any other person, the direction can be revoked. The patient may then be returned to prison to be treated on a voluntary basis. If, subsequent to the prisoner's being returned to prison from hospital, his or her mental health deteriorates, he or she may be transferred back to hospital for treatment. In such cases, the conditions for making another transfer for treatment direction will have to be met.

I move amendment 101.

Amendment 101 agreed to.

The Convener: Group 39 is on compulsory treatment orders and compulsion orders in relation to cross-border transfers and visits. Amendment 126, in the name of the minister, is grouped with amendment 127.

Lewis Macdonald: In our earlier discussions, I touched on the purpose behind the amendments in the group. On that basis, I am content simply to move the amendments in the group.

I move amendment 126.

Amendment 126 agreed to.

Amendment 127 moved—[Lewis Macdonald]—and agreed to.

The Convener: Group 40 is on patients absent from hospital. Amendment 128, in the name of the minister, is grouped with amendment 131.

Lewis Macdonald: Again, convener, these are consequential amendments that will repeal provisions in the Mental Health Act 1983 as they apply to Scotland, and they relate to the matters we have dealt with previously.

I move amendment 128.

Amendment 128 agreed to.

The Convener: Group 41 is on assessment orders and the adjournment of criminal proceedings. Amendment 129, in the name of the minister, is the only amendment in the group.

Lewis Macdonald: Amendment 129 relates to prisoners on remand who are made subject to an assessment order if the court considers it is likely that they have a mental disorder and might need hospital treatment. The Criminal Procedure (Scotland) Act 1995 allows a court at the first calling of a summary prosecution the option of adjourning the first calling without calling on the accused to plead out to any charges against them. A problem has been identified in practice with the provisions as they relate to a person who is subject to an assessment order, which is that the person is required to plead at first appearance even although they might not be fit to do so. The effect of amendment 129 will be that the first calling for a person for whom an assessment order is made under the 1995 act may be adjourned without plea in those circumstances.

I move amendment 129.

Amendment 129 agreed to.

Sections 68 and 69 agreed to.

Schedule 1

MINOR AND CONSEQUENTIAL AMENDMENTS

The Convener: Amendments 39, 40, 130, 27, 102, 103 and 104 are all in the name of the minister and have all been debated.

Lewis Macdonald: Moved.

The Convener: Not yet! I think the minister has his go-faster stripes on today. I invite the minister to move the amendments en bloc.

Amendments 39, 40, 130, 27 and 102 to 104 moved—[Lewis Macdonald]—and agreed to.

The Convener: Amendment 139, in the name of Nanette Milne, is grouped with amendments 140 and 105.

Mrs Milne: The amendments in the group are technical. Amendments 139 and 140 would add two extra paragraphs—(e) and (f)—to schedule 3. They seek to achieve consistency with the other provisions of the Adults with Incapacity (Scotland) Act 2000, and to avoid the risk of creating an unwanted category of attorneys who may continue to act without being subject to any of the provisions of the 2000 act. The amendments seek to substitute the terms in paragraph 4 of schedule 4 of the Adults with Incapacity (Scotland) Act 2000, which deals with the creation of attorneys. The current provisions of the 2000 act give rise to a risk that an unwanted category of attorneys may be created and that they may continue to act without being subject to any of the provisions of the 2000 act. Those provisions should be amended to ensure that that does not happen, and to achieve consistency with the other provisions of the act.

I move amendment 139.

Lewis Macdonald: Amendment 105 is a purely technical amendment that will clarify part of the transitional provisions of the 2000 act.

Amendments 139 and 140 also relate to transitional provisions but we wish to resist them because we think that the provisions were and are clear, and that there has, as far as I am aware, been no difficulty with the provisions relating to pre-2000 act attorneys. They have already had an effect, and nothing is to be gained by retrospective amendment to transitional provisions that have already had effect. There is therefore a risk of unintended consequences. I ask Nanette Milne to seek leave to withdraw amendment 139 and not to move amendment 140.

15:00

Mrs Milne: As I said before, I am no lawyer but I have been persuaded that there is a difficulty, so despite what the minister has said, I will press amendment 139.

The Convener: The question is, that amendment 139 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

FOR

Cunningham, Roseanna (Perth) (SNP)
Milne, Mrs Nanette (North East Scotland) (Con)
Robison, Shona (Dundee East) (SNP)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)

AGAINST

Eadie, Helen (Dunfermline East) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
Maclean, Kate (Dundee West) (Lab)
Robson, Euan (Roxburgh and Berwickshire) (LD)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 139 disagreed to.

Amendment 140 not moved.

Amendment 105 moved—[Lewis Macdonald]—and agreed to.

Schedule 1, as amended, agreed to.

Schedule 2

REPEALS

Amendments 41, 131, 42, 106 and 43 moved—[Lewis Macdonald]—and agreed to.

Schedule 2, as amended, agreed to.

Section 70—Orders

Amendment 44 moved—[Lewis Macdonald]—and agreed to.

Section 70, as amended, agreed.

Sections 71 and 72 agreed to.

Long Title

Amendments 28 and 29 moved—[Lewis Macdonald]—and agreed to.

Long title, as amended, agreed to.

The Convener: I am happy to say that that concludes stage 2 of the Adult Support and Protection (Scotland) Bill. All that remains is for me to wish everyone a happy Christmas and a good new year. I will see you all back here after the recess.

Meeting closed at 15:02.

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