JUSTICE AND HOME AFFAIRS COMMITTEE

Wednesday 19 January 2000
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
2nd Meeting 2000 (Committee Room 1)

CONVENER:

*Roseanna Cunningham (Perth) (SNP)

DEPUTY CONVENER:

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS:

*Scott Barrie (Dunfermline West) (Lab)
*Phil Gallie (South of Scotland) (Con)
*Christine Grahame (South of Scotland) (SNP)
*Mrs Lyndsay McIntosh (Central Scotland) (Con)
*Kate MacLean (Dundee West) (Lab)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Pauline McNeill (Glasgow Kelvin) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Euan Robson (Roxburgh and Berwickshire) (LD)

*attended

THE FOLLOWING MEMBERS ALSO ATTENDED:

Dorothy-Grace Elder (Glasgow) (SNP)
Iain Gray (Deputy Minister for Community Care)
Angus MacKay (Deputy Minister for Justice)
Dr Richard Simpson (Ochil) (Lab)

COMMITTEE CLERK:

Andrew Mylne

SENIOR ASSISTANT CLERK:

Shelagh McKinlay

ASSISTANT CLERK:

Fiona Groves

Scottish Parliament

Justice and Home Affairs Committee

Wednesday 19 January 2000

(*Morning*)

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

The Convener (Roseanna Cunningham): I welcome everyone, including those who are not usually at the Justice and Home Affairs Committee. This is the first meeting of stage 2 of the Adults with Incapacity (Scotland) Bill.

I welcome to the committee Michael Matheson who, by a motion last week, is on the committee in the place of Tricia Marwick. This is his first attendance; no doubt he will soon wish he had not asked to join.

Adults with Incapacity (Scotland) Bill: Stage 2

The Convener: I should explain how we are dealing with stage 2 of the bill as this stage is new to most people. Members should have before them a copy of the bill, the marshalled list of amendments that was published this morning and the suggested groupings of the amendments. Please check that you have those papers.

The amendments have been grouped to facilitate debate. The order in which they are called and moved is dictated by the marshalled list. Members will have to get used to working between the two papers. All amendments will be called in turn from the marshalled list and will be taken in that order. We cannot move backwards on the marshalled list. Once we have moved on that is it.

There will be one debate on each group of amendments. You can speak to your amendment if it is in that group, but there will be only one debate on the group. In some groups there may be several amendments; many may be technical amendments but some may be more substantive.

I will call the proposer of the first amendment in the group, who should speak to and move the amendment. I will then call other speakers, including the proposers of all amendments in the group. Please note that you should not actually move amendments at that stage.

I will call members to move the amendments at the appropriate time. Other members should indicate their wish to speak in the usual way. One of the deputy ministers will be called to speak on each group.

Following debate, I will clarify whether the member who moved the amendment still wishes to press it to a decision; if not, he or she may seek the agreement of the committee to withdraw it. If it is not withdrawn, I will put the question on the first amendment in the group. If any member disagrees, we will proceed to a division by a show of hands. It is important that members keep their hands raised until the clerk has fully recorded the vote. As Gordon Jackson's right arm is injured, he will have to use his left.

Only members of the Justice and Home Affairs Committee may vote. Other members of Parliament are here to speak to or move amendments today but they are not able to vote. At this stage of the proceedings, only members of the Justice and Home Affairs Committee can vote. If any member does not want to move their amendment, they should simply say "Not moved" when the amendment is called.

After we have debated the amendments, the committee must decide whether to agree to each section or schedule of the bill as a whole. Before I put the question on any section or schedule, I am happy to allow a short, general debate, which may be useful in allowing discussion of matters not raised in amendments. On the other hand, of course, members may feel that they have said enough. We do not have to have debates. People are entitled not to speak if they do not want to.

Members should be aware that the only way in which it is permitted to oppose agreement to a section is by lodging an amendment to leave out the section. Therefore, if members want to delete an entire section, they must have lodged an amendment that says that. A section cannot be opposed if such an amendment has not been lodged. No such amendments have been lodged. If any member wants to oppose the question that a section or schedule be agreed to, he or she has the option to propose a manuscript amendment. If that happens, it is my decision whether to allow that amendment to be taken.

I propose to call a short adjournment around the mid-point of the meeting. Partly for that reason, I will not delay any division to enable members who are not present in the chamber to return. If there is a division, we will go straight to a vote. We will not sit about waiting for anyone who has gone out. Committee members who choose to go out for whatever reason must do so on the understanding that if they miss a vote, that is their responsibility.

I hope that members have seen the announcement in yesterday's business bulletin which states that we will not go beyond the end of part 2 of the bill today. That is the furthest point—

at least in so far as we were aware on Monday afternoon—that it seemed reasonable that we might reach. In fact, it now looks unlikely that we will get that far.

Before we begin, it would be useful to know whether it would cause difficulty for any members who have not yet lodged amendments to part 2 if we get beyond part 1 of the bill. Is there anybody who thought that we would not get beyond part 1 who has not lodged part 2 amendments and is concerned? It appears not.

Having said all that, I think that we can probably move on.

Dr Richard Simpson (Ochil) (Lab): What procedure does one adopt to indicate that one does not agree with the groupings of amendments?

The Convener: The groupings are under my control. The decision was reached in conversation with the Executive and is final. There can be no challenge.

Dr Simpson: Is that the case even if there is an error in one of the amendments which means that it has been wrongly grouped?

The Convener: The decision has been taken and we must deal with the groupings that we have. The issue can be raised at the time of the groupings, but we are not going to change the groupings.

Dr Simpson: I would like, then, to record my regret, as amendment 126 in my name should have been under group 1 and not under group 4. There is an error in the line number, which may well have been my mistake. I do not want to imply in any way that the clerks are wrong. My amendment is to line 20, not line 21, and therefore refers to communication, under group 1, and falls into the categories with that group.

09:45

The Convener: Throughout the passage of the bill people will have to keep an eye on the amendments when they appear in the business bulletin. The amendments that we are considering today appeared in print on either Monday or Tuesday. Once lodged, amendments go into the business bulletin for the following day. Those who lodge amendments must check that what appears in the business bulletin accords with their amendments as lodged and must pick up any errors at that point. By the morning of the committee meeting, the marshalled list is printed and we cannot change it. Dr Simpson can make his points when he moves his amendment.

Section 1—General principles and fundamental definitions

The Convener: We proceed now to consideration of amendment 1, which is grouped with amendments 154 and 127. It is an Executive amendment and I call the Deputy Minister for Justice to speak to it.

The Deputy Minister for Justice (Angus MacKay): The Executive intends in future to make available to committee members in advance a brief synopsis of Executive amendments as lodged with a brief purpose and effect attachment to clarify the Executive's position on those amendments. I have copies of the amendments as lodged so far, which may be useful to members. I appreciate that they are being distributed somewhat late in the day. We will usually try to make them available further in advance.

The Convener: One of the clerks will distribute those documents, which I think members will find helpful. Some organisations that propose amendments in the hope that MSPs will take them up use a similar format and most people find it useful in clarifying the purport of an amendment.

Angus MacKay: I shall speak to the three amendments that you have listed, convener. As you have already said, this is a new procedure. I hope that you will therefore exercise a degree of discretion over the extent to which ministers are fully in tune with how the committee's processes work.

The Convener: We are all in the same boat, minister.

Angus MacKay: Amendment 1, lodged in the name of Jim Wallace on behalf of the Executive, makes it clear that an adult's wishes and feelings about anything that is done for him or her under the bill are to be ascertained by whatever method of communication is appropriate to the adult. That communication could take place through another person who understands the way in which the adult expresses himself or herself, or it could be through some technological aid to assist communication in cases where people cannot speak at all.

The Executive agrees with those who have commented on this part of the bill that it is absolutely vital to ensure that we are able to find out what the adult thinks and wants, whatever capacity he or she has or does not have. Incapacity, in the legal sense, does not mean that people have no feelings or preferences. The bill as it stands already makes it a requirement to find out what those are. This amendment strengthens that requirement further by referring to the use of means of communication that are appropriate to the adult.

The Executive understands the thinking behind amendments 154 and 127. However, most of what they do is already covered in the bill by other provisions for communication with the adult, although perhaps not in such explicit terms as those amendments set out. We understand the desire for the bill to refer expressly to advocacy as one means of helping adults to express their views and to exercise to the full what capacity they have. However, we think that advocacy is already covered as a possible means of communication under our amendment.

We agree fully that advocacy can and should play a valuable role, although it is not the only means of assistance available and may not be the best means for everyone who needs such help. It may not be appropriate to consider it in all cases under the bill, as the amendments appear to imply. There are certainly some risks in being too prescriptive in the primary legislation lest something is missed out in that prescriptive approach.

We prefer to retain the general terms in which the bill and amendment 1 are drafted. On a practical level, there will be full guidance when the legislation is enacted on ascertaining an adult's wishes and on assessing incapacity. The detail will be fully spelled out in that guidance. On that basis, we hope that members will agree to withdraw their amendments.

I move amendment 1.

Pauline McNeill (Glasgow Kelvin) (Lab): My intention in lodging amendment 154 was to ensure that the bill covered the issue of verbal and non-verbal communication. In view of what the minister said, I believe that the issue will be covered.

Dr Simpson: Robert Brown apologises for not being present to move his amendment. He asked me to do so on his behalf. He also gave me the authority to withdraw amendment 127 after having heard the minister, and in the hope that other amendments might receive a warmer welcome from the Executive.

Amendment 1 agreed to.

The Convener: I call Phil Gallie to move amendment 84.

Phil Gallie (South of Scotland) (Con): This amendment seeks to remove the requirement for account to be taken of the views of a nearest relative on the affairs of an individual who has already identified a primary carer.

The bill says that account shall be taken of

"the views of the nearest relative and the primary carer of the adult in so far as it is reasonable and practical to do so."

I suggest that we remove the words "nearest relative and the" because the nearest relative might be a spouse or a child who has not seen the individual for many years. The individual might not want account to be taken of that person's views.

I appreciate that family ties are important and that, in many cases, it is right that families should have an input. In the majority of cases, the primary carer will be the nearest relative. I do not suggest this amendment because I believe that relatives are not the best people to make such decisions but because, if, for instance, the parents of a child have cared for that child for many years, they will be identified as the primary carer.

I move amendment 84.

Michael Matheson (Central Scotland) (SNP): I support what Phil Gallie has said. The majority of those who will be primary carers will be the individual's nearest relatives. The amendment provides clarification and ensures that the primary carer will be consulted. There will be instances where the primary carer is not the nearest relative and there is a potential for conflict. The primary carer is likely to have the greatest understanding of the individual's needs.

Scott Barrie (Dunfermline West) (Lab): I may have missed something, but I think that Phil was describing a false dichotomy, because, as Michael Matheson said, the primary carer and the nearest relative might be one and the same person. If they are not, the amendment does not say which one should be given priority. When the nearest relative, as defined later on in the bill, and the primary carer are not one and the same person, the views of both should be sought, so I do not think that we should make Phil Gallie's deletion.

Gordon Jackson (Glasgow Govan) (Lab): I understand what Phil Gallie says, but I think that it is wrong to take the nearest relative out of the loop completely. All the bill says is that we need to take their view into account. What value is then put on that view will vary from case to case. If the nearest relative is, as Phil says, someone who has been out of the picture for 20 years, that fact would be reflected in the value given to their views. However, the alternative of saying that a nearest relative can be totally ignored and not even consulted is going too far. I am not keen that they should be taken out of the bill entirely. That does not seem reasonable, and I could not support it. However, I accept that, because of the background, there will be occasions when the view of the nearest relative is not of tremendous importance.

Phil Gallie: To answer Scott Barrie's point, the argument is that the primary carer has been identified by the adult with incapacity as having responsibility for their affairs.

Gordon Jackson suggests that he does not want to take the nearest relative completely out of

consideration; but that nearest relative may not have had any contact with the individual for many years. The individual has made their choice, so it seems to me that the primary carer's view should predominate. If, as Gordon suggests, the nearest relative's views should be taken into account somewhere along the line, perhaps the minister could find a way of amending the section in such a way that a pecking order could be established. However, I feel that the views of the primary carer should be considered first and foremost. I repeat that, in the great majority of cases, that person will be the nearest, or a very close, relative.

The Convener: Minister, I have made my first mistake: I should have called you to speak immediately after Phil Gallie had first spoken to his amendment. It would be appropriate if you spoke now. I will endeavour to remember that, for non-Executive amendments, the minister should be called immediately after the person who is moving the amendment.

Angus MacKay: I have taken no offence at not being called. [*Laughter.*]

The Convener: Do you mean that you had not noticed either?

Angus MacKay: As you will have noticed, I was blissfully unaware that I should have been called.

Some important points have been made in the discussion of this amendment. I would like to raise two points. I agree with Scott Barrie that the views of both the relative and the carer should be sought—that would be correct and appropriate. However, as Gordon Jackson said, the views do not necessarily have to prevail, they just have to be taken into account. That is an important distinction.

The Executive accepts that the nearest relative will not be the primary carer in every case, and may not have direct contact with the adult. However, the nearest relative will often be the spouse, the child or the parent of the adult. If not expressly mentioned as being someone whose views should be taken into account, the nearest relative will have the status only of any other person under the appropriate part of section 1. To the Executive, that seems to go too far. Our view is that the nearest relative should be expressly mentioned in the list of those whose views should be sought where possible and taken into account. It must be remembered that there are many others on the list, and the nearest relative's views, as I have already said, will not necessarily prevail.

10:00

The nearest relative's views will be sought subject to that being reasonable and practicable. It is not an absolute requirement to obtain them when, for example, a decision has to be taken urgently and the nearest relative is out of the country. If the nearest relative is manifestly unsuitable, under amendment 131 it would be possible to have them displaced.

Pauline McNeill: I feel that Phil Gallie's fear about a nearest relative not having been around for some time is covered by the phrase

"reasonable and practicable to do so"

in the bill.

I am sure that like many other MSPs he has received letters from husbands and wives who care for their sons or daughters. The bill does not say "primary carers", but "primary carer". What does he think would happen in a case where a husband and wife were jointly looking after their son or daughter, but the mother was designated the primary carer? Would it not be right to include the father as the nearest relative, to ensure that the broadest spectrum of views was taken into account? I mention that only because I have received many letters about husbands and wives acting jointly as carers. Would Phil Gallie not be taking something away from the bill by removing the term "nearest relative"?

Euan Robson (Roxburgh and Berwickshire) (LD): Originally I had some concerns about the use of the term "nearest relative", but my reservations have been dealt with by the inclusion of the phrase

"reasonable and practicable to do so",

which covers the point that was made about somebody who has been absent for a long time. The phrase means to me that if someone has been absent from the family for many years and cannot be traced, their views will not be considered.

In addition, the bill states only that their views are to be taken into account. They go into the pot, as it were, with other views. At this stage I am minded to retain the term "nearest relative" in the section, although I would not be averse to redrafting it later to address some of Phil Gallie's worries.

Dr Simpson: One of the main problems with this bill is that it is trying to cover all eventualities, from the sudden loss of consciousness of an individual to someone with learning disabilities who has an incapacity in a particular area. It could be that, because someone has collapsed very suddenly, there is no primary carer and the only person available is the nearest relative. If we removed the term "nearest relative" from the bill, we would exclude anybody acting under section 1(4)(b)—unless we said that the nearest relative is de facto the primary carer—as the adult with incapacity would not have appointed that person

as their primary carer. That is why the reference to the nearest relative must be retained.

Christine Grahame (South of Scotland) (SNP): I, too, support the retention of the term "nearest relative"—for once, I agree with Dr Simpson—because the views of that person would be sought in the context of other consultations, rather than in isolation. The bill also refers to the

"present and past wishes and feelings of the adult"

and, in section 1(4)(c)(ii), to

"any person whom the sheriff has directed to be consulted",

which is pretty wide.

I do not see a problem in the situation that Pauline McNeill described, unless the parents have conflicting views about what should be done. That raises the issue of what happens if there are two primary carers who do not speak with the same voice. That would be a problem in any event. If the parties have conflicting views, the important thing is to weight those views appropriately.

The prevailing view may be that of the adult in so far as it can be ascertained, which could have enormous influence on the treatment, with other interventions or influences being very minor indeed. I oppose the deletion of "nearest relative", as the relative's opinion is one of a whole group of views that must be considered. To delete it goes against the whole idea of interaction and of decisions being taken according to the specific circumstances of each case.

Phil Gallie: Richard Simpson said that the bill had to cover all eventualities. Sadly, that is true of all legislation that the Parliament will have to consider. Bills must attempt to cover all eventualities, although that view could bring me into conflict with some of Pauline McNeill's comments. Section 1(4)(b) refers to

"the views of the nearest relative".

Who is the nearest relative in a situation such as the one that Pauline McNeill described, which involves a mother and a father? Which one of them is the primary carer? Perhaps the minister can tell us whether the mother or the father is considered the nearest relative if there is a dispute between them.

The definition should perhaps be wider—"a nearest relative" or "the nearest relatives". This matter seems to create marginal confusion. In principle, however, I accept what most members have said. It is important that, somewhere along the line, relatives should maintain an interest.

Richard Simpson mentioned the suggestion, which we will consider later this morning, that a deputy should be appointed as well as an advocate so that, if someone is ill, drops out of the scene or dies, a replacement will have been nominated to take their place.

The overall will of the committee seems to be that the bill should retain the phrase "nearest relative". I would like to hear some comforting words from the minister, assuring me that he will consider the matter. I hope that he will clarify some of the points that have been raised so that there is no muddying of the waters at a later date. If I get those comforting words, I shall withdraw the amendment.

The Convener: Minister, would you like to comfort Mr Gallie?

Mrs Lyndsay McIntosh (Central Scotland) (Con): I would like to see that. [*Laughter.*]

Angus MacKay: I am not sure how to answer that question.

Mr Gallie's point centres on who the appropriate relative would be. That is already defined in mental health law as the spouse first, then parents, siblings, and so on. The bill makes it clear that there must be room to establish an order and section 76 specifies that

"'nearest relative' means the person who would be, or would be exercising the functions of, the adult's nearest relative under sections 53 to 57 of the 1984 Act if the adult were a patient within the meaning of that Act".

Phil Gallie: I withdraw the amendment and thank those who participated in the debate.

The Convener: Despite the fact that Phil has indicated that he is withdrawing the amendment, I need the agreement of the committee that the amendment be withdrawn.

Amendment, by agreement, withdrawn.

The Convener: I call Dorothy-Grace Elder to move amendment 122.

Dorothy-Grace Elder (Glasgow) (SNP): Amendment 122 reads:

"In section 1, page 1, line 21, after <adult> insert <(consulting, where the adult has no close relative or primary carer, the charitable or voluntary organisation most appropriate in view of the adult's condition)>

I draw the attention of the committee to the fact that there is an omission in the text. My amendment originally had the word "especially" before

"where the adult has no close relative or primary carer".

We know that a large number of the many thousands of older people and people with incapacity who die in hospital have nobody to speak for them. I see little mention in the bill of voluntary organisations with special expertise, although there are several thousand of them in Scotland. Alzheimer Scotland—Action on

Dementia, for instance, can draw on the expertise of professionals, lay people and others with massive experience. If cases were referred to such bodies, adults with incapacity would have an extra protection. Obviously, the state would have to consider what extra provision would have to be made to ensure that charitable organisations could cope with the extra demand on their resources.

We are all worldly enough to know that it is not always wise to leave someone's fate in the hands of those who are legally designated as their nearest and dearest. We also know of the breakdowns that can happen in families as a result of severe incapacity. For instance, parents of a child with severe incapacity might fall out with each other. We all know that there must be safeguards against certain types of lawyers and—sometimes—certain types of doctors.

I move amendment 122 as a protection for helpless people.

The Convener: It is not necessary to read out amendments, as all committee members should have documents that reprint them.

The amendment can be moved only in the form in which it appears on today's list of amendments. We have already had some problems with that. I urge members to check carefully that the amendments in the business bulletin appear in the form in which they were lodged, as they cannot be changed once they appear in the marshalled list.

The Deputy Minister for Community Care (Iain Gray): I am happy to continue to blaze the trail that my colleague started—this is almost the first time that a bill has been taken to this stage. We appreciate the good intentions behind the amendment, although the amendment that was spoken to by Dorothy-Grace Elder was slightly different from the one that appears on our paper. We have a number of practical difficulties with that amendment, which also apply to the amendment as described a moment ago.

The amendment would give voluntary organisations an unprecedented statutory role in the affairs of adults with incapacity. It would represent a major change, which we do not think we could make without extensive public consultation. As far as we know, consultation has not been undertaken with those organisations that would be involved.

The purpose of taking into account the views of interested parties on section 1 is to find out as much as possible about what is in the individual adult's interests. That includes gathering all the evidence possible about the adult's views and preferences. We doubt that the organisations to which the amendment refers would be able to contribute to the process in many cases—they might have a theoretical interest, but there is no guarantee that they would have a live connection with the adult.

10:15

There would also be a number of problems in establishing which was the appropriate organisation to consult in each case. The amendment refers to the "adult's condition", but that might not be a well-defined condition that had a matching organisation. Several organisations, national and local, might have competing claims—or competing disclaims, if that is grammatical. There is no legislative mechanism for deciding the appropriate organisation.

The bill provides two ways in which interested parties can have their views taken into account. First, under section 1(4)(c)(ii), the sheriff can direct that a person be consulted. Secondly, section 1(4)(d) provides for views to be heard where they are made known to whomever is acting for the adult.

I hope that that goes some way towards achieving Dorothy-Grace Elder's aim in lodging the amendment and towards ensuring that the views of voluntary organisations can be considered. We appreciate the intention to increase protection for vulnerable adults with incapacity, but we think that the amendment would be unworkable in practice and could pose considerable problems for the organisations to which it refers. We believe that it would be unlikely to benefit the adult very much. On that basis, and given the reassurance that section 1(4) of the bill provides, I hope that Dorothy-Grace Elder will agree to withdraw her amendment.

The Convener: Nobody else has indicated that they wish to speak to the amendment. Dorothy, do you want to come back in?

Dorothy-Grace Elder: Yes. I understand the minister's points, especially about the practicality of the amendment, but I do not think that it would be as difficult to implement in practice as it might seem. A number of persons with whom we will be dealing in future will suffer from clearly defined conditions—multiple sclerosis, dementia and so on—and, where there is doubt, Disability Scotland will do its best to recommend the correct organisation. I do not envisage that anyone who picked the wrong organisation by accident would suffer much criticism later. In fact, it would be rather difficult to pick the wrong organisation, as there are proper registers of all the organisations and precisely what they do. Organisations would also be happy to refer people on to other organisations that they thought were better qualified to deal with them.

The practicalities might involve cost, and one does not want to burden charitable organisations

unnecessarily. However, long before we reached this stage in the proceedings, many organisations made submissions to this committee and to the Health and Community Care Committee indicating their great concern about this issue, along with their approval for the legislation as a whole. The good will is there and, having dealt over many years with queries from charities, I do not think that the amendment would be that difficult to implement. I would not like it to fall.

The Convener: Nobody else has indicated that they wish to speak. Do you wish to reply, minister?

Iain Gray: I want to respond to a couple of the points that Dorothy-Grace Elder made.

It may be true that in some cases of adults with incapacity there is one clear cause of that incapacity. However, in many cases there is not, and the procedures that we set up must be able to cover all cases. The decision on who has a role in decision making on behalf of an adult with incapacity must be legislative—it must be testable in court. That is one of the principles that we are taking forward. However, the process that Dorothy-Grace Elder describes, whereby a decision could be taken on the appropriate organisation, defers a legislative decision to a voluntary organisation.

Voluntary organisations quite properly have a great interest in this legislation. Many organisations have made submissions, both to the committee and at the consultation stage before the bill came before Parliament. However, we are not aware of any organisation that has suggested that it would want or be able to take on the role that the amendment describes, which indicates that organisations themselves do not see it as appropriate.

The Convener: Dorothy-Grace, do you insist on your amendment?

Dorothy-Grace Elder: Yes. I feel that overall it is important. The organisations may simply have been following the remit that they were given when we asked them for their views and they may have thought no further about it at that stage. However, we have all had many weeks in which to consider the proposals. This is not a question of voluntary organisations making clear-cut decisions, but of their being consulted at some stage. Otherwise, who is left who has any particular knowledge of the condition? Relatives may not even be that knowledgeable about the person involved or they could be beneficiaries of the will.

I urge the minister to bear the extra difficulties in mind and realise that the amendment might even help in allowing proper decisions to be made more easily in the long run.

The Convener: Dorothy-Grace, no one else wants to speak. As you wish to press your amendment, I will put it to a vote.

The question is, that amendment 122 be agreed to. Those in favour of the amendment should raise their hand. Dorothy-Grace, you do not have a vote.

AGAINST

Scott Barrie (Dunfermline West) (Lab)
Roseanna Cunningham (Perth) (SNP)
Phil Gallie (South of Scotland) (Con)
Christine Grahame (South of Scotland) (SNP)
Gordon Jackson (Glasgow Govan) (Lab)
Mrs Lyndsay McIntosh (Central Scotland) (Con)
Kate MacLean (Dundee West) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)
Pauline McNeill (Glasgow Kelvin) (Lab)
Michael Matheson (Central Scotland) (SNP)
Euan Robson (Roxburgh and Berwickshire) (LD)

The Convener: The result of the division is: For 0, Against 11, Abstentions 0.

Amendment 122 disagreed to.

The Convener: We come now to amendment 123, which is grouped with amendments 126, 128, 137, 140 and 149, all of which are in the name of Dr Richard Simpson.

Dr Simpson: Amendment 123 introduces to the bill the whole area of advocacy. My criticism of the bill is that it does not reflect modern practice; within a few years, it will need to be amended to recognise the position of independent advocates.

Advocates are a fairly new group within the health service and social services, but advocacy is already extensively funded in mental health services within the national health service. It is therefore necessary for us to begin to regulate that group, which is what these amendments seek to achieve.

People with learning disability, in particular, whom we are attempting to bring into the main stream in other areas, such as through the education bill, should be encouraged to make assisted decisions—that term is not mentioned in the bill at all. There is by inference an understanding that the wishes of the adult should be ascertained wherever possible—as we discussed when considering the group 1 amendments—but I do not believe that that is nearly specific enough. We must have guidance on independent advocates—that is what one of the amendments would achieve.

The process of independent advocacy is one that will be of enormous—and growing—importance in the next 10 or 15 years. Having been a general practitioner and a psychiatrist for 30 years, and having grown up in a household with somebody who had Down's syndrome, I feel strongly that independent advocacy should be incorporated into the bill. There may be concerns

about its cost implications, but we should not fail to grapple with those concerns. We may, within our limited resources, have to be prudent about the funds that could be allocated to advocacy, but funds will have to be allocated. It is vital that, through the use of independent advocacy, individuals can make the maximum possible of their abilities.

I move amendment 123.

The Convener: I said that I was going to call the minister, but I am having some difficulty with the issue of those members who are not members of this committee. If you continue, Christine, I will call the minister after you.

Christine Grahame: I hope that the minister will not be too upset. I have great difficulties with this issue for many reasons. Amendment 128 states:

"Any adult with partial capacity may appoint an independent advocate."

Who determines an adult's capacity? Capacity is a legal matter and we might be talking about fluctuating capacity. I have great concerns about the vulnerability of people in such circumstances.

Amendment 128 also suggests:

"An independent advocate may with the agreement of the adult apply for the sheriff to be appointed under section 3(4)(a)."

The use of the word "may" means that an independent advocate does not have to apply to the sheriff. That could give rise to great dangers in relation to coercion, undue influence and so on.

Section 3—"Powers of sheriff"—provides a safeguard; subsection (4) states:

"In an application or any other proceeding under this Act, the sheriff—

(a) shall consider whether it is necessary to appoint a person for the purpose of safeguarding the interests of the person who is the subject of the application or proceedings".

There are provisions for advocacy for incapable adults, regardless of the degree of incapacity. We all know the difficulties with the word "capacity", and that is at the heart of my concerns about Richard Simpson's set of rather fundamental amendments, which would bring another individual into the proceedings. I might—if I may—return to that later.

The Convener: Yes.

Iain Gray: Once again, the Executive finds that it agrees with the principle behind the amendments, which is that—as Richard Simpson said—advocacy is potentially a useful means of encouraging and helping people with incapacities to express their views and their feelings. Advocacy can also help such people to make their own decisions and can avoid the need for formal measures to be used on their behalf. The Executive supports fully the development of advocacy services that are independent of statutory authorities. Richard referred to areas, including in the national health service, where that is already happening.

The Executive, however, remains unconvinced that the general principles in the bill need to be extended to include specific references to independent advocacy. The bill will ensure that no one will be assessed as incapable simply because they have communication problems that could be overcome, as we discussed in relation to the first group of amendments. Amendment 1, which was lodged by the Executive, spelt out that adults should be helped to express their wishes and feelings by human or mechanical means as appropriate. It is very clear to us that advocacy is included in that. Moreover, under the principle of minimum intervention—one of the fundamental principles of this legislation—no intervention need be made if the adult concerned can be helped to act for themselves or to make their own decisions. That addresses the point that Christine Grahame has just made.

10:30

We understand the good intention behind amendment 140, on assisted decision making, but we think that it is neither necessary nor desirable, as the general principles of the bill already promote assisted decision making, while retaining a clear focus on what is in an adult's interests. Again, the principle of minimum intervention and encouraging the adult to use and develop their skills is relevant.

Under the bill, an adult will not be assessed as incapable if they can act or manage decision making with appropriate or available help. However, independent advocacy and, even more, assisted decision making are relatively new concepts. For that reason, we do not think that it would be appropriate to introduce either—particularly assisted decision making—into the bill at this late stage without consultation or clear definition. It would be inconsistent to amend this provision of the bill and not others. I repeat that we believe that the general principles of the bill are perfectly compatible with assisted decision making.

Richard Simpson makes the point that advocacy and assisted decision making are modern practice and that we should avoid having to amend this legislation in the near future, but the danger of being too specific is that we may later find that we have excluded new practices and ways of working. It is better to be general—that will allow modern practice to be included and will avoid the need to

amend the legislation later.

I hope that Richard Simpson will agree that the bill already allows for and encourages the promotion of advocacy and assisted decision making, and that it is not necessary to pursue the amendment.

The Convener: Phil Gallie, you indicated that you wished to speak.

Phil Gallie: No.

The Convener: Does anyone else wish to speak to the amendment?

Christine Grahame: I do not want to be difficult—I can see the intentions behind the amendments—but there are difficulties of operation. Subsection (6) in amendment 128 states:

"An independent advocate shall keep records of the exercise of his powers."

That is very vague. What would be recorded and who would check the records? Because all this would be set up within a legal framework, the operation would have to be more tightly defined. There would have to be more opportunity for the courts to regulate and things would be mandatory rather than discretionary. I think that advocacy can be used as part of the consultation, but it should not be included in the bill in this format.

The Convener: Phil Gallie has indicated that he now wishes to speak.

Phil Gallie: I had not intended to. However, even given what Christine Grahame has said about the difficulties of individual members proposing amendments to the bill and getting the details totally right, we must have some sympathy with the points that Richard Simpson makes about advocacy. It might be useful if the minister could give us an assurance that he will take on board Richard's concerns and seek to find a way of presenting the underlying point without necessarily accepting the detail of the amendments.

Iain Gray: I have tried to make clear that the principles that Richard Simpson is highlighting are accepted in essence; we have a difference of view about the efficacy of placing them in the bill.

Advocacy is not a recognised legal term, so it would throw up difficulties of definiton. A range of advocacy options—independent advocacy, paid advocacy, self advocacy—are widely used and developed, often powerfully, in the sector. I will see how the codes of practice that will follow the bill ensure that our commitment to the promotion and availability of advocacy is made clear and effective.

Dr Simpson: I accept many of the points that Christine made about specifics and I thank Phil for his helpful comments. I was involved in the Public Finance and Accountability (Scotland) Bill, but in many respects it was a lot simpler than this bill.

As the minister said, the bill allows advocacy—but it should encourage advocacy. In this bill, all things are possible in relation to advocacy. Nowhere does it support individuals with limited or partial capacity—a term I have used that may not be appropriate—or with learning disability who can manage 95 per cent of their own affairs adequately with assisted decision making, but only 70 per cent without assisted decision making. The 5 per cent that they do not have the capacity to manage at all is covered, because they can have a safeguarder, a guardian, a continuing attorney or a welfare attorney. I am concerned about the gap between the level at which they can manage their decisions on their own and the level at which they cannot. That threshold is where advocacy comes into its own. We are missing something if this modern concept is not included.

An increase in advocacy will occur, because it is not precluded by the bill. I am concerned that unless advocacy is managed and controlled, Christine's fear that individuals will set up companies of independent advocates will lead to the exertion of undue power and influence. We must manage and control advocacy and set it up so that advocates have training and qualifications.

Having said that, I am happy to withdraw the amendment on the basis that the minister's last words were that he will examine the issue again. However, I give notice that I will move amendments at stage 3 if there is no mention of assisted decisions or of advocacy in the bill at that stage, or if no amendments are moved by the Executive on those points.

The Convener: I am not sure whether those were the minister's last words. Minister, do you want to come back on that point?

Iain Gray: I fear that my words failed to comfort Richard Simpson, given his last words.

I did not wish to suggest that the Executive does not believe that advocacy should not only be promoted, but encouraged and guided and, to some extent, controlled. The point that I tried to make is that this bill is not the place to do that.

With regard to Richard Simpson's example, we will discuss the issue at greater length when we discuss the next group of amendments, on the definitions of incapacity and mental disorder. My view is that someone with a learning disability who is judged capable of making 95 per cent of decisions on their own behalf would not be considered an adult with incapacity under the bill. Therefore, Richard Simpson's amendments that seek access to advocacy seem to fall in the wrong place. That is the point Christine Grahame made:

the amendments mix up the right to, or necessity for, advocacy and the definition of incapacity. This bill is not the place to address some of the valid points that Richard Simpson has made.

The Convener: Thank you, minister.

Dr Simpson: In the light of the minister's comments, I wish to press the amendment. [*Laughter.*]

The Convener: All right. Richard is now withdrawing his previously intimated withdrawal, and wishes to press the amendment.

The question is, that amendment 123 be agreed to.

FOR

Phil Gallie (South of Scotland) (Con)

AGAINST

Scott Barrie (Dunfermline West) (Lab)
Roseanna Cunningham (Perth) (SNP)
Christine Grahame (South of Scotland) (SNP)
Gordon Jackson (Glasgow Govan) (Lab)
Mrs Lyndsay McIntosh (Central Scotland) (Con)
Kate MacLean (Dundee West) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)
Pauline McNeill (Glasgow Kelvin) (Lab)
Michael Matheson (Central Scotland) (SNP)
Euan Robson (Roxburgh and Berwickshire) (LD)

The Convener: The result of the division is: For 1, Against 10, Abstentions 0.

Amendment 123 disagreed to.

The Convener: The amendment falls; we will come back to the consequential amendments individually.

Phil Gallie: I thought it was worth recording my support for the amendment.

Christine Grahame: I would like to ask about a procedural point—not something that pertains to this amendment, but something that I want to know about for later. If one feels that there is merit in an amendment, but does not want to vote for it, can that be minuted?

The Convener: If you speak, and say that there is merit in an amendment, that will be recorded.

Christine Grahame: That is sufficient.

Amendment 154 not moved.

The Convener: We now come to amendment 124, which is grouped with amendments 125, 85, 2, 10, 13, 16, 19, 23, 26, 27, 37, 39, 40, 51, 52, 112, 80, 82 and 83. Robert Brown is not here this morning; is anyone moving amendment 124 on his behalf?

Phil Gallie: Robert Brown spoke to me earlier this morning. To get the debate under way, I will move the amendment, as one of my amendments is in the group. Is that in order? I would like this group of amendments to be discussed.

The Convener: You can either move amendment 124 or not. I understand from the clerk that if amendment 124 is moved, we will have a debate that incorporates the whole group of amendments. If amendment 124 is not moved, we will take the amendments in the order that they appear on the marshalled list, so we will not debate amendment 85—Phil's amendment in the group—right now.

Phil Gallie: That would be fine.

Amendment 124 not moved.

The Convener: As no one has moved amendment 124, it falls.

We therefore move on to amendment 125.

Dr Simpson: The Scottish Executive has indicated that it will seek to amend section 1 after it has received the Millan committee report. I have lodged this amendment to insert some of the wording of the European legislation, which does not define incapacity using the terms "mental disorder" or "mental disability". Such definitions could pose considerable difficulties. I understand that we need to use those definitions in the present bill because the Mental Health (Scotland) Act 1984 is still extant and we have to use its terminology. Will the minister tell us that due cognisance will be taken of European legislation in the eventual conclusions that will follow the Millan committee's report? It will not be very helpful to reinvent the wheel on this issue.

I move amendment 125.

10:45

The Convener: All the amendments in group 5 now fall to be debated; they will be decided on in the order in which they appear in the marshalled list. Members who have an interest in amendments in the group can speak to their own amendments as well as make any comments about amendment 125.

Iain Gray: Just to be clear, are we moving amendments in the group headed by amendment 124?

The Convener: Yes.

Iain Gray: In that case, I move the Executive amendments 2, 10, 13, 16, 19—

The Convener: No, no, no, minister. We are not moving the amendments just now, but debating them. We will move them when we come to them in order. The procedure is slightly separated.

Iain Gray: I will speak to the Executive amendments in group 5 and address some of the other amendments in this large and important

group. The Executive amendments in this group are essentially technical amendments that change the way in which incapacity is defined in the bill. Currently, incapacity as it relates to the different functions of acting, making, communicating, understanding and retaining memory of decisions is repeatedly defined throughout the bill. The Executive amendments would leave the same definitions in section 1 and remove the duplications from other sections. In response to comments from the Law Society of Scotland and others on our amendments, I can confirm that the full set of options for defining incapacity will apply throughout the bill as a result of these amendments.

However, we have expanded the definition of incapacity somewhat, compared with the definition in the Scottish Law Commission's original draft bill. That has been done as a result of helpful comments that were made during stage 1. The definition now clarifies that being incapable might mean being unable to understand the nature and effect of the decision concerned and the reasonably foreseeable consequences of not making the decision at all.

In response to Richard Simpson, I will talk a little about the Millan committee in a moment. I can reassure him that the committee will examine widely differing definitions of mental disorder and make wide-ranging proposals. As we intend to have an extensive consultation and debate on the committee's report, there will be every opportunity to have the discussion for which Richard has just laid down a marker.

We are happy to accept amendment 112, which is a technical change to improve consistency and references to the Mental Welfare Commission's remit in relation to people with mental disorder. We have had detailed discussions with many people who have suggested amending the definition of mental disorder.

As we have said before, we have several serious concerns about what is being proposed. With the committee's forbearance I would like to set out those concerns again, to explain why we urge the committee to reject amendments 125 and 85.

I should start by explaining that mental disorder does not mean that someone is incapable under the bill; nor—as has been suggested—does having a learning disability mean that a person lacks capacity in all or any areas of their life. Mental disorder is one of the two threshold criteria for assessing incapacity. The second threshold criterion is the inability to communicate because of physical disability, with the provisos that we discussed in the debate on the first group of amendments.

Incapacity must be assessed in relation to particular acts and decisions. That functional approach to defining incapacity is very important. The purpose of the two threshold criteria—mental disorder and the inability to communicate—is to limit the group to whom the bill applies, rather than to expand it, which was a fear that was raised in earlier discussions. We believe that there would be grave risks in trying to assess capacity without some kind of threshold. It would make it too easy to class as incapable people who simply made decisions that others thought to be unwise or irrational: that is not the intention behind this bill.

The major difficulty with other threshold criteria—such as Richard Simpson referred to—is that they are unknown quantities in our legislation. They may also include more people than we would like. There is a danger that those responsible for assessing incapacity could be encouraged to take account of the quality of a person's decision making when determining whether they are legally capable. There have been some recent judgments in English courts about incapacity in the absence of any mental disorder. That is not an approach that we favour in Scotland.

The definition of mental disorder in the bill is, as Richard Simpson said, drawn fairly and squarely from the Scottish tradition and the terminology used in the Mental Health (Scotland) Act 1984. We believe that there are considerable advantages in having consistent definitions in legislation. For example, there are advantages of familiarity in the medical and legal professions and among others who work with them. Those advantages should not be discarded lightly.

We have been asked whether our definition covers all the underlying conditions that we wish to be included, particularly the effects of head injuries or stroke. I understand that there have been some fears that they will not be covered and that some of the amendments seek to address those fears. Our advice is that those conditions are likely to fall within the definition, which ties in with well-known international medical terminology. The definition in the Mental Health (Scotland) Act 1984 already describes mental disorder "however caused or manifested". The phrase "however caused" is intended to cover whatever physical accident or illness might have led to the condition causing incapacity.

In the event of a dispute about whether a condition should be included, the courts would be the proper place to decide the matter. It would not be helpful—nor would it be good law—to attempt to list every condition, or in the definition to single out specific conditions. Medical science changes quickly and the danger is that we would find that other conditions would be excluded as a result of the good intentioned inclusion of certain

conditions. I see that Gordon Jackson is nodding his head as I speak about the law, so I must have got something right.

It has been claimed in this discussion that the definition in the bill should be fit for purpose—that the definition should be solely for the purpose of this bill, which, of course, is rather different from the basis for mental health legislation. We agree, and I hope that the rest of the bill makes that amply clear. Mental disorder does not necessarily imply incapacity; the definition of mental disorder in the Mental Health (Scotland) Act 1984 is not the definition of incapacity for this bill. Mental disorder is one of the two threshold criteria that define the client group we discussing.

We clarify matters further in the bill by adding to the Mental Health (Scotland) Act 1984 definition of mental disorder the caveat that no one should be treated as suffering from mental disorder

"by reason only of . . . acting as no prudent person would act."

We therefore think that the bill meets the requirement of using a definition that is fit for purpose, without creating a new definition with which the legal and medical professions are not familiar.

We appreciate that amendment 125 may be designed to cover the same groups of people as are covered by the threshold criteria—mental disorder and inability to communicate—and that it avoids the terminology of mental disorder, which is currently being reviewed by the Millan committee, but we are concerned that it would lead to far more people being assessed as incapable than the amendment intends. The wording of the new threshold criteria seems broad and risks including people with emotional rather than mental disorders, which is not the bill's intention. The criteria are subjective and would be difficult for those who assess incapacity, such as doctors, to use.

I have said several times that the Mental Health (Scotland) Act 1984 definition of mental disorder is under review. On a number of occasions, in different contexts, the Executive has made it clear that that definition has to be reviewed, changed and modernised. The committee that is chaired by Bruce Millan is working hard to review mental health law. We expect that the committee will make recommendations when it reports later this year.

We sought Bruce Millan's advice when we introduced the bill. He strongly advised that when the Executive receives his committee's recommendations it decides whether to amend incapacity legislation to maintain consistency between the two pieces of legislation. We believe that although that approach is not ideal, it has much to commend it. We will have the advantage of the Millan committee's wide public consultation, and its expertise.

We will maintain the advantages of consistency between incapacity and mental health law and avoid the likelihood of two changes to the definition in quick succession with which professionals and the public would have to deal. We appreciate that it is uncomfortable to introduce legislation that may have to be amended, but we believe that that is the most efficient and effective way of dealing with the situation.

To sum up, it would be unwise to adopt a new or amended definition on which there has not been consultation and which might have unintended and undesirable consequences, given that we will shortly have the opportunity to consider a definition on which the full panoply of consultation and expertise has been brought to bear.

We listened carefully to the arguments about the definition that were made last year and believe that we can allay the concerns that have been expressed. I undertake to review the definition once we have the recommendations of the Millan committee. If necessary, we will then amend incapacity legislation. I look forward to hearing today's discussion because it is a part of an important debate that is taking place in several contexts.

The arguments for change would have to be very strong indeed to outweigh the case for retaining the definition that is currently in the bill.

11:00

The Convener: I call Phil Gallie to speak to amendments 85 and 112.

Phil Gallie: Let me begin by thanking the minister for accepting amendment 112 right from the start. He has rather thrown me, because I thought that I would have to debate only parts 1 and 2 today and he has jumped ahead to part 6. Nevertheless, I am grateful to him.

However, I am not quite satisfied with the minister's other comments. I recognise what he has said about the Millan committee. I also know that it is a matter that we will have to address again at a relatively early date. This bill may well be enacted before the minister gets round to judging and assessing the Millan findings. There is therefore a gap that leaves a question mark over the definition that has been presented in the bill.

Amendment 85 tries to address that gap by being specific. I accept the minister's criticism that I have, perhaps, been overly specific in introducing the element of brain injury, but the wording of amendment 125—

"an impairment or insufficiency of their personal faculties whether permanent or temporary"—

is the sort of all-embracing definition that covers the sort of cases that every member of this committee agrees should be covered.

The wording of amendment 125 is excellent. I am quite happy to accept the criticisms that have been made of my amendment, but I recommend that the minister consider amendment 125 again, as it has some short-term value. In the longer term, he will have to readdress the problem once the Millan committee has reported.

Gordon Jackson: With respect to Richard Simpson, I do not think that the changes in amendment 125 take us anywhere. I accept the fact that definitions are a nightmare in mental health. Mental disorder is a difficult phrase and we did not find it easy to deal with when we passed emergency legislation last year. In discussing mental disorder or an inability to communicate, we are dealing with definitions that have been reached in the past and have some meaning. We may have to change those definitions after the Millan report and we may arrive at better definitions, although that will not be easy.

I think that changing the wording to

"an impairment . . . of their personal faculties"

would make it more difficult to be precise. I am not at all sure what it means and it would open the door to all kinds of argument about when people fall within the concept of the bill. I do not see any advantage at this stage in moving away from the existing definition, although it may be worth considering in a year or two.

Amendment 85 adds "including acquired brain injury". I see what Phil Gallie means to do, but I do not really see the point of his amendment. The minister has said that the Executive has taken legal advice suggesting that that phrase is likely to fall within the category of physical disability. The use of "likely" suggests to me that it was very conservative legal advice, because I cannot for the life of me see how brain injury could not be considered a physical disability. Whoever gave that advice must have been a typical lawyer hedging his or her bets; "likely" is putting it lightly.

I take the minister's point that if the bill specifically includes something, people will claim in court that it therefore excludes other things. Strictly speaking, that is not right. Including something does not mean that other things are excluded. There are occasions when things must be included for the avoidance of doubt, but the minister is right to say that the moment one includes something, someone else will claim that something else is therefore not included. Unless it is absolutely necessary, inclusion opens the door to all kinds of legal controversy. It seems to me that the suggested wording is not necessary in this case and I can find no argument that shows that physical disability would not include acquired brain injury.

Dr Simpson: In moving amendment 125, I was trying to make the point that we will have to consider carefully compatibility with European legislation as a whole and with whatever Millan proposes. Despite Phil Gallie's welcome support for it, I withdraw the amendment.

The Convener: Are members content that amendment 125 be withdrawn?

Amendment, by agreement, withdrawn.

Amendment 85—[Phil Gallie]—moved.

The Convener: The question is, that amendment 85 be agreed to.

FOR

Roseanna Cunningham (Perth) (SNP)
Phil Gallie (South of Scotland) (Con)
Christine Grahame (South of Scotland) (SNP)
Mrs Lyndsay McIntosh (Central Scotland) (Con)
Michael Matheson (Central Scotland) (SNP)

AGAINST

Scott Barrie (Dunfermline West) (Lab)
Gordon Jackson (Glasgow Govan) (Lab)
Kate MacLean (Dundee West) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)
Pauline McNeill (Glasgow Kelvin) (Lab)
Euan Robson (Roxburgh and Berwickshire) (LD)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 85 disagreed to.

The Convener: Amendment 126 has already been debated with amendment 123, so anything said at this point should be brief.

Dr Simpson: I will be brief. I would like to hear whether the Justice and Home Affairs Committee feels that the Executive should be asked to consider including independent advocacy and assisted decision making in the bill. If the committee expresses that view I will be happy to withdraw the amendment.

The Convener: I do not think that that is a competent procedure at this stage of the bill. We are debating and voting on specific amendments, which are either moved or withdrawn. We cannot go into a group huddle that would indicate a general committee view. A lot of sympathy for those ideas was expressed in the debate we had on them and I expect that the Minister for Justice will take that on board, but we cannot now have an expression of the committee's view, as you suggest. Please indicate how you want to proceed on amendment 126.

Dr Simpson: I move amendment 126.

Gordon Jackson: A lot of us thought we had voted on that amendment.

The Convener: We have voted on the lead amendment in that group, amendment 123. We still have to deal individually with each of the amendments in that group. As I said earlier, the vote and debate can be out of kilter.

The question is, that amendment 126 be agreed to.

AGAINST

Scott Barrie (Dunfermline West) (Lab)
Roseanna Cunningham (Perth) (SNP)
Phil Gallie (South of Scotland) (Con)
Christine Grahame (South of Scotland) (SNP)
Gordon Jackson (Glasgow Govan) (Lab)
Mrs Lyndsay McIntosh (Central Scotland) (Con)
Kate MacLean (Dundee West) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)
Pauline McNeill (Glasgow Kelvin) (Lab)
Michael Matheson (Central Scotland) (SNP)
Euan Robson (Roxburgh and Berwickshire) (LD)

The Convener: The result of the division is: For 0, Against 11, Abstentions 0.

Amendment 126 disagreed to.

The Convener: Amendment 2 has already been debated. It appears on the selection list as part of the group headed up by amendment 124.

Amendment 2—[Iain Gray]—moved and agreed to.

The Convener: As we are about to move on to a quite substantial debate, it would be appropriate to have a short break now.

11:11

Meeting adjourned.

11:26

On resuming—

The Convener: We now move on to deal with amendment 86, which is not grouped with any other amendments. It is in the name of Phil Gallie and a number of people have added their names to it in support.

Phil Gallie: The word "intervention" has been used time and again, even though we are only three pages into the bill. However, the bill includes no definition of the word. Such a definition is needed and my amendment suggests one. I hope that, although the wording might not be quite right, the minister will recognise the requirement of the need for a definition of "intervention" and try to include one in the bill.

I move amendment 86.

Michael Matheson: I support the amendment. The primary purpose of the amendment is to provide greater clarity on the issue of intervention, about which concern was expressed by the committee and in the chamber. I do not think that the amendment would narrow the definition of the word "intervention", which would still cover cases where a positive act or a decision not to act was necessary. The amendment would avoid the need for legal debate about the need for intervention.

11:30

Angus MacKay: The amendment, as has already been stated, seeks to define an intervention, to which the general principles in section 1 must apply, as either a positive act or a decision not to act.

The legal advice that we have is that it would be unhelpful and unnecessary to attempt to define an intervention in an adult's affairs beyond what is already present in section 1(1). A wide interpretation of the word "intervention" should be possible as circumstances demand. An intervention is anything that anyone does in relation to the adult. That would include declining or refusing to take a positive action. Leaving the definition open ensures that anyone with functions under the bill follows the general principles. If a more precise definition is attempted, there is a risk that someone or something that should be covered could be left out.

The amendment might be intended to deal with concerns about welfare attorneys and guardians who refuse medical treatment that doctors want to give under part 5 of the bill. The Executive amendments to part 5 that were announced in the stage 1 debate should meet such concerns. Under the amendments to section 47, doctors will be able to proceed with treatment in the face of such a refusal if they get a second medical opinion that the treatment should be given. It will not be necessary for doctors to go to court to override a proxy's refusal of treatment, although the proxy will still be able to challenge medical opinion in the court if they continue to disagree that treatment should be given. Once the amendments are made, there should be less concern about ill-informed or unscrupulous proxies blocking treatment.

Codes of practice under the bill will cover clearly the application of the general principles by all involved in an adult's affairs and will give other guidance on when and how proxies are expected to act.

We hope that those reassurances and points of clarification are sufficient to persuade Mr Gallie to withdraw his amendment.

Christine Grahame: It is important to clearly define the key words that appear in a bill at this stage, even if the definition is wide. That gives those who seek to apply the law some guidance.

I understand what you said, minister, but the amendment is extremely helpful as it clarifies the meaning of the word "intervention" and, importantly, says that the definition includes

"a decision to refrain from acting".

The definition is broad and flexible but does not leave anyone in any doubt about what is meant by the word "intervention". The wording that appears in the bill does not make clear whether an intervention could mean something that is not done. The amendment makes that point clear and is important.

Dr Simpson: Margaret Smith, who is convener of the Health and Community Care Committee, and I are keen on the amendment. The only way in which I would be comfortable with the amendment's withdrawal would be if the minister would undertake to ensure that the guidance for medical practitioners makes absolutely clear the fact that refraining from an action counts as an intervention. Speaking as a doctor, I can say that that would not be clear to me from the bill. It would have to be spelled out with great clarity in the notes of guidance accompanying the act. I will only support the withdrawal of the amendment on that basis.

Pauline McNeill: I wish to ask the minister about the interpretation of the word "intervention". It is standard practice to have a section in a bill in which words are interpreted for the purposes of the bill. Would it be possible to use such a section to clarify what is meant by intervention?

Gordon Jackson: I am not entirely sure about this matter. My instinct is that the minister is right and that, as always, the more words are put in, the more problems are created. The amendment is probably not necessary. Although at this stage I am content to say that we should not insert this amendment, perhaps the Executive could apply its mind to this matter before we reach the next stage. I do not say that the Executive will change its mind, but the question of whether it would be better to include a definition of "intervention" is certainly worth thinking about.

I suspect that people would be happy to remove the amendment if it were acknowledged that this issue still needs to be thought through at a later stage. It is a difficult question.

The Convener: Given that Richard Simpson, who has a medical background, has said that he would have interpreted intervention as an act of commission rather than omission, which is a narrower definition than that in the bill, has the Executive consulted practitioners about what intervention means in practice?

Angus MacKay: There are a number of points to be addressed. In leaving the definition open, we are ensuring that anyone with functions under the bill follows the general principles. Amendment 86 gives a partial list of those people who are to be covered, without prejudice to the generality. Less helpfully, it omits others with an important role, such as statutory authorities, nearest relative, primary carer, withdrawer under part 3, care establishment manager under part 4, and so on.

Richard Simpson mentioned the codes of practice under the bill. Those, and the guidance to the bill, will and should cover negative decisions, as he has suggested.

Phil Gallie: A lot of good points have been made. Michael Matheson summed up the issue as being about declining, refusing and refraining from intervention. I am not satisfied with the minister's response. He has not taken on board the idea of someone stepping back from a decision.

It was said that the definition should cover negative issues. However, that is not good enough; the bill should be specific about them. There should be a clear indication in the bill that those with responsibility who refrain from taking action are not meeting their responsibility.

I do not think that definite wording would prejudice future developments. The minister referred to sections 44 and 45, which will be debated later. At this point we need to clarify the situation and ensure that people are clear about the responsibilities that they have assumed.

Christine Grahame: I wish to tell Richard Simpson that by "professionals", I referred to all types of professional people, and not just to legal professionals. I would not be content to have an explanation in detached guidelines. What would the legal status of such guidelines be? People do not always know that guidelines exist.

Endeavour should be made to define—there are many examples of this in other legislation—in as flexible and as all-encompassing a manner as possible, the word "intervention", which is key in this bill, and to clarify that it means inaction. It should not be difficult for the Executive, with the resources that it has, to apply its mind to the problem. It is difficult to define capacity and incapacity. This is another definition that could be included in the bill. I am not content that it should just be included in guidelines.

Angus MacKay: Notwithstanding the points raised by Christine Grahame, the bill provides for codes of practice that will cover clearly the application of the general principles of the bill by all involved in an adult's affairs, which will guide people on whether and how proxies are expected to act. It is important to restate that.

No absolute duty will be imposed on attorneys and guardians to act positively, which is perhaps

the nub of the matter. However, if a proxy consistently refuses to act when intervention should be made for the adult's benefit, the courts will be able to make a direction that the proxy should do something or, ultimately, they will be able to limit or remove the proxy's powers.

Gordon Jackson or Phil Gallie—I cannot remember which—asked earlier if we would consider re-examining this issue in preparation for stage 3.

Gordon Jackson: I asked that question.

Angus MacKay: I do not object to reconsidering the issue in advance of stage 3, without giving a commitment at this stage that the Executive will move an amendment. However, should the committee feel sufficiently strongly that it merits re-examination, we will do so. Perhaps we could consider discussing with medical practitioners the particular point raised by Richard Simpson on refraining from action.

Pauline McNeill: Your comments are welcome, minister, as we will be able to ensure that we get this particular section right.

I asked earlier whether the Executive would be willing to consider the inclusion of a definition of intervention in section 76, "Interpretation", rather than amending section 1.

Angus MacKay: I am advised that that is a matter of drafting. We could consider how, where and when—

Pauline McNeill: I realise that. However, it seems to me that the committee has a genuine concern about the definition of "intervention", which could be dealt with by some simple drafting of section 76.

Angus MacKay: In the context of my suggestion that the Executive would agree to think further about the generality of this amendment, we would consider an Executive amendment if we felt it appropriate to do so. We are happy to give time to reconsidering the issue.

Euan Robson: It is important that the bill contains some definition of "intervention". I would be minded to support this particular amendment but I have difficulty with some of the text. If the minister is saying that he will take the amendment away and examine it in more detail, that would be welcome, particularly if he focuses on the question of refraining from exercising powers. That is the committee's major concern and it is certainly my major concern.

Phil Gallie: While I go along with Euan Robson's comments, the minister made one point that concerns me. I may be a little sceptical, but I have heard it all before from Conservative ministers, who say, "Yes, we will look at it again". However, when such a matter comes back to members, while the minister may have considered it, nothing has happened.

If the minister were to give a commitment to include in the definition of "intervention" something that reflects the feelings that have been expressed about including the word "refrain", I would accept his word. However, it would have to be a commitment, not simply the comments that he has made so far.

The Convener: Minister, you are on the spot.

Angus MacKay: I am not prepared to give such a commitment, but I am happy to commit the Executive to looking at the issue afresh and giving it thorough consideration. Of course, members are free to lodge their own amendments if they are not satisfied with either the Executive's justification of its position or any Executive amendment.

The Convener: The ball is in your court, Phil.

Phil Gallie: I will put my trust in the minister on this occasion. We have a long way to go on the bill, and if he lets me down, that will be reflected in my future actions. [*Laughter.*]

The Convener: I take it that you wish to withdraw your amendment.

Phil Gallie: Yes.

The Convener: Is the committee content that the amendment be withdrawn?

Amendment, by agreement, withdrawn.

11:45

The Convener: We move to amendment 127, in the name of Robert Brown, which was debated in the grouping with amendment 1. I have been passed a note that says the amendment was not moved. Can I have clarification of that? [*Interruption.*] Does anyone wish to move the amendment in Robert Brown's place? No.

Amendment 127 not moved.

The Convener: That completes the amendments to section 1 but, as I said, before we move on we must decide whether section 1 stands part of the bill—if such terminology is not banned here. Minister, do you have any comments about section 1 as a whole? Other members should indicate if they want to speak.

Angus MacKay: If no one else wants to speak, I will not drag out the proceedings unduly. I could make comment, but I am conscious of the time and know that you want to make progress.

Section 1, as amended, agreed to.

After section 1

The Convener: We move on to amendment 128, which was debated with amendment 123. Amendment 128 is in the name of Richard Simpson and concerns independent advocates.

Amendment 128 not moved.

Section 2—Applications and other proceedings and appeals

The Convener: We now move on to amendment 87, in the name of Phil Gallie. Do you want to speak to your amendment?

Phil Gallie: During the course of evidence taking by the Justice and Home Affairs Committee, considerable comment was made about the expertise levels of the sheriffs who would deal with the specific issues. It was suggested that sheriffs could be nominated who had special training, direction or expertise in dealing with adults with incapacity. The amendment seeks to build on the information that the committee received in evidence.

I acknowledge that things have moved on since we took evidence. To say the least, a degree of shambles now exists in the sheriff court system, given the problems that we have had with the European convention on human rights and temporary sheriffs. The wording is such that, by including the words

"unless no such sheriff is available",

the terms of the amendment could be met quite practically. That would acknowledge the fact that there are difficulties at present and that they may still be there in future. I thought that, as an underlying principle, members of the committee wanted expert sheriffs to deal with that sensitive area.

I move amendment 87.

Christine Grahame: I fully support the amendment. The evidence from the Mental Welfare Commission for Scotland and other groups convinced me that there should be specialist sheriffs in this area, as is already the case in certain areas of the bench. I know from my years in practice that appearing before a sheriff who does not want to deal with family law cases can be a bad experience for all who are involved.

There have been moves in sheriffdoms towards specialisms and that is a good idea. It increases the quality of decisions and will also increase consistency in decision making among sheriffs who have undertaken training and understand the relevant legislation well. Of course, there will always be the catch-all:

"unless no such sheriff is available to do so".

Specialist sheriffs may be introduced progressively, but I certainly think that that is a good way forward, not just for this legislation but also for the quality of sheriffing in Scotland.

Angus MacKay: I understand that the proposed amendment simply reinstates the provision of the Scottish Law Commission's original bill. However, the Executive has dropped that provision and has done so for good reason. Where the nominated sheriff is unavailable for any reason—which could include being engaged in court, being on leave or hearing another application under the legislation—the lack of flexibility that would result could lead to considerable delays. In smaller or rural courts, it could lead to particular inflexibility and delay.

Sheriffs in most Scottish courts are already all-rounders and deal with a wide range of cases. They are also professional lawyers and judges and receive a high degree of training in all the areas in which they have to work. The provisions of the bill will be no exception. There will be a programme of training to ensure that sheriffs are fully conversant with the principles of the bill and with their particular responsibilities. Accordingly, we do not see the need to accept the amendment.

Scott Barrie: Christine Grahame and Phil Gallie are right. When we took evidence, some witnesses were strongly of the opinion that it would be useful if some sheriffs were to train in particular areas. That is true of many aspects of the law. Christine mentioned family law, and I endorse what she said. However, I can see the point that the minister is making. In certain courts, it is impractical for sheriffs to specialise. We could end up with a two-tier system, with the larger courts subdividing as has been proposed and smaller courts retaining generalist sheriffs. That could be a dangerous trend to set.

The phrase

"unless no such sheriff is available to do so"

is a kind of get-out clause. To go down that road is not necessarily the way to go about things. We should ensure that all our sheriffs are fully conversant with all the legislation with which they must deal and training must be of the highest standard so that they can keep up to date. I do not want to negate Phil and Christine's arguments, but I do not think that the amendment as proposed would get us much further down the line, because that get-out clause could be extensively used.

Euan Robson: I have worries about the practicalities of the proposal in rural communities, where it could lead to delays. Nor am I entirely sure that the wording entirely achieves the purpose that it set out to achieve. I suppose that the key phrase in amendment 87 must be "being for that purpose", but I am not entirely clear that that would impose on the sheriff principal any

obligation to refer to a specialist sheriff. The wording may not be sufficient to ensure the purpose of the amendment.

Michael Matheson: I am not sure about the minister's view that this amendment will prevent flexibility, because, as Scott Barrie mentioned, the final part of the amendment includes an opt-out clause,

"unless no such sheriff is available to do so."

It could be another sheriff who deals with the case.

Euan Robson raised the issue of delays, but I do not think that that need be a major factor, given that there is an opt-out clause. We must also reflect on the number of cases that will be brought before sheriffs, which is unlikely to be tremendously high. It may be that when the legislation first comes in there will be an increase in demand for the services of welfare attorneys, but there should not be a considerable increase in the demands on sheriffs.

It is also important that we reflect on the problems that occur when people take up matters with sheriffs under the current mental health legislation. Often when someone applies to take out a guardianship or some type of mental health order sheriffs have little understanding of the relevant legislation. A good case can be made for the need for specialists and specialist training, but this amendment is reasonable and provides the Executive with an opt-out clause, because if there is no sheriff available who specialises in this area, the case can be passed to another sheriff.

Gordon Jackson: I understand that people want sheriffs who know what they are doing to deal with cases, although that is perhaps naive, but to go down the path of having nominated sheriffs by statute is not a good idea, for three reasons.

First, we need to understand that, recently, sheriffs' training has improved dramatically. There was a time when there was no training—people were simply appointed and hoped for the best—but a very good training scheme was set up under the previous Lord Justice Clerk and Sheriff Stoddart. Training will now be tackled in a way that it never was before.

Secondly, sheriff principals tend in any event to be careful and to ensure that cases are handled by the appropriate person.

Thirdly, it would be a minefield to have a nominated sheriff. If we had nominated sheriffs and one of them did not preside over a case, I could envisage an appeal on the basis that the decision in that case was ultra vires of the statute because it was not made by a nominated sheriff. The sheriff principal might say that the nominated sheriff was not available because he was ill, and there might then be an argument about whether another one should have been brought in.

This amendment could create a legal minefield, and I do not think that the need for it has been demonstrated. We must trust the system and the sheriff principals to ensure, as I think they will, that properly trained people do this job. To make it a statutory requirement would create more bother rather than improve the situation.

Dr Simpson: I found Gordon Jackson's comments very convincing, so I will change slightly what I was going to say. My concern is that I have appeared before a few sheriffs who did not appear to be in the same world as me. That is perhaps rather strong, but it is the threshold of capacity in this bill that really concerns me. As both ministers have said, they do not want people to be brought under this bill unnecessarily. One has to have trained doctors and trained sheriffs to make decisions, but in the light of Gordon's comments, I do not support this amendment.

Christine Grahame: I accept what is said about training of sheriffs these days and that some sheriffs are all-rounders. However, there are sheriffs who do not want to deal with certain types of cases. If we have nominated sheriffs, it is a two-way process. They would be sheriffs who take an interest in this area and become specialists. That is already happening in the Court of Session, where there are commercial judges and so on.

Flexibility is built into this amendment by the phrase

"unless no such sheriff is available".

This amendment would not cause logjams and makes a statement about sheriffing in Scotland in the long term. It accepts that some people can be masters of everything but that others can be specialists. What one would be looking for is consistency in decisions. Having nominated sheriffs who were trained in this area would ensure that and would be extremely helpful in such a difficult area.

In some respects, I would feel quite sorry for sheriffs if they were dealing with cases that they did not want to deal with. I still support the amendment, for nominated sheriffs, which includes the catch-all,

"unless no such sheriff is available to do so."

That is in line with current progress with sheriffs in Scotland.

Angus MacKay: Gordon Jackson made a number of direct points on this amendment, which I agree with. Christine Grahame, in her second contribution, indicated that there is already some degree of specialisation among sheriffs. I would agree with that. In practice, sheriffs in large courts

in cities tend to specialise, for example, in mental health cases. It is very likely that, under the new legislation, that will continue to be the case. One disadvantage of passing this legislation would be if the bill made it appear that that should also apply in smaller or rural courts. That could present significant problems for those courts.

12:00

I do not have much more to add to my initial contribution on this amendment, other than to say that the sheriffs themselves have opposed the proposal, effectively saying that they consider it to be unworkable in practice.

Phil Gallie: I think that that was indeed the recollection from the evidence that this committee took. Amendment 87 arose from the raft of evidence that we listened to.

Gordon Jackson's arguments were quite persuasive. The last thing that I would want to do would be to create a situation whereby judgments made by a sheriff might be once again called into question.

I am not sure that it is quite right to talk about this matter being determined by statute. We are concerned with a sheriff or several sheriffs in a sheriff principal's area being nominated to be experts in the type of cases which are concerned in this bill. They would be the people who would receive the targeted training, albeit that that training would be passed on to colleagues in whatever way sheriffs pass on information between themselves.

I also believe that, as Christine Grahame has emphasised, we have a get-out on this matter, in the part of the amendment which deals with cases where no sheriff is available. I do not necessarily think that Christine's concern about consistency will be covered by having nominated sheriffs, given the fact that that would apply across a range of areas. I am not always satisfied with the consistencies concerning sheriffs—or judges for that matter—as they currently are, although that is another point.

The amendment has some merit. I recognise that the Deputy Minister for Justice has thought about the matter to some extent, although he is not prepared to accept the amendment. I do not feel obligated to push it to the end.

The Convener: Can you indicate what you want to do with it, then, Phil?

Phil Gallie: I wish to withdraw it.

The Convener: Is the committee content that amendment 87 be withdrawn?

Amendment, by agreement, withdrawn.

Section 2 agreed to.

Section 3—Powers of sheriff

The Convener: We now move on to amendment 129, in the name of Richard Simpson. It is grouped together with amendment 132, which is an Executive amendment.

Dr Simpson: The reason for amendment 129 is to get some response from the ministers. We seem to be setting up a number of tiers as far as the protection of and assistance for the person with problems of incapacity is concerned. I will not reiterate the arguments about the lowest level that I was proposing, which was for independent advocates. The upper levels are guardians, continuing attorneys and welfare attorneys. The term "safeguarding" comes in for the first time in this section, but is not defined. There is no such thing as a safeguarder. There are no notes of guidance on who the people are who are to be known as safeguarders; they are just people who will undertake specific tasks. I seek clarification from the minister on who that group of people are and how they are intended to function.

I move amendment 129.

Iain Gray: I will say some words about amendment 129 and will then go on to speak to amendment 132, which is an Executive amendment.

I am grateful for Richard Simpson's explanation. The term "safeguarder" is already in use generally. Its definition is, I suppose, in essence, someone who is appointed by the court for the particular purposes under subsections (3), (4) and (5).

A parallel safeguarder system exists for children, although the term "safeguarder" is not, in fact, used or defined in either the Children (Scotland) Act 1995 or this bill. If the term were introduced to this section, as the amendment proposes, that would be its sole appearance in legislation. I am advised that it would only be necessary to define the term if it were to be used elsewhere in the bill. However, we are clear that the term can be used in ordinary language even though it does not appear in statute. For that reason, an express definition of the term "safeguarder" in this section is, in our view, unnecessary. A safeguarder is someone who is appointed under this section of the bill.

Amendment 132 provides that the appointment of a safeguarder—thus proving that the term can be used in conversation without its being defined in the bill—to the adult shall be considered in all Court of Session proceedings. As it stands, the bill requires sheriffs in the sheriff court to consider such an appointment for the purpose of ensuring that the adult's interests are fully protected.

Amendment 132 extends that important protection for the adult to proceedings in the Court of Session, which is the higher court. It is envisaged that such proceedings could include appeals against a sheriff's decision or, in particular, sensitive matters in relation to medical treatment that could arise under part 5.

I hope that, in the light of that explanation, Dr Simpson can agree not to move amendment 129 and that the committee will agree to the further protection provided by amendment 132.

The Convener: Nobody else has indicated that they wish to speak in this part of the debate.

Christine Grahame: Something has come into my head, convener. When the court appoints somebody in a specific capacity, it usually gives that person a legal title of some kind. I understand what the minister said about safeguarding in children's proceedings—a difficulty does arise if the term used becomes muddled with the definition of the term in another act—but having appointed someone to a capacity, it may be important to give them a label, as others have a title.

Gordon Jackson: The person who is appointed to safeguard will be known as the safeguarder, as happens in children's cases, where the sheriff appoints an interlocutor who is known as the safeguarder. Richard Simpson wants the bill to specify that that person shall be known as the safeguarder, but we can safely say that that person will be known as the safeguarder. That is the title that will be given to someone who is appointed to safeguard. Perhaps I am wrong, but the term is used in children's hearings all the time.

Christine Grahame: If we use the term "safeguarder", will it mean the same across the legal spectrum, or will it have different meanings in children's proceedings from its meaning under this act? The point that is being raised is that it will not mean the same thing in both environments.

The Convener: The minister is conferring so we will give him a moment or two.

Gordon Jackson: Surely a safeguarder is someone who is there, as it says in section 3(5),

"to safeguard the interests of another"

person. A safeguarder to a child is an independent person with a duty to look after their interests. I suspect that it is the same in both cases.

Iain Gray: Our view is that there is an implicit definition and that to use the word safeguarder for someone who had not been appointed to safeguard under the terms of the Children (Scotland) Act 1995 or this legislation would be to use it incorrectly.

Christine Grahame: I am sorry to be annoying about it but it might then be appropriate to say that the term has the same meaning as it has in the Children (Scotland) Act 1995. That would make it clear that we are talking about exactly the same role.

Iain Gray: Surely the point is that it is the same role but it is different because it applies under different legislation.

The Convener: What is the fundamental problem you have, Christine? The minister will address that, rather than getting into a question and answer session that I can see will never end.

Christine Grahame: Oh, there is an end. My fundamental problem is that when a word in one act applies elsewhere in other acts, it should specifically say that the word has the same meaning as it has in the other legislation. Now that it is clear that it is going to mean the same, that underlines the point of saying so.

Pauline McNeill: I had not intended to speak on this subject, but if the committee thinks that there should be some mention of the word "safeguarder" in the bill and the minister is saying that that is what the person would be known as, what is the big deal? Given that we are making legislation and must make sure that it is as good as possible, I do not think that he has made the case for opposing the amendment.

Iain Gray: The point I was going to make in reply to Christine Grahame was that the Children (Scotland) Act 1995 and this bill would not both apply to the same person, as one is about children and the other is about adults, so the two contexts would not apply in the same case. In response to what Pauline McNeill said, if it is unnecessary, why include the definition? I could, however, take further advice on that as I do not have a straight answer to her final question.

Gordon Jackson: I would say to Richard Simpson that we should not put unnecessary words into legislation. To say that the person appointed to safeguard will be known as the safeguarder is tautologous. I do not think that it would do any harm but it is a pointless addition. What else would they be known as?

12:15

Dr Simpson: My point is that there are people affected by the bill who are accorded different statuses in the bill—guardians, continuing attorneys, welfare attorneys and so on. There is not, however, a safeguarder included. If, in practice, there are safeguarders, they should be covered by the bill, including a definition of "safeguarder". There will be discussion among practitioners about which category it would be appropriate to include such people in. The

illustration that I tried to give in my earlier argument was that there might well be a safeguarder whose views, in terms of the Executive's amendment, will, as far as they are ascertainable, be conveyed to the court. They will, in fact, undertake the role of advocate. I would like to see safeguarders included in the bill in the absence of the inclusion of advocates.

Having said that, if the minister gives the committee assurances that he will examine the suggestion and consider inclusion and definition of the term in the bill, I would be happy to withdraw the amendment.

The Convener: Are you indicating that you are withdrawing the amendment?

Dr Simpson: I would like to hear the minister's summing-up before I do that.

The Convener: You are not withdrawing the amendment yet.

Dr Simpson: No.

The Convener: Minister, do you have anything to add?

Iain Gray: No. The Executive's position remains that Dr Simpson's amendment is unnecessary. Gordon Jackson is correct in saying that it is a tautology and that there is, therefore, no need to make the amendment.

Dr Simpson: I wish to press amendment 129.

The Convener: There will be a division.

FOR

Roseanna Cunningham (Perth) (SNP)
Phil Gallie (South of Scotland) (Con)
Christine Grahame (South of Scotland) (SNP)
Pauline McNeill (Glasgow Kelvin) (Lab)
Michael Matheson (Central Scotland) (SNP)

AGAINST

Scott Barrie (Dunfermline West) (Lab)
Gordon Jackson (Glasgow Govan) (Lab)
Mrs Lyndsay McIntosh (Central Scotland) (Con)
Kate MacLean (Dundee West) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)
Euan Robson (Roxburgh and Berwickshire) (LD)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 129 disagreed to.

The Convener: We now move on to amendment 130.

Iain Gray: Amendment 130, in the name of Jim Wallace, is a technical amendment. Under section 3 of the bill, sheriffs have wide-ranging powers to deal with matters in relation to the affairs of an adult with an incapacity that come before the court. Sheriffs can make appropriate court orders and can impose conditions or restrictions on such orders. The amendment ensures that the same people who could apply initially for the order could apply for a variation to the conditions and restrictions.

I move amendment 130.

The Convener: Does any member wish to say anything about that amendment? It seems not.

Amendment 130 agreed to.

Section 3, as amended, agreed to.

After section 3

Angus MacKay: Amendment 131 is to insert a new section in the bill. The new section allows an adult to apply to the courts in certain circumstances to set aside requirements in the bill for the nearest relative to be consulted or informed about matters that affect them. If the amendment is accepted, it would back up a commitment that was made by the Deputy First Minister in the stage 1 debate on 9 December 1999.

The Executive believes that it is right that incapable adults should be able to ask that the person who would otherwise be treated as their nearest relative be displaced from that position. Such adults should, alternatively, be able to apply for particular information to be withheld that would otherwise be given to the nearest relative. There is, otherwise, a risk that the adult's right to privacy might be infringed.

Applications will be granted where the courts consider that it is in the adult's interest to do so. This test will also take into account the possible benefit to the adult of consulting the nearest relative, who might know the adult better than anyone else and would therefore have information that should be contributed to the decision-making process.

Gordon Jackson: I might be wrong, but does that go some way to meeting Phil Gallie's point about problems that might be caused if the nearest relative has been living in Timbuktu for 20 years?

Phil Gallie: Yes.

The Convener: If no one else wishes to speak, I invite the minister to move his amendment.

Angus MacKay: Before I move the amendment, I want to say that I agree with Mr Jackson's observations.

I move amendment 131.

Amendment 131 agreed to.

The Convener: We move on to amendment 132 on safeguarding, which has already been debated with amendment 129. Minister, do you wish to make any further comments about this Executive amendment?

Iain Gray: There will be rules for carrying out the safeguarding role and the amendments will allow some flexibility if the procedures need to be changed. That parallels the system already in operation under the Children (Scotland) Act 1995, which should allay some of the fears that were expressed.

I move amendment 132.

Amendment agreed to.

Section 4 agreed to.

Section 5—The Public Guardian: further provision

The Convener: We will now move on to amendment 5, which is grouped with amendments 134, 135, 7 and 8. Those are all Executive amendments.

Angus MacKay: Amendment 5 ensures that the public guardian will only dispense with notifying the adult of important events under the bill where that guardian has considered evidence prescribed in regulations. That is the parallel provision to the provision already in the bill about circumstances in which the sheriff might decide that the adult should not be notified of applications or proceedings that concern that adult.

In general, the adult should be told of all formal applications and proceedings that affect him or her, as well as being asked for his or her views on what is being done for him or her. Intimation should only be withheld where that would pose a serious risk to the adult's health, for example, where hearing of a guardianship application might lead the adult to attempt to harm himself or herself. Medical evidence is likely to be required that the adult's health would be put at risk, and amendment 5 meets a suggestion that was made in the Subordinate Legislation Committee's stage 1 report that the bill should clarify that the regulation-making power at section 5 will cover such evidence to the public guardian.

With respect to amendments 134, 135, 7 and 8, in principle the adult is to be told about everything that is proposed or done for him or her under the bill so that he or she is involved as much as possible in the decision-making process. Amendments 134 and 135 ensure that the adult is told of all Court of Session proceedings and sheriff court matters under the bill that affect him or her, unless notifying him or her is likely to pose a serious risk to the adult's health. I dealt with the context in which that might happen when I spoke to amendment 5.

Amendments 7 and 8 are technical amendments that are required to ensure that section 9(2) remains consistent with section 9(1) in referring to dispensing with intimations and notifications to the adult.

Christine Grahame: Do certain kinds of actions require changes to sheriff court rules on intimation and notification?

Angus MacKay: Those rules cover this matter, so the answer is no.

The Convener: I take it that you are moving the amendment, minister.

Angus MacKay: I move all the amendments.

The Convener: Well, we are only at amendment 5 at this stage.

Angus MacKay: I move amendment 5.

Amendment 5 agreed to.

The Convener: That completes consideration of the amendments to section 5.

Section 5, as amended, agreed to.

Section 6—Expenses in court proceedings

The Convener: We will now consider amendment 88. I call Phil Gallie to move the amendment.

Phil Gallie: Amendment 88 addresses the fact that the public guardian, the Mental Welfare Commission, the local authority or whoever is looking after the affairs of the incapable adult must look to the protection of the interests of the adult in any award of court expenses. What surprises me is that section 6 allows a charge to be made against the incapable adult if the bodies to which I have referred are representing the public interest. I want to find out from the minister what was in his mind when he set that condition.

I move amendment 88.

Angus MacKay: The effect of amendment 88 would be to remove the possibility of the public guardian, the Mental Welfare Commission or the local authority recovering expenses for a court action that they initiated or became a party to in order to preserve the public interest. That situation could arise when, for example, a proxy decision maker was abusing his or her position by making false claims or misusing services on behalf of the adult concerned.

It is important to make the point that the expenses need not be recovered from the adult's estate; they could be recovered from the person

"whose actings have resulted in the proceedings."

The Executive's view is that it would be wrong to remove that possibility, which is what this amendment would do. The public purse should not have to bear the cost of proceedings against private individuals by public authorities that are designed to protect the public interest, nor should

public authorities always have to meet their own costs when they become party to an action that is brought by someone else. The present provisions in the bill are consistent with practice in other civil law areas.

Christine Grahame: I thank the minister for the explanation. He gave a clear example of a case in which expenses should be awarded against the person

"whose actings have resulted in the proceedings."

Can the minister give an example of a case in which the adult's estate should be penalised? Why is that provision there?

Angus MacKay: To some extent, that is a hypothetical situation, but one such case would be where the adult stood to benefit.

Christine Grahame: So it would not be a case in which the person whose actings have resulted in the proceedings did not have assets. Are you saying that this is not about sources, but is directly linked to benefits?

Angus MacKay: My initial point was that this is a hypothetical question. It would depend on the specific circumstances pertaining in the case.

Christine Grahame: It is just—

The Convener: Christine, enough.

Christine Grahame: I obey.

Gordon Jackson: The amendment would not take out the reference to protection for the adult, but the bit about "representing the public interest". I am trying to get my mind around the situation that is envisaged. In what kind of situation would it be appropriate to charge the adult's estate for the expenses of a local authority or someone else that arose not from representing the interests of the adult—because the amendment leaves that in—but from representing the public interest? I am struggling to envisage what is envisaged. Can I be given an example, even a hypothetical one?

Angus MacKay: In the interests of reaching some clarity in this regard, I would prefer to examine the issue further so that I can provide a more detailed explanation of the circumstances in which this provision would pertain. I might then be able to reassure members of the committee. I am not sure whether Mr Gallie wishes to withdraw his amendment for the moment.

The Convener: We cannot not deal with the amendment, but we could end the meeting at this point and discuss it at another meeting. I leave that in Phil Gallie's hands.

Phil Gallie: I can see no harm in my pressing the amendment and trying to get it carried. That will allow the minister to come back at a later date to rectify what he might see as an omission. I would have to be persuaded that I should drop the amendment at this point.

12:30

The Convener: If it was thought to be useful, we could decide not to proceed to a vote at this stage. We could deal with it at the start of the next meeting. I do not regard that as a useful procedure and I do not want to do it too often. I wanted to deal with the amendment today so that we could start the next meeting with a fresh amendment.

In the light of the minister's comments and Phil's interest, I will draw the proceedings to a close so that we can clarify the matter before moving to a decision.

Debate on amendment 88 adjourned.

The Convener: I had hoped to give an indication of our target for Tuesday, but because Monday is an all-day meeting and we might get through more than we thought we would, I will not specify a target at this point. Members are advised to check the business bulletin daily for information—such as target dates—about stage 2 of the bill.

I once more remind members to check that their amendments are in the bulletin in the form in which they ought to be. By the time we get to the marshalled list, the wording cannot be changed. Amendments for next Tuesday need to be in by 5.30 on Friday if members want them to appear on the list. There is not a great deal of time.

I will close the meeting—[*Interruption.*] Sorry, Pauline, you are too late.

Pauline McNeill: I have had my hand up for ages.

We did not come to a conclusion about the timing of Tuesday's meeting. There was a debate about whether it was from 3 pm until 6 pm or 2 pm until 5 pm.

The Convener: The meeting starts at 9.30 am. We will break for lunch at 12.30 and reconvene at 3 o'clock.

Pauline McNeill: We had not agreed to that.

The Convener: The difficulty is that committee members have organised their diaries on the basis of a 3 o'clock afternoon start. Because of that, we will break for lunch at 12.30 and reconvene at 3 o'clock.

Meeting closed at 12:32.

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