JUSTICE AND HOME AFFAIRS COMMITTEE

Tuesday 1 February 2000
(*Morning*)

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

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ADULTS WITH INCAPACITY (SCOTLAND) BILL: STAGE 2 692

JUSTICE AND HOME AFFAIRS COMMITTEE
4th Meeting 2000 (Chamber)

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:

Lord James Douglas-Hamilton (Lothians) (Con)
Iain Gray (Deputy Minister for Community Care)
Angus MacKay (Deputy Minister for Justice)

CLERK TEAM LEADER:

Andrew Mylne

SENIOR ASSISTANT CLERK:

Shelagh McKinlay

ASSISTANT CLERK:

Fiona Groves

Scottish Parliament

Justice and Home Affairs Committee

Tuesday 1 February 2000

(*Morning*)

[THE CONVENER *opened the meeting at 09:38*]

The Convener (Roseanna Cunningham): Good morning everybody. I am sorry that we are a little late, but we had one or two minor technical details to discuss before we could start today's meeting.

We have had apologies from three members of the committee. Phil Gallie is unable to be here; I understand that Lyndsay McIntosh will be moving the amendments that are in his name and that Lord James Douglas-Hamilton is here as a back-up.

Mrs Lyndsay McIntosh (Central Scotland) (Con): He is holding my hand, Roseanna.

The Convener: Our colleague Kate MacLean is chairing the Equal Opportunities Committee in committee room 2. I understand that she is trying to organise things so that in future there is no clash between that committee and this committee; in order to achieve that, she needs to be at the Equal Opportunities Committee today.

Totally coincidentally, but luckily for balance, Christine Grahame is ill with the flu. As a result, we have a hat trick of party non-representation, which means that we will not have to worry about any difficulties should there be any tied votes.

Adults with Incapacity (Scotland) Bill: Stage 2

The Convener: I remind members that whoever is moving the first amendment in a group should state that they are doing so while they are speaking to it. That would help me, because if I forget to prompt you to move it, and you do not move it, strictly speaking it is not moved. If members could get into the habit of moving the amendment at the appropriate time, everything would move along more easily.

Section 34—Application of Part 4

The Convener: We should crack on. The first amendment is amendment 184, which is in the name of the minister, Mr Jim Wallace. It is grouped with amendments 185, 187, 188, 189, 190, 191, 192, 145, 194 and 267—all of which are Executive amendments.

The Deputy Minister for Community Care (Iain Gray): Thank you, convener. I start with amendments 184, 192 and 194.

Under the provisions of this bill, registered establishments will have the power from the outset to manage funds and will be subject to inspection to ensure that they have the necessary controls in place. Part 4 of the bill is about establishments such as residential care homes and their capacity to manage funds for adults with incapacity. We recognise that some establishments in that category that are subject to registration, especially the smaller ones, may not wish to exercise that power, and may wish to exclude themselves from the responsibility of maintaining appropriate financial controls—controls that quite properly go along with the power to manage people's funds. Were the establishments to make such a choice, they would not be able to manage an adult's affairs under the bill. That would mean that, if any resident adult were incapable, separate arrangements would have to be made—for example, a financial guardian or a relative would have to assume the responsibility of managing the adult's affairs. The three amendments are to give that option to those establishments that require to be registered but do not want to take on the responsibility of managing their residents' finances.

Section 34(3) provides for the list of establishments at subsection (1) to be amended by regulations. There is an overlapping provision in schedule 1, paragraph 2 that provides for the list of establishments in paragraph 1 to be amended. Paragraph 1, however, defines "the managers", so it is appropriate to retain that provision and, as amendment 194 suggests, to delete the provision

that would allow Scottish ministers to amend the establishments in the schedule.

Amendments 185, 190 and 191 aim to rationalise the list of establishments in section 34(1) whose managers will have the power to manage the affairs of residents with incapacity. The establishments included in paragraphs (d) and (e) are already covered by paragraph (f)—they are all establishments registered under sections 62 or 63 of the Social Work (Scotland) Act 1968.

A hospital that is managed by a national health service trust as described in paragraph (j) is already covered by paragraph (a) by virtue of the reference to the Nursing Homes Registration (Scotland) Act 1938 that refers to such hospitals. The last line of subsection (1) is not necessary, as the managers of the establishments listed will have the power from the outset to manage residents' affairs—unless, of course, that power is relinquished by the managers or is removed for some reason.

There are consequential amendments to section 38—amendments 214 to 219. They will be taken separately.

Amendments 187, 188, 189 and 267 are technical and consequential amendments to ensure that references to the Social Work (Scotland) Act 1968 are correct and consistent. The references to the 1968 act in paragraph (g) require correction and need to be made consistent with the references to registration in paragraph (f). That is achieved by amendments 188 and 189. The exception referred to in paragraph (g) is found at section 61(1A)(a) of the 1968 act, and this change is made also.

09:45

Amendment 145 deletes section 34(5), which gives effect to schedule 1. That schedule defines the managers of the authorised establishments in section 34. It is activated by subsection (4); subsection (5) is not necessary.

With that explanation, I hope that the committee agrees that the amendments correct some technical points in the bill and, perhaps more important, open up flexibility, particularly to smaller establishments that provide care but which do not wish to take on the responsibility for finance. Convener, this has also provided me with a major inclusion in my list of best speeches ever.

I move amendment 184.

Gordon Jackson (Glasgow Govan) (Lab): Could you go through that again?

Iain Gray: Which bit did you not follow, Gordon?

The Convener: I will restrain myself from testing the members of the committee on what has just been said. Does anybody have any questions or wish to make any comments?

Amendment 184 agreed to.

Amendment 185 moved—[Iain Gray]—and agreed to.

The Convener: We come to amendment 186, with which are grouped amendments 193 and 266.

Iain Gray: I do not know how much help it is if I say that the main thrust of these Executive amendments is the reverse of the previous group. The aim is to bring forward a major policy matter that is presently contained in schedule 5, but which we believe should be in the body of the bill, although the basic policy intentions remain unchanged.

The important development is to make provision for smaller care establishments—for example, sheltered housing and other supported accommodation—that would not normally require to be registered under the Social Work (Scotland) Act 1968, but which nevertheless wish to be able to manage the financial affairs of their incapacitated residents. The Executive considers that it is more appropriate to have this provision in the body of the bill than within a schedule.

In giving effect to the policy, it is important that we ensure that such establishments and their managers are subject to all the safeguards that the bill provides, in much the same way as other registered establishments are subject to them. Registration in such cases would be entirely voluntary, although without it the establishments could not manage the finances of residents who are adults with incapacity. Registration would be limited to the provisions of the bill, and to certain provisions relevant to registered establishments under the Social Work (Scotland) Act 1968. Once again, the purpose of the amendments is to provide some flexibility, while ensuring that the maximum protection of the bill is available for residents.

I move amendment 186.

The Convener: Is there any query, question, interest or debate?

Amendment 186 agreed to.

Amendments 187 to 192 moved—[Iain Gray]—and agreed to.

Amendment 145 moved—[Iain Gray]—and agreed to.

Section 34, as amended, agreed to.

Amendment 193 moved—[Iain Gray]—and agreed to.

Schedule 1

MANAGERS OF AN ESTABLISHMENT

The Convener: We move now to schedule 1.

Amendment 194 moved—[Iain Gray]—and agreed to.

Schedule 1, as amended, agreed to.

Section 35—Residents whose affairs may be managed

The Convener: We move to amendment 195, which is grouped with amendments 196 to 201 and 204 to 208, all in the name of the Executive.

Iain Gray: These amendments deal with the identification and intimation of the circumstances in which managers of an authorised establishment can manage the affairs of a resident. Managers of such an establishment may manage the affairs of a resident only in respect of whom a certificate has been issued stating that the resident is incapable of doing so himself or herself. The amendments result from a desire to harmonise various parts of the bill. They will ensure greater consistency and increased protection for individuals.

Amendments 195 and 196 express the principle implied in section 43 that a manager should be required to consider other options as to how a resident's affairs should be managed before the manager applies for a certificate to enable them to manage the resident's affairs. This consideration is reflected in amendment 200, which requires any notification under section 35(4)(b) to be supported with details and reasons. Therefore, amendment 200 is broadly in line with the principle of the bill that interventions under the act should take place only when other possibilities have been exhausted.

Amendments 198 and 199 ensure that the certificate and notification under subsection (4) are sent to the resident. By virtue of amendment 197, these requirements are made subject to the precautionary measures in subsection (8), which is consistent with the similar provisions in subsection (3).

The deletion of subsection (5) by amendment 201 removes the only reference in the bill to assisted decision making, thereby ensuring a consistent approach, which was debated at previous meetings of this committee.

Amendments 204 to 207 amend subsection (8). It is considered more appropriate to provide that the managers of the authorised establishment should be exempt from taking action under subsections (3) and (4) only if the supervisory body agrees to such a request. That is consistent with the approach at section 9(1), for example.

Amendment 208 deletes subsections (9) to (11). That is proposed to ensure consistency with the approach taken elsewhere in the bill not to specify the kind of evidence that should be taken into account in reaching decisions that are likely to affect the health of the adult. We consider it more appropriate that those matters should be dealt with by way of regulations, which is what amendment 208 would achieve. That is consistent with sections 5(1)(c) and 5(1)(d), for example.

This group of amendments is primarily geared towards ensuring consistency throughout the bill, and I hope that the committee will agree to them.

I move amendment 195.

The Convener: As I see that no one is desperate to speak, I will put the question.

Amendment 195 agreed to.

The Convener: Scott, I see that you wish to speak, but you are too late.

Scott Barrie (Dunfermline West) (Lab): I was still thinking about what the minister said.

Amendment 196 moved—[Iain Gray]—and agreed to.

The Convener: We turn to amendment 39, which was debated with amendment 124.

Iain Gray: I move amendment 39.

The Convener: The question is, that amendment 39 be agreed to. Are we all agreed?

Iain Gray: I move the amendment.

The Convener: I did not speak.

Iain Gray: Sorry. I am trying to read and move at the same time.

The Convener: We all know that men can do only one thing at a time.

Amendment 39 agreed to.

Amendments 197 to 201 moved—[Iain Gray]—and agreed to.

The Convener: I call amendment 202, in the name of the Executive, grouped with amendments 100 and 103, in the name of Phil Gallie, and amendments 203, 234 and 235, in the name of the Executive.

Iain Gray: I will speak to amendment 202 and the other amendments in the group, including amendments 100 and 103.

Managers of authorised establishments may manage the affairs of a resident only in respect of whom a certificate has been issued that that resident is incapable of doing so himself. I repeat that point, because it is a principle that runs through this part of the bill. Executive amendments 202 and 203 result from a desire to harmonise

various parts of the bill, and so ensure greater consistency and increased protection for individuals.

The amendments are to section 35(7). I will come to amendment 100 later. They clarify the procedure for reviewing a certificate by specifying who may instigate a review and by expressly providing for a change in the resident's condition to be a basis for review. That is consistent with certificate procedures in section 44, which we intend to amend further. The provision will mean that a change in circumstances—for example, when a relative returns who might be better placed to manage the resident's finances—and not only a change in capacity, might be a basis for review.

I hope that it is clear from the amendments that I have just explained that we acknowledge the intention behind amendment 100, which was lodged by Mr Gallie. We agree that the most important matter is to ensure that any adult should not be prevented from managing his own affairs when he is capable of doing so. However, there are benefits in having flexibility—for example, to cover the return of a resident's relative who wishes to take over the management of the incapable adult's affairs. In other words, the Executive amendments address what is intended by amendment 100, but provide for further flexibility.

Executive amendment 203 ensures that a change in the adult's condition, including a deterioration, is also ground for review. That seems only right. We believe that there is greater advantage in keeping the grounds for review as wide as possible, so I hope that amendment 100 will be withdrawn and that amendment 203 will be supported.

Executive amendments 234 and 235 put more meat on the bones of section 41 and set out more clearly our policy intentions. They do that by giving due recognition to a resident who regains capacity; they provide for the management of his affairs to be restored to him, accompanied by a statement of his affairs both at the time he regains capacity and, when he has arrangements in place to manage his own affairs, on the actual transfer.

Similar provision is made for when the resident remains incapable of managing his affairs but leaves the authorised establishment to live elsewhere. If the resident moves, the supervisory body is to be notified so that its records can be updated. Where the person takes up residence in a place other than another authorised establishment, or other than in the care of a local authority, the local authority for the area in which the person is expected to live is also to be notified.

I hope that Mr Gallie and the committee will agree that the intention behind amendment 103 has been adequately covered by amendments 234 and 235. We do not believe that amendment 103 would have achieved what we think was intended; it would simply have given an example of a reason for a person ceasing to be a resident—that is, by regaining capacity. There is no need for that, as the phrase "for whatever reason" covers the case of a person leaving an authorised establishment because they have ceased to be incapable. Our amendments cover that situation as well as the case in which the resident regains capacity but continues to live in the establishment. I therefore hope that amendments 100 and 103 will be withdrawn.

I move amendment 202.

10:00

The Convener: Lyndsay, do you want to speak to amendments 100 and 103?

Mrs McIntosh: I shall speak first to amendment 100 on Phil Gallie's behalf. I appreciate the comments that Iain Gray has made, and I am grateful that he has considered my colleague's amendments. Phil would want me to mention the fact that section 35(7)(a) provides that a certificate

"shall be reviewed on any change of circumstances of the resident".

In some people's opinion, the review of the certificate is necessary only if there has been an improvement rather than a deterioration in the resident's circumstances.

Amendment 103 deals with the provision for the administration and disposition of a person's estate upon the person ceasing to be a resident. The implication of the section as drafted is that it may not apply when the person assumes full capacity, but our amendment makes it clear that that section applies. I can tell that you have given some thought to this concern, minister, and am grateful for that.

The Convener: Do you want the minister to respond?

Mrs McIntosh: I do not think that I shall move this amendment.

The Convener: Will you move either of Mr Gallie's amendments?

Mrs McIntosh: I shall not move either of them.

The Convener: Would you like the minister to respond to your comments?

Mrs McIntosh: I would like him to confirm that he has given consideration to the ideas behind Phil Gallie's amendments and will take them into account.

Iain Gray: The two points that Mrs McIntosh has made will be covered in the Executive

amendments.

Mrs McIntosh: Thank you.

Amendment 202 agreed to.

Amendment 100 not moved.

Amendments 203 to 208 moved—[Iain Gray]—and agreed to.

Section 35, as amended, agreed to.

Section 36—Power to manage residents' affairs

Iain Gray: The policy behind amendment 209 is that managers of all registered establishments will from the outset have the power to manage the affairs of residents who are not able to do so for themselves, unless they have opted out of that power or the power has been withdrawn or revoked for any reason. Registration is carried out under the Nursing Homes Registration (Scotland) Act 1938, the Social Work (Scotland) Act 1968 and the Mental Health (Scotland) Act 1984 as appropriate to the kind of establishment in question.

It is important to ensure that the registration process under those statutes includes a requirement that the establishments have in place the necessary procedures and controls to ensure that residents' property is properly protected. In other words, different establishments are registered under different statutes and all establishments must ensure that they have the proper procedures. Section 36 as it stands does not achieve the intended policy, hence the replacement provisions.

That explains the purpose of amendment 209. I hope that the committee will agree that it is in some ways a technical amendment aimed at ensuring that adults with incapacity are protected.

I move amendment 209.

Amendment 209 agreed to.

Section 36, as amended, agreed to.

Section 37—Matters which may be managed

The Convener: I call the minister to speak to Executive amendment 210, which is grouped with Executive amendments 211, 212, 213, 220, 223 and 224, and with Phil Gallie's amendment 102.

Iain Gray: Amendments 210, 211 and 220 are minor amendments to ensure that proper statutory references are given and to avoid duplication of provisions.

It may help if I say a little about the background to the social security legislation. Social security benefits are not covered by the bill, as separate provision is made for them in social security legislation, which is a reserved matter and therefore one in which we may not interfere. However, that legislation makes provision for a person to be appointed to receive benefits on behalf of another, and we envisage that some managers of establishments will continue to be appointed for that purpose under that legislation.

I turn now to amendments 210 and 220. Reference is made in section 37(1)(a) and section 39(1)(a) to benefits paid under the Social Security Contributions and Benefits Act 1992. Although entitlement to benefits arises under that act, payments are made under the Social Security Administration Act 1992. The former act is nevertheless referred to because it will be familiar to recipients of benefit. The amendment is being made following a request from the Department of Social Security to ensure consistency of statutory references to the benefits legislation, which is, as I have said, a reserved matter.

Amendment 211 removes a duplication. Paragraph 37(1)(b) already covers the matters that may be managed under paragraph (c), so the latter paragraph is unnecessary and can be deleted.

I turn now to the remaining Executive amendments. Amendments 212, 213, 223 and 224 have the intention that managers should be able to manage any matter included in section 37(1) of a value up to the prescribed limit unless otherwise authorised by the supervisory body in respect of a named resident. That intention is not satisfactorily provided for in section 37(3), as read with section 39(3), as the bill stands at present.

Amendment 213 allows limits to be set in regulations for any of the matters in section 37(1), and different limits may be set for different matters. The new subsection provides for the supervisory body to authorise management of matters the value of which exceeds the prescribed limit in respect of an individual resident. The equivalent provision at section 39(3) falls, as it is no longer needed.

Turning to amendment 223, section 39(2) provides for the repayment of a resident's funds where they have been misused by a manager of an authorised establishment. In the course of the discussion on part 3 of the bill, when amendment 148 was agreed, we gave notice that we intended to introduce this amendment. Members will recall that amendment 148 brought together into one new section requirements for all those acting under the bill to repay with interest to the adult the funds that they had misused. Section 39(2) is therefore no longer necessary and should be deleted as we propose.

These amendments put in place through further regulations the limits on the property of the adult

with incapacity that can be managed. As was forewarned in our discussions on part 3, this group of amendments also makes it clear that where funds are misused they will have to be repaid with interest.

The Executive supports what it understands to be the intention behind Phil Gallie's amendment 102, namely, that joint purchases should be allowed where the individual resident would benefit from the communal purchase. We are advised, however, that the present wording of section 37(1)(g) does not preclude such an arrangement so long as each resident contributing benefits from the purchase. We believe that that was probably part of the intention behind Mr Gallie's amendment, and that point will be covered in more detail to managers.

Section 39(1) provides for a resident to be indemnified against any loss attributable to expenditure by the manager that breaches section 39(1)(g). Amendment 148, which I touched on earlier, also provides sanctions to deal with repayment of funds that have been misused. I hope that the committee will therefore agree that amendment 102 is not necessary, and we ask that it not be moved as its intention is already covered.

I move amendment 210.

Mrs McIntosh: I shall speak to amendment 102, which ensures that a resident's funds may be pooled with those of other residents. The purpose behind it is that more than one person should benefit from the purchase of what can often be quite expensive items. However, I hope that the minister accepts the principle that the individual contribution should not be exceedingly disproportionate to other contributions and that a person should be able to contribute to a pooled resource for an additional item. That was the thinking behind Phil's amendment.

Iain Gray: Those matters, which may be attached to amounts that would need to be revised from time to time, would be covered in the guidance.

Mrs McIntosh: Will that be in the guidelines rather than in the legislation?

Iain Gray: We believe that the bill covers the principle of the possibility of contribution to a communal purchase, provided that there is a benefit to each resident. Protection in terms of the amount of resources that can be allocated would in any case form part of the guidance and regulations. That guidance would therefore not appear in the bill, but Mr Gallie has drawn attention to the importance of getting that right for communal purchases as well as for individual purchases. We undertake that that would be fully covered in the guidance, on which there will be consultation.

Mrs McIntosh: As you might expect, Mr Gallie would wish to guard against excessive contributions.

Lord James Douglas-Hamilton (Lothians) (Con): I understand exactly what the minister is saying. However, it is not altogether clear that section 37(1) covers that situation, as it does not spell it out. Although we are quite clear as to the minister's intention, somebody reading this act later on might not be sure. Can the matter be clarified?

Iain Gray: I think that it has been clarified for us in the sense that we have sought legal advice, which makes it clear that contributions to communal purchases would be covered. The problem with guarding against excessive contribution is that it comes down to the question of what is considered excessive at a given time and place. It seems to me that that is a matter best dealt with in guidelines.

Lord James Douglas-Hamilton: Will the minister read out the exact words in the bill that cover that situation?

Iain Gray: The reference can be found in section 39(1)(g):

"(1) The managers of an authorised establishment shall, in relation to residents whose affairs they are managing under section 37 . . .

(g) spend money only on items or services which are of benefit to the resident on whose behalf the funds are held".

We believe that that provision would apply to communal purchases as well as to individual purchases; indeed, more than our belief, that is the advice that we have been given.

10:15

Lord James Douglas-Hamilton: I think that Phil Gallie would wish this matter to be clarified further. The minister is relying upon the words "or services", but it is not absolutely clear that those services could be used for communal benefit, which needs to be spelled out.

Iain Gray: I take Lord James's point, but our position, on which our advice is strong, remains that the circumstance described would be covered by the bill.

Scott Barrie: I think that we are discussing two slightly different issues. When Lyndsay McIntosh moved the amendment, she suggested that its purpose was to guard against a resident paying an excessive contribution towards communal purchases. However, we are now debating whether or not communal purchases can be made. We have heard that the reading of section 39(1)(g) suggests that one could make communal purchases. It is a matter of interpretation whether

one person could be charged excessively for such purchases, which is a separate idea. This matter should be dealt with by guidelines, rather than being included in the bill.

Mrs McIntosh: While I take Scott's point, I am concerned that we will have to wait for the guidelines for clarification.

Iain Gray: Mr Barrie made a good point. The clarification as to whether communal purchases are possible does not lie in the guidelines, as it is our belief that it is contained in the bill. The guidelines would clarify the controls and establish what would be considered to be an excessive contribution.

Gordon Jackson: I am not wearing my legal hat, but, for what it is worth, I cannot see why one could not buy things communally. I cannot see why the fact that an establishment wants to help a resident by buying something for four residents all at once would be struck at. It would seem pedantic in the extreme to turn round and say, "You can't do that because it benefits four people and not just one". I tend to think that the minister's advice must be right.

The Convener: Have we exhausted interest in this matter? Members agree that we have.

Amendment 210 agreed to.

Amendments 211 to 213 moved—[Iain Gray]—and agreed to.

Section 37, as amended, agreed to.

Section 38—Supervisory bodies

The Convener: Amendment 214 is an Executive amendment and is grouped with amendments 215, 216, 217, 218, 101 and 219, all of which are Executive amendments with the exception of amendment 101, which is in the name of Phil Gallie.

Iain Gray: I will speak to the Executive amendments first and then return to Mr Gallie's amendment 101.

These amendments are to the list of relevant supervisory bodies referred to in section 38 of the bill. They are primarily consequential upon the changes being made to section 34, which rationalise the list of authorised establishments.

We have taken this opportunity to make the health board the supervisory body of a private hospital registered under the Mental Health (Scotland) Act 1984. The health board has in place already financial controls to carry out this task properly, which would otherwise fall to the First Minister as the registering authority of a private hospital. The health board is named already as the supervisory body of a state hospital and therefore it makes good sense for the board to have similar oversight in respect of private hospitals. However, while there are no such private hospitals registered under the 1984 act at present, and we do not envisage any such registrations, it seems correct that the possibility should be covered by the legislation.

Amendment 219 provides for the list of supervisory bodies to be amended by regulations. These tidying-up amendments will remove duplications from the list. I commend their acceptance by members.

I move amendment 214.

We are happy to support amendment 101, which was lodged by Mr Gallie and which ensures consistency in the terminology—references should be to the "supervisory body", rather than to "supervisory authority" throughout part 4 of the bill. We thank Mr Gallie for spotting what is, in essence, a mistake.

Mrs McIntosh: Mr Gallie will be so glad.

The Convener: A startling outbreak of consensus.

In the circumstances, Lyndsay—

Mrs McIntosh: The minister is very accommodating.

Amendment 214 agreed to.

Amendments 215 to 218 moved—[Iain Gray]—and agreed to.

Amendment 101 moved—[Mrs Lyndsay McIntosh]—and agreed to.

Amendment 219 moved—[Iain Gray]—and agreed to.

Section 38, as amended, agreed to.

Section 39—Duties and functions of managers of approved establishment

Amendment 220 moved—[Iain Gray]—and agreed to.

The Convener: Amendment 221 is an Executive amendment and is grouped with amendment 222, which is also an Executive amendment.

Iain Gray: I trust that the committee will not press me too hard on amendment 221, which makes a grammatical correction, as my ability to parse sentences lies in the dim and distant past.

Amendment 222 has been lodged for the sake of consistency with requirements on record keeping elsewhere in the bill. The committee may recall our discussion on records, which I think took place at last week's meeting, when we agreed that particular formats for records need not be

specified in the bill. This amendment makes that approach consistent in the bill. The term "proper records" has no clear meaning on its own and the detailed requirements of what records need to be made and kept for any particular purpose will be set out in codes of practice and guidance.

These are relatively minor correcting amendments and I hope that the committee will accept them.

I move amendment 221.

Amendment 221 agreed to.

Amendment 222 moved—[Iain Gray]—and agreed to.

Amendment 102 not moved.

Amendments 223 and 224 moved—[Iain Gray]—and agreed to.

Section 39, as amended, agreed to.

Section 40—Authorisation of named manager to withdraw from resident's account

The Convener: I call the Executive's amendment 225, which is grouped with amendments 226, 227, 228, 229, 230, 231, 232 and 233, which are all Executive amendments.

Iain Gray: To clarify the process for obtaining a certificate of authority to withdraw funds, amendment 225 provides for application to be made in writing to the supervisory body. We believe that these provisions will add further safeguards for the protection of residents' funds. They differ from the access to funds scheme outlined in part 3 of the bill, which the committee discussed last week. That scheme is primarily for domestic carers: an official of a public body, such as a local authority, is excluded under section 24(1).

As section 40 stands, a named manager in an establishment may be authorised to make withdrawals from a resident's account. However, that manager is likely to be a different person from the managers that are described elsewhere in part 4 as

"managers of an authorised establishment".

For example, the named manager is likely to be an administrative officer, bookkeeper or some other employee. Such person should not be described as a manager, to avoid confusion with the term

"managers of an authorised establishment",

which is used elsewhere in the bill.

In addition, to provide some flexibility in the arrangements made by establishments to take account of, for example, shift working, leave or sickness, we consider it necessary to provide for more than one person to be nominated; in other words, for more than one person within the establishment to be able to make withdrawals from a resident's account. Amendments 230 and 233 are safeguarding amendments, aimed at further protecting the adult's funds.

The certificate of authority authorises persons in an authorised establishment to have access to a resident's funds. It is important that the period of authorisation or validity of the certificate does not exceed the period of validity of the certificate of incapacity that has been issued by a medical practitioner under section 35(2). That will ensure that the authorised person does not continue to have access to a resident's funds when, for example, they may have regained capacity and be able to manage their own funds.

The supervisory body will be able to specify a shorter period in any particular case, as it considers appropriate. As a further safeguard, the certificate of authority may be revoked at any time and the person holding the funds shall be notified accordingly. Therefore, fund holders will be made aware of any change in the authorisation of people who may have access to the funds. They will also be able to avoid making payments to an unauthorised person.

The purpose of these amendments is to be both practical and safeguarding, to allow establishments to operate and access funds practically and, equally, to increase the protection for the person whose funds are being accessed.

Amendment 230 is a simple grammatical correction.

I move amendment 225.

Amendment 225 agreed to.

Amendments 226 to 229 moved—[Iain Gray]—and agreed to.

Iain Gray: I should point out that my reference to amendment 230 was incorrect. I meant to refer to amendment 232. Amendment 230 is not a grammatical correction, but I move it in any event.

Amendment 230 agreed to.

Amendments 231 to 233 moved—[Iain Gray]—and agreed to.

Section 40, as amended, agreed to.

Amendment 103 not moved.

Amendment 234 moved—[Iain Gray]—and agreed to.

Section 41, as amended, agreed to.

Amendment 235 moved—[Iain Gray]—and agreed to.

Section 42—Withdrawal of right to manage

10:30

The Convener: We now come to amendment 236, in the name of the Minister for Justice. It is grouped with amendments 104, 237, 238, 239, 240 and 241. Amendment 104 is in the name of Phil Gallie; the remainder are in the name of the minister.

Iain Gray: I will start by speaking to the Executive amendments in the group, and will return to Mr Gallie's amendment later.

Section 42 deals with the revocation of registration or the power to manage funds, whether at the instigation of the supervisory body or at the behest of the managers. Consequential provision is also made for the future management of a resident's funds where registration or the power to manage is no longer available.

Amendment 236 corrects the reference to the new form of limited registration provided under new section 61B of the Social Work (Scotland) Act 1968. Where revocation of registration has taken place under subsection (1), amendment 239 enables the former position to be restored where appropriate.

Amendment 237 takes account of requests made under new section 34(2A) of the 1968 Act not to have the power to manage funds, and provides for registration to be revoked in such cases.

This might be an appropriate point to consider amendment 104, lodged by Phil Gallie. The Executive believes that that amendment would reduce the protection available to residents. We take the view that, where the serious step of revocation under section 42 is contemplated because of a particular incident or a particular concern, that revocation should apply in respect of the manager's powers to manage the affairs of all residents, not just the affairs of the resident to whom the incident or concern related. Mr Gallie's amendment would limit the revocation to the resident about whom concern had been raised. We believe that that would introduce an unacceptable element of complacency in an area where utmost care is paramount. I hope that amendment 104 will therefore not be pressed.

Amendment 238 ensures that, where registration or the power to manage has been revoked, and the supervisory body has assumed temporary responsibility for managing any resident's affairs, the supervisory body can transfer the management not only to another establishment, but either to another body or person or to the resident himself. That allows greater scope in determining who is the most appropriate person to manage the resident's affairs.

Amendments 240 and 241 extend the appeal provision to cover any decision of a supervisory body; I think that those amendments will also be welcome.

In summary, this group of amendments ensures protection for all residents in an establishment in which that protection is necessary, through the revocation of the authority to manage the affairs of adults with incapacity.

I move amendment 236.

Mrs McIntosh: I will speak to amendment 104. The minister addressed several of Phil Gallie's concerns. In view of the minister's comments that he is not in favour of restrictions, Phil would be supportive of the wider protection that the minister identified. The word that Phil used in advising me about the amendment was "probing". Having probed, I am satisfied with the minister's explanation.

Amendment 236 agreed to.

Amendment 104 not moved.

Amendments 237 to 241 moved—[Iain Gray]—and agreed to.

Section 42, as amended, agreed to.

Section 43 agreed to.

Section 49—Intervention orders

The Convener: We now come to amendments to section 49, the first section of part 6.

Amendment 40 moved—[Iain Gray]—and agreed to.

The Convener: I call the Deputy Minister for Justice to speak to and move amendment 41, in the name of Mr Jim Wallace, grouped with amendments 42 and 242.

The Deputy Minister for Justice (Angus MacKay): Amendments 41 and 42 are technical amendments, to bring the detailed provisions of section 49 for buying or selling accommodation for the adult under an intervention order into line with those for a guardian performing the same function.

Section 49(5) is defective, in that it refers generally to acquiring or disposing of an interest in heritable property rather than specifically to the purchase or sale of accommodation for the adult to live in. The amendments in the group will make the terminology consistent with that in schedule 2, and will limit the provision of section 49 to the purchase and disposal of accommodation for the adult to live in.

Amendment 242 is also a technical amendment.

It makes part 6 of the bill consistent in the way in which it treats guardianship and intervention orders that confer powers over the title to property belonging to an adult with incapacity. The amendment inserts a new section in the bill to make the same provision for registering intervention orders relating to heritable property as section 55 makes for guardianship orders. The amendment will ensure that third parties can find out, by looking in the property registers, who has powers to deal with property belonging to an adult with incapacity.

I move amendment 41.

Amendment 41 agreed to.

Amendment 42 moved—[Angus MacKay]—and agreed to.

The Convener: We now come to amendment 43, with which we shall consider amendment 44.

Angus MacKay: Amendments 43 and 44 are also technical amendments to section 49. Amendment 43 tightens the wording in subsection (8), ensuring that it can refer to all adults with incapacity under the bill, whether or not they have ever had capacity. The amendment prevents any interpretation of the subsection as validating only actions under the law as it stood when the adult possessed capacity.

Amendment 44 affects notifications that the public guardian will make when an intervention order has been made. It specifies in detail, as is provided for in similar provisions elsewhere in the bill, the circumstances under which the Mental Welfare Commission should be informed of an intervention order affecting the adult's personal welfare. Under the bill, the commission is generally told of matters relating to the welfare of adults whose incapacity results from mental disorder.

I move amendment 43.

Amendment 43 agreed to.

Amendments 44 and 45 moved—[Angus MacKay]—and agreed to.

The Convener: We now come to amendment 46, which is grouped with amendments 47 and 48.

Angus MacKay: Amendments 46 and 47 are also technical amendments, whose aim is to remove from the bill unnecessary duplicate references to the termination of an intervention order on the death of the adult concerned.

Amendment 48 is a further technical amendment to remove the reference to substituting intervention orders for guardianship orders from section 49(11), as amendments 46 and 47 render that provision unnecessary. As a result of the amendment, subsection (11) will refer only to section 58(2), which does not use the phrase, "guardianship order". The point of subsection (11) is to ensure that an intervention order cannot be used to circumvent the provisions of mental health legislation and allow an intervener to have the adult detained against his or her will. An intervention order cannot be used to give consent on the adult's behalf to any of the sensitive treatments to be excepted from the general authority to treat in part 5 of the bill.

I move amendment 46.

Amendment 46 agreed to.

Amendments 47 and 48 moved—[Angus MacKay]—and agreed to.

The Convener: Amendment 105 was debated with amendment 94.

Mrs McIntosh: I move the amendment.

Wait a minute. We are not moving that one.

Amendment 105 not moved.

Mrs McIntosh: This is getting too fast for me.

The Convener: I am going fairly quickly, but nobody is indicating that they want to speak at any point. If I am moving a bit too fast, I ask members to wave their arms about to attract my attention.

Section 49, as amended, agreed to.

Amendment 49 moved—[Angus MacKay]—and agreed to.

Section 50 agreed to.

Amendment 242 moved—[Angus MacKay]—and agreed to.

Section 51—Application of guardianship order

Michael Matheson (Central Scotland) (SNP): Amendment 243 relates to the application of guardianship orders. Section 51(3)(b) relates to a guardianship order being applied for in relation

"to the personal welfare of the adult,"

in which case there may be

"a report, in prescribed form, from the mental health officer"

to the court.

The question of social circumstances is very important where someone's personal welfare is concerned. That is currently the case with reports that mental health officers produce.

I should be grateful for the minister's view on the amendment, which seeks to include "social circumstances".

Iain Gray: The Executive is aware that the mental health officer's report in the corresponding guardianship provisions of the Mental Health (Scotland) Act 1984 is already commonly known

as a social circumstances report. The 1984 act specifically requires reports on social circumstances in applications for detention and community care orders, although they are rather different matters from the appointment of a guardian.

The Executive agrees in principle that the mental health officer's report should cover the factors that I believe Mr Matheson has in mind, although I would like to hear him enlarge on how broad he envisages the social circumstances report to be.

The Executive would like to consider the amendment further, for two reasons. First, we want to be sure that adding the phrase,

"the social circumstances of the adult"

to the requirement already present in section 51, for the report to comment on the general appropriateness of the order, adds something new.

Secondly, we are concerned that, if the bill refers specifically to social circumstances, that should not detract from the requirement for the report to cover the more general aspects of the need for guardianship. For example, the report should focus on whether guardianship should be for the adult's benefit, as required by the general principles. It should also comment on whether a less intrusive intervention in the adult's affairs would achieve that benefit.

We have already discussed how lists of specifics can sometimes weaken the bill, if they imply that something not listed is excluded.

Section 51 provides that the content of the mental health officer's report, and of other reports to the court, will be prescribed in regulations. That means that the intention behind the amendment could also be put into effect through subordinate legislation if not in the bill.

We believe that the intention behind amendment 243 has considerable merit, and we are sympathetic to it. We wonder whether, on that basis, Mr Matheson would be willing to withdraw it, and we will consider it seriously for stage 3.

10:45

Michael Matheson: I am cautious about defining what social circumstances would be because, as the minister will appreciate, it is an extremely wide area, and once one started defining it, that could have the effect that the minister mentioned—we might exclude certain areas.

There is need for clarification of what the prescribed form will be. I assume that the minister is saying that he is prepared to go away and think about the issue and that at a later date he will propose the contents of the prescribed form.

Is that what the minister is stating?

Iain Gray: That is our intention. We will examine the amendment and consider it for stage 3; we might get further views on regulations or subordinate legislation.

Michael Matheson: On that basis, I am happy to withdraw the amendment.

The Convener: You have not moved the amendment yet.

Amendment 243 not moved.

The Convener: We now come to amendment 50, in the name of the minister.

Angus MacKay: The amendment corrects a typographical error. It is a technical amendment to correct a simple mistake in the bill. Subsection 51(4) should refer, as does subsection 51(3)(b), to a mental health officer.

I move amendment 50.

Amendment 50 agreed to.

Section 51, as amended, agreed to.

Section 52—Disposal of application

Amendments 51 and 52 moved—[Angus MacKay]—and agreed to.

The Convener: We now come to amendment 244, in the name of Michael Matheson.

Michael Matheson: The amendment relates to the way in which the Mental Health (Scotland) Act 1984 works at present. Under that act, welfare guardianships last for six months, then they are renewable for a year at a time. It appears from the bill that the norm would be three years for the duration of a guardianship order. The Mental Welfare Commission seems to have concerns about the implications of that period. I should like to hear the minister's views on that area of concern.

I recognise that it might not be desirable for someone who has an incapacity of lengthy duration to return continually to court. However, through the processes of the transferring arrangements, there will be individuals who have a welfare guardianship under present mental health legislation, which might last for only six months, but once it transfers, it could last for up to three years.

Angus MacKay: The Executive is aware that there has been considerable debate about the period for which a guardian should be appointed, during both the Scottish Law Commission and the Scottish Executive consultation exercises.

Under the Mental Health (Scotland) Act 1984, guardians are currently appointed for six months, renewable for one year at a time. Curators bonis, on the other hand, may be appointed for indefinite periods. The SLC recommended a guideline figure of three years to bridge the gap between existing forms of welfare and financial guardianship. It emphasised the importance of flexibility to suit the adult's circumstances. The sheriff could choose a shorter or longer period, including an indefinite period. We think that the SLC was right, and we have included its recommendations in the bill.

There are separate provisions for renewal at section 54. Applications for renewal must be accompanied by the same reports that are required for an initial application. That emphasises the importance of a thorough review of the adult's circumstances and establishing whether guardianship is still required.

The Executive certainly understands why some people may take the view that there should be a three-year limit on the appointment of a guardian. We have had representations that the maximum period should be even shorter. We are not sure that the differences between Mental Health (Scotland) Act 1984 guardianship and the new, flexible system of intervention orders and guardianship under the bill have been made sufficiently clear. It might help if I comment on those differences.

Under the bill, there is no restriction on how often a guardianship order can be appealed, whereas that is possible only at set specific intervals under the Mental Health (Scotland) Act 1984. If an order is not thought necessary, the courts can be asked at any time to recall it—in other words, to end it. Alternatively, the courts can be asked to vary the terms of the order or to replace the guardian with someone more suitable. Those are powerful new rights compared with those that exist at present for the offices that will be replaced by part 6 of the bill.

It is also important that the bill provides a unified system of financial and welfare guardianship. The terms on which a guardian is appointed must meet the needs of both. In many cases, requiring three-year renewals could impose considerable unnecessary expense on the adult's resources, where their circumstances had not changed.

Although the Executive has had representations that three years is the longest period for which a guardian should be appointed, we have also heard genuine sincere concerns that there should be no maximum period. Those concerns have come, in particular, from parents who are acting for their son or daughter, where there is no prospect of their gaining or regaining capacity. It is distressing—and could be offensive to such parents—to suggest the need for frequent reviews of their powers. The Executive recognises that we must strive to do what is right for the individual adult.

The Executive's view is that it should be left to the sheriff to decide how long a guardianship order should run, based on the three-year guideline in the bill, but with discretion to vary it bearing in mind the adult's circumstances. It is vital that, under the bill, each adult is seen as an individual and that the courts and the public authorities consider them as such. We believe that there should be no unnecessary statutory requirements that are not related directly to the interests of the individual.

It is the Executive's view that the provision in the amendment for the guardian to seek extensions of their appointment for up to a year at a time is intended to be in addition to the renewal provisions in section 54. We consider that it would be confusing to allow both types of renewal. Further, under the amendment, the guardian would be able to ask for, and be granted, extensions of their appointment without the normal requirements for evidence to the court, for example, to show that the adult is still incapable and still needs a guardian. That would weaken significantly the protection that the bill currently gives to the adult.

I appreciate that the period of appointment of the guardian in part 6 is a contentious and much-debated issue. The Executive has listened carefully to all the arguments that have been made on the issue over a long period. We think that the bill, as drafted, strikes the correct balance between rights and protection for the adult and makes the task of guardianship manageable. I hope that Mr Matheson will agree that periods of appointment should, on the basis of what I have said, be left to the discretion of the courts and that he will agree not to press his amendment.

Michael Matheson: I recognise what the minister said. I am conscious that this is a contentious issue. I am also conscious that there might not be a period on which all parties would agree. It might be that the three-year period strikes the correct balance. I am also persuaded by the minister's argument about sheriffs' flexibility in being able to vary the period by up to three years.

Amendment 244 not moved.

The Convener: We now come to amendment 53, which is grouped with amendment 54.

Angus MacKay: The amendments ensure that all guardians with powers over property or financial affairs are required to provide caution, or insurance against liability. That is to protect the adult from any mishandling of their affairs, ensuring that recourse to compensation is possible. When an intervention order over property

or financial affairs is made, the bill already requires the person authorised under the order to find caution. However, as the bill currently stands, that is not a requirement for all guardians with powers over property or financial affairs. The amendment will correct that anomaly and require all financial guardians to find caution before being authorised to act.

Euan Robson (Roxburgh and Berwickshire) (LD): I do not understand the phrase, "to find caution".

Angus MacKay: It means insurance against liability.

Euan Robson: Is it a legal term?

Angus MacKay: I believe so.

Euan Robson: Why does the bill not say insurance if it means insurance?

The Convener: It is not insurance, strictly speaking.

Gordon Jackson: It normally comes from an insurance company. It means that you have to satisfy the court that you are lodging a bond, so if there is any loss, it will be covered. One normally gets it from an insurance company, but it could be done another way. Someone who was wealthy could lodge their own bond, if they had the money to do so.

Euan Robson: Okay.

Gordon Jackson: May I ask a question?

The Convener: The minister says no. [*Laughter.*]

Gordon Jackson: What worried me about this a little was whether we are satisfied that people will always be able to find caution. Normally speaking, if someone is appointed as a guardian, they might not have the wherewithal or the background. Have we satisfied ourselves about the people who will provide bonds, which might be from within the insurance industry, that they will be able to find caution? I can see in principle why it is a good idea that people should find it, but we do know that they will be able to do so.

Angus MacKay: The advice that I am receiving is that the specific circumstance that has been raised would have a bearing on whether that individual should be appointed as a guardian, if they were not capable of securing the insurance against liability for specific reasons, in their own specific circumstances. I am not sure whether that fully addresses the point that Gordon Jackson raised.

Gordon Jackson: I am slightly worried about occasions when, for one set of reasons, a person is the right person to get a guardianship order, because of their relationship to the adult, but cannot be appointed because they cannot find the caution.

Angus MacKay: Gordon Jackson has raised an interesting point, which bears some consideration. The important issue, and the reason why the amendment was lodged, is to safeguard the interests of the adult in all circumstances. It is likely that the guardian, in these circumstances, would be appointed only if the adult's needs were fairly long term and some significant complexity applied to the circumstances of the adult and the resources. Notwithstanding that there might be difficulty in the appropriate guardian trying to secure caution, none the less it is in the best interests of the adult with incapacity that that safeguard should be in place. The cost should be relatively low—it is likely to be 0.1 per cent, or £1 per £1,000. That is not a significant liability.

The Convener: I am always a little cautious about applying "not significant" to incomes in relation to which small sums might be significant. If I can pick up on what Gordon Jackson said, he is concerned that we do not get into the situation in which somebody, for a technical reason, cannot become the guardian even though there is every good reason why they should.

Angus MacKay: I do not think that there is a significant difference in our views about whether it is appropriate to ensure that safeguards are in place. On that basis, if we can take the amendment away and consider it again to see whether we can resolve the issue that Gordon Jackson has raised, we will then happily bring it forward at a later stage.

Gordon Jackson: I am not against this in principle, but I have a sincere worry that there may be situations where the right person, the decent person whom everybody wants to be the guardian, cannot do it because, for a technical reason, they cannot get the bond.

Angus MacKay: I understand and accept the point that Gordon Jackson is making, which is why I am offering to take the amendment away, to try to fix it.

The Convener: You are not moving it at this stage?

Angus MacKay: I will not move it at this stage; I will propose it later.

11:00

Lord James Douglas-Hamilton: I have a question, although I am not sure whether this is the best time to raise it. Under powers of attorney, certain persons can be excluded if they are next of kin, for reasons of deemed unsuitability. I would like to know whether guardians, if they are close

relatives, can be excluded for reasons of deemed unsuitability, and whether that flexibility exists within the provisions that have been brought forward.

Angus MacKay: Before I receive advice, I question why Lord James is raising that point now.

The Convener: I do not think that it is immediately relevant to the amendment. Let us finish with amendment 53, Lord James. When I put the question on sections 52, 53 and 54, that will be the appropriate time to raise that point. Your question relates to section 53.

Amendment 53 not moved.

Section 52, as amended, agreed to.

The Convener: I shall now put the question on sections 53 and 54. I would normally press on and ask whether they are agreed to, but Lord James wants to comment on section 53.

Lord James Douglas-Hamilton: I ask the minister to confirm that a close relative who is deemed unsuitable to have the power of attorney would be excluded, and that the same flexibility would exist under these guardianship provisions. The granter of a power of attorney has the right to exclude somebody who is deemed unsuitable, and the granter probably has inside information about the family that nobody else has.

Angus MacKay: No, the guardian can be a family member.

Lord James Douglas-Hamilton: I am sure that a guardian can be a family member. However, a family member who might seem to others to be an obvious guardian might be deemed unsuitable for particular reasons. I am asking whether the same flexibility will exist as currently exists with a power-of-attorney appointment, to exclude the person who might otherwise be appointed.

The Convener: Lord James, quite a lot of detail is involved.

Angus MacKay: I have now grasped the issue. The guardian can be appointed only by the court, and the views of a range of individuals are taken into account when the court decides on the appointment of the guardian. Therefore, that matter should be addressed at that stage.

Lord James Douglas-Hamilton: Thank you very much.

Sections 53 and 54 agreed to.

The Convener: We are about to move on to section 55. Now is the appropriate time for a brief adjournment. I ask members to return in 10 minutes. We have a realistic prospect of completing all the business today, which would be a great advantage to everybody.

11:02

Meeting adjourned.

11:21

On resuming—

Section 55—Registration of guardianship order relating to heritable property

The Convener: Amendment 245, in the name of the minister, is grouped with amendments 246, 247, 248, 249, 250, 251, 252, 253 and 254.

Angus MacKay: Amendment 245 ensures that only guardianship orders that can confer powers that are relevant to the title to an adult's property need be registered in the land register or general register of sasines, for the benefit of the adult and of third parties. The amendment excludes from section 55 other orders that, for example, give a guardian powers to manage the property but not to sell it or raise a loan on it.

The other amendments are technical and ensure that the procedures for registering guardianship orders relating to heritable property with the Keeper of the Registers of Scotland work correctly.

I move amendment 245.

Amendment 245 agreed to.

Amendment 54 not moved.

Amendments 246 to 254 moved—[Angus MacKay]—and agreed to.

Amendment 55 moved—[Angus Mackay]—and agreed to.

Section 55, as amended, agreed to.

Section 56—Joint guardians

The Convener: Amendment 56, in the name of the minister, is grouped with amendments 57, 58 and 59.

Angus MacKay: Those amendments are all technical amendments to section 57 of the bill.

Amendment 56 ensures that joint guardians can act without consultation when consultation is impracticable or when they have agreed that consultation is not necessary. It would be unnecessarily restrictive to insist, as the bill currently does, that both those criteria are met before one joint guardian can make a decision.

Amendments 57 and 58 ensure that substitute guardians can be appointed by the court at any point after a guardian has been appointed, to act if that guardian is unable to act. As the bill stands, a substitute could be appointed only after the original guardian became unable to act. That could

harm the adult's affairs and make it difficult to plan for the future.

Amendment 59 ensures that the appropriate statutory authorities are notified, not only of the appointment of a substitute guardian, but of the point at which he or she starts to act as guardian.

I move amendment 56.

Amendment 56 agreed to.

Section 56, as amended, agreed to.

Amendments 57 to 59 moved—[Angus MacKay]—and agreed to.

Section 57, as amended, agreed to.

Section 58—Functions and duties of guardian

The Convener: Amendment 106, in the name of Phil Gallie, is grouped with amendment 107, which is also in the name of Phil Gallie.

Mrs McIntosh: The effect of amendment 106 adds actions of nullity of marriage to the list of status-related actions that the guardian may pursue or defend. If the guardian can pursue or defend divorce or separation actions, other actions relating to married status should be included in that power. The amendment is worded accordingly.

I move amendment 106.

Angus MacKay: Are we dealing with amendments 106 and 107?

The Convener: Yes.

Angus MacKay: The two amendments in Phil Gallie's name attempt to clarify that, when a court makes an order to appoint a guardian, it may confer on the guardian power to negotiate a separation agreement or to pursue or defend an action for declarator of nullity of marriage in the name of the adult.

The Executive has considered these amendments and thinks that amendment 106 is not necessary. The general powers are sufficiently broad that a power to negotiate and conclude a legal separation agreement could be conferred on the guardian. Regulations made under section 58(11), on the scope of powers that may be conferred on guardians, will clarify that.

The Executive wants to ensure that powers in respect of actions for nullity of the adult's marriage are covered by the bill. We would like to consider this issue further, to assess whether amendment 107 is necessary. If the mover of the amendment agrees to withdraw it, the Executive will consider lodging its own amendment at stage 3.

Mrs McIntosh: I think that we can agree to that.

Amendment 106, by agreement, withdrawn.

Amendment 107 not moved.

The Convener: Amendment 108 is in the name of Phil Gallie.

Mrs McIntosh: You are going too fast for me, convener.

The effect of amendment 108 on the list of powers that a guardian may exercise is to ensure that the guardian may petition for appointment as an executor. The problem that we would like the Executive to consider is, in general terms, the position in section 58, which seeks to give the guardian all the powers that the adult could exercise.

The Convener: Is that a question to the minister?

Mrs McIntosh: It is.

Angus MacKay: The best way in which to address that question is to respond to the amendment.

The amendment attempts to clarify that a guardian may apply to become an executor of a deceased person when the incapable adult would be so entitled. We understand that that is on the presupposition that, under section 58, a guardian stands in the shoes of such an adult. The Executive does not agree that that is the effect of section 58—the section does not put the guardian in exactly the same position as the adult. For example, it does not enable him to take up the adult's fiduciary role—he cannot act as an attorney or guardian for others in place of the adult.

An executor is in a position of trust for someone else. It does not seem right that the guardian should be appointed to that position in place of the adult. The right course is for another executor to be identified. The procedures that are in the bill to do that should be used. I hope that Mr Gallie's substitute will withdraw his amendments.

11:30

Mrs McIntosh: My buzzer has not gone to tell me to do anything other than agree to the minister's suggestion.

Amendment 108, by agreement, withdrawn.

The Convener: I call amendment 146, in the name of Dr Richard Simpson. Is there anyone here to move that amendment?

Amendment 146 not moved.

The Convener: I call amendment 60, in the name of the minister, which is grouped with amendment 61, also in the name of the minister.

Iain Gray: These amendments are similar to amendments 14 and 15, which the committee agreed to last week. Amendments 14 and 15

apply to welfare attorneys, but amendments 60 and 61 provide for important restrictions on the powers of welfare guardians in the field of medical treatment. They ensure that welfare guardians cannot consent to any of the sensitive medical procedures in section 45(2). Those types of treatment are to be excluded from the general authority, in section 44, to treat people who are unable to consent. Extra safeguards, such as the consent of a court or a second medical opinion, are required before such treatments can be carried out.

The amendments also ensure that welfare guardians cannot consent to the sensitive treatments in sections 97 and 98 of part X of the Mental Health (Scotland) Act 1984 on behalf of a patient who is formally detained under that act. We do not believed that it would be right to allow guardians to circumvent the additional protections for the patient in that act by consenting to those treatments. Last week, the committee agreed to the parallel amendments, 14 and 15. Amendments 60 and 61 restore the position in the bill to that in the original Scottish Law Commission draft bill. We believe that they will be generally welcomed and we hope that the committee will support them.

I move amendment 60.

Amendment 60 agreed to.

Amendment 61 moved—[Iain Gray]—and agreed to.

Amendment 109 not moved.

The Convener: I call amendment 62, in the name of the minister, which is grouped with amendments 63 and 65, which are also in the name of the minister.

Angus MacKay: The purpose of Executive amendments 62 and 63 is to maintain consistency in the bill. They require the public guardian rather than the guardian to notify interested parties when the adult or guardian changes address. That is consistent with the approach that is taken elsewhere in the bill, which is for the public guardian to convey key information to statutory authorities and other interested parties.

Amendment 65 is a technical change to clarify who should be notified of the name of the officer responsible for carrying out the functions and duties of welfare guardian where the chief social work officer has been formally appointed. The amendment provides that those informed of the original appointment of a guardian in section 52(5) will be notified, including the adult, and the Mental Welfare Commission, in cases where incapacity is due, wholly or in part, to mental disorder.

I move amendment 62.

Amendment 62 agreed to.

Amendment 63 moved—[Angus Mackay]—and agreed to.

The Convener: I call amendment 64, in the name of the minister, which is grouped with amendments 67 and 68, also in the name of the minister.

Angus MacKay: Amendment 64 is a technical amendment to a cross-reference in section 58 of the bill. It ensures that the guardian is subject to paragraph 6 of schedule 2, which deals with buying or selling accommodation on behalf of the adult.

Amendments 67 and 68 are also technical amendments to paragraph 6 of schedule 2. They amend incorrect cross-references within the provisions of the schedule for appeals against the public guardian's decision on whether a guardian should buy or sell a house for the adult.

I move amendment 64.

Amendment 64 agreed to.

Amendment 65 moved—[Angus MacKay]—and agreed to.

The Convener: The next question is, that section 58 stand part of the bill. Are we all agreed?

Lord James Douglas-Hamilton: I would like to raise one query. I think that the answer is yes, but I would be grateful if the minister could confirm this.

There is a problem under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. If a house requires to be sold, an assurance has to be given that the house is not a matrimonial home. If the granter is unmarried, that is done by an affidavit, and the evidence can only be given by the granter. The problem arises where the person in incapacitated. Currently, the Keeper of the Registers of Scotland asks for a medical certificate with some form of statement from the attorney.

Under the bill, when an arrangement is contemplated to replace powers of attorney, is it not the case that that authorised person, namely, the guardian, can grant an affidavit for the purposes of the matrimonial homes act?

Angus MacKay: I am beginning to regret Lord James's attendance at committee this morning. I think that I have an answer to his question, however.

Everything that Lord James has raised would depend on the specific scope of the powers conferred on the attorney or guardian. Where there is a need for an affidavit, and the powers do not cover that, there may be a need to seek an intervention order or, alternatively, to seek a variation of the guardian's specific powers under section 67 of the bill. I think that that addresses

the point that Lord James raised.

Lord James Douglas-Hamilton: I thank the minister for that response. I do not want to prolong the debate on this point, but I request that it be examined with a view to ensuring that the present powers of attorney under the matrimonial homes act will be transferred to the guardians. I am pretty sure that the minister's answer will be yes, but it is as well to ensure that that is the case so that problems do not arise in future.

Angus MacKay: I will happily undertake to examine that point further, and I will write to Lord James on it. If he still has a concern, the matter can be raised at a later stage.

Lord James Douglas-Hamilton: Thank you very much, minister.

Section 58, as amended, agreed to.

Amendment 66 moved—[Angus Mackay]—and agreed to.

Amendments 67 and 68 moved—[Angus Mackay]—and agreed to.

Schedule 2, as amended, agreed to.

Section 59 agreed to.

Amendments 69 to 71 moved—[Angus Mackay]—and agreed to.

Section 60, as amended, agreed to.

Sections 61 and 62 agreed to.

Section 63—Non-compliance with decisions of guardian with welfare powers

Angus MacKay: Executive amendments 255 and 256 are in response to concerns that a welfare guardian should not be able to use section 63 to require a third party to do something that they would not ordinarily have to do. The amendments clarify that the welfare guardian's decisions may only be enforced by the courts where it would be reasonable for the adult or third party concerned to comply.

It will be for the sheriff, when considering whether to make an order enforcing the guardian's decision, to ensure that the order does not contravene any other statutory requirements and that it is not in contravention of the European convention on human rights.

I move amendment 255.

Amendment 255 agreed to.

Amendment 256 moved—[Angus MacKay]—and agreed to.

Section 63, as amended, agreed to.

Sections 64 and 65 agreed to.

Section 66—Recall of guardianship by Public Guardian, Mental Welfare Commission or local authority

The Convener: I call amendment 72 in the name of the minister, which is grouped with amendments 110, 73, 74, 75, 76 and 111. Amendments 110 and 111 are in the name of Phil Gallie.

Angus MacKay: Amendments 72 to 76 affect the recall of guardianship powers by the public guardian, the Mental Welfare Commission and the local authority. They provide that the statutory bodies will deal with recall of either financial or welfare powers. The public guardian will be able to recall only property or financial powers. The local authority and Mental Welfare Commission will be able to recall only welfare powers. That separation reflects the areas of expertise of the different authorities where they have specific functions under the legislation.

Amendment 110 replaces the word "recall" with "terminate". That may be because "recall" is thought to be imprecise and could imply that a guardian may retain some of their powers. The Executive does not agree that the term "recall" has such connotations. When the bill uses the term "recall", it means that the guardian's authority comes to an end. There is no residual authority. The Scottish Law Commission used the term to replace the old-fashioned mental health terminology, which refers to discharging a patient under guardianship. Various public statements on the policy in the bill by the Executive have used "recall" in relation to a guardian's powers, without attracting any adverse criticism.

The Executive does not believe that the word "terminate" is appropriate in the context of the amendment. "Terminate" is used in the bill in a more general sense to refer to all the ways in which a guardianship can be brought to an end, for example, by the death of the adult. I hope that Lyndsay McIntosh will agree to withdraw the amendment in the name of Phil Gallie.

Amendment 111 attempts to insert a new provision that where the statutory authorities recall a guardian's powers, the adult and the guardian are notified of their right to appeal. The Executive understands the thinking that recall decisions by the statutory authorities are particularly significant, since they have the effect of ending the guardianship altogether. It is important that the adult and the guardian know that they have the right to appeal to the sheriff if they are unhappy with the decision. However, if amendment 111 were accepted, it would be the only provision in the bill for mandatory information on appeal rights to be conveyed by the public guardian or other statutory authorities.

The Executive does not wish this amendment to be accepted. Information about appeal rights will be included in codes of practice and all guidance material issued to adults affected by the bill and those such as guardians appointed to act for them. Guidance material will be available to everyone who has dealings with the public guardian or other statutory authorities. To refer to one such requirement for public information—appeal rights against recall—within the bill, might lead to the undesirable assumption that assistance, guidance and advice are not to be given in other areas. I hope that Lyndsay McIntosh will also agree not to move this amendment in Phil Gallie's name.

I move amendment 72.

Mrs McIntosh: Having heard the minister's comments on the two amendments in Phil Gallie's name, I will not move amendment 110. I accept that the semantics of the amendment have caused some concern and I am happy that the terminology of the paragraph means "bring to an end", as the minister indicated. I am satisfied with the minister's assurance about the availability of codes of practice and guidance material, so I will not move amendment 111 either.

Amendment 72 agreed to.

Amendment 110 not moved.

Amendments 73 to 75 moved—[Angus MacKay]—and agreed to.

The Convener: We now come to amendment 257, in the name of Michael Matheson.

Michael Matheson: Section 66 allows for a decision on the recall of guardianship made by the Mental Welfare Commission to be appealed against in a sheriff court. Given that the Mental Welfare Commission has quasi-judicial powers under mental health legislation for issues that are not appealable, such as liability for detention in hospital, the commission is concerned about the legal precedent that might be set in areas that cannot be appealed against if its decisions on this issue are appealable.

I move amendment 257.

11:45

Angus MacKay: Amendment 257 affects section 66(10), which deals with rights of appeal against recall decisions taken by the public guardian, the Mental Welfare Commission and the local authority. Section 66(10)(a) allows all decisions on recall to be appealable; section 66(10)(b) allows appeals against decisions by the statutory authorities to remit or not applications for recall to the sheriff for determination, instead of the public authorities taking the decision about recall. An application might be remitted to the sheriff if it raised particularly difficult issues such as if it were not clear whether the adult had regained capacity to manage his or her own affairs.

The amendment removes the right of appeal against Mental Welfare Commission decisions under section 66(10)(b) on whether to remit the recall application to the sheriff. The right to appeal against a Mental Welfare Commission decision on recall under section 66(10)(a) is rather confusingly left in place. We wonder whether that was intended.

The Executive is aware that the Mental Welfare Commission is not happy with the rights in section 66 to appeal against its decisions on recalling a guardian's powers. In the bill, the adult and any other person claiming an interest would have possible other remedies such as making an application for recall under section 64. Where the guardianship was recalled, the adult could make a fresh guardianship application. However, for policy and legal reasons, we do not think that that is sufficient.

It would be most practical for any appeal against a decision of the Mental Welfare Commission to be dealt with as part of that decision-making process, rather than having to begin a fresh application under the bill. Furthermore, the Executive thinks that the bill should contain clear rights of access to the court on all decisions of public authorities, where those authorities are determining civil rights and obligations.

Moreover, as the determination of matters concerning guardianship is a determination of civil rights and obligations, it is necessary to meet requirements under article 6 of the European convention on human rights. Although the position under current mental health legislation is a separate matter, we can confirm that the issue falls within the scope of the Millan committee's review of mental health law.

In light of my comments, I hope that Mr Matheson will agree that amendment 257 would weaken the adult's rights under the bill, even though this particular appeal right will probably not be invoked often. In those circumstances, I hope that he will agree to withdraw the amendment.

Michael Matheson: Will the minister confirm that, if the sheriff court had no right of appeal against the Mental Welfare Commission, that could be in contravention of article 6 of the ECHR?

Angus MacKay: I think that that is the case in relation to a guardian.

Michael Matheson: On that basis, I will withdraw the amendment.

Amendment 257, by agreement, withdrawn.

Amendment 76 moved—[Angus MacKay]—and agreed to.

Amendment 111 not moved.

Section 66, as amended, agreed to.

Section 67—Variation of guardianship order

The Convener: We now come to amendment 147, in the name of the Minister for Justice.

Angus MacKay: Please bear with me, convener—I am struggling to keep up. Perhaps I should wave my arms around.

It may be best if I attempt to help the committee by explaining the purpose of amendment 147. Section 67 of the bill allows for applications to vary a guardian's powers, such as adding the power to sell the adult's house to a guardian's already more restricted financial powers. Such applications need not be accompanied by any specific reports to the court, such as are required for the appointment of a guardian.

Under section 51, an application for financial guardianship must include a report from a person with sufficient knowledge to comment on the need for guardianship and the suitability of the proposed guardian. An application for welfare guardianship must include a report from a mental health officer or the chief social work officer.

Amendment 147 attempts to clarify that an application to vary the guardian's powers—to confer welfare powers on a financial guardian or financial powers on a welfare guardian—must be dealt with as a fresh application for guardianship, requiring the relevant expert reports. That provides additional protection for the adult's interests, ensuring that guardians are given only those powers that they genuinely require in the adult's interests and that they are fit people to carry out their duties. I hope that the committee will agree that amendment 147 is an improvement to the bill.

I move amendment 147.

Amendment 147 agreed to.

Section 67, as amended, agreed to.

Section 68—Resignation of guardian

The Convener: We move on to amendment 112, which was already debated with amendment 124. I do not recall where we were with that—I think that the amendment was debated at a previous meeting.

Mrs McIntosh: The amendment proposes leaving out one word—"it". It is a dinky, small amendment.

The Convener: Are you moving the amendment or withdrawing it?

Mrs McIntosh: I move amendment 112.

Amendment 112 agreed to.

Section 68, as amended, agreed to.

Section 69—Change of habitual residence

The Convener: Amendment 113, in the name of Phil Gallie, is grouped with amendments 77 and 78, in the name of the Minister for Justice, and with amendment 258, in the name of Michael Matheson.

Mrs McIntosh: Amendment 113 is a very small amendment. It proposes adding only two letters, changing "with" to "within". I am sure that the minister is able to accommodate that change, which is for the purposes of clarity.

I move amendment 113.

The Convener: Minister, the Executive has two amendments in this group and you will want to speak to the other amendments.

Angus MacKay: Thank you, convener.

Section 69 of the bill sets out the procedure to be followed where an adult under the welfare guardianship of the local authority changes their place of habitual residence to another local authority area. In amendment 113, Mr Gallie's eagle eye has noticed a typing error in the bill. The requirement for chief social work officers should be, of course, to communicate with one another "within seven days" and not "with seven days"—indeed, it is difficult to see how that could be done "with seven days"—of the adult's change of habitual residence. Therefore, the Executive is happy to accept amendment 113.

Amendments 77 and 78 are technical amendments lodged by the Executive. They make the bill more consistent with respect to the notifications to be made by the chief social work officer of the local authority who has been appointed as a welfare guardian. The amendments ensure that, in each case, all the appropriate people are kept informed of changes under this section of the bill.

The Executive has some sympathy with amendment 258. Section 69 already requires the new local authority to become the adult's guardian and that that authority must notify the public guardian of the change of guardianship.

Section 69 also requires the new local authority to tell the adult and others the name of the officer—generally someone in the social work department or equivalent service—who will be responsible day to day for carrying out the chief social work officer's responsibilities as guardian. The effect of the amendment is that that must be done within seven days. The Executive is

assuming that a similar amendment is intended to apply to section 58(9) of the bill, which requires notification of the relevant officer's name when the local authority is first appointed welfare guardian.

The Convener: Michael—[*Interruption.*] Sorry, are you not finished?

Angus MacKay: No, I was just pausing for breath.

Michael Matheson: He is coming up for air.

Mrs McIntosh: Nature abhors a vacuum.

The Convener: That was too long a pause. We do not like pauses in this committee. Continue, minister.

Iain Gray: There are another 20 pages.

Angus MacKay: No, there are not another 20 pages. I was about to conclude my comments by saying that it would be helpful if Mr Matheson would clarify the issue that I just raised.

The Executive understands the intention behind the amendment—that there should be as short a gap as possible in the practical arrangements for carrying out the duties of a local authority welfare guardian when the adult moves to a new area. We can see the point of that, particularly as the seven-day requirement already applies to formal notifications of which authority is acting as guardian.

Seven days, as opposed to seven working days, is a very tight timetable, however, and that needs more scrutiny. The Executive does not want to agree to the spirit of the amendment without consulting local authority social work staff on whether it would be practicable to identify individual officers to carry out guardianship duties within the time scale that is proposed. We wish to listen to their views before reaching a decision on whether to accept the principle. We have already had a good deal of useful contact with the Association of Directors of Social Work on the bill and the practical aspects of its implementation. The association has undertaken to give us its views quickly on what is proposed here

If Mr Matheson is prepared to withdraw his amendment, I am happy to undertake to consider seriously the point that he is making and, if it is feasible to put it into effect, to bring forward at stage 3 the necessary amendments to both section 58 and section 69. I hope that that approach will be acceptable to him and the committee.

Michael Matheson: I thank the minister for his comments. He has made most of my case for me. I take on board the fact that he is in discussion with the Association of Directors of Social Work. I believe that it is most likely that social work departments will have a designated officer who will be responsible for dealing with these matters. I would be concerned if a time scale is not set in the legislation and the matter is left open, given that a welfare guardian will exercise important powers on behalf of an individual.

The period of seven days was chosen because, as the minister said, it is in line with the notification that chief social work officers have to provide to local authorities and the public guardian. I would be concerned about moving outwith that. I accept that the minister may want to discuss this matter and its full implications further. However, if he lodges amendments at stage 3, I would welcome a clear explanation of why chief social work officers do not believe that notification cannot be given within seven days.

The Convener: We are assuming that they are going to say that it cannot be done in seven days.

Michael Matheson: I would be particularly concerned if they said that they were unable to manage it because of resources.

I accept what the minister is saying and am prepared to allow him to explore the issue further and bring back amendments at stage 3. However, if the time scale is to be more than seven days, we should be given an explanation of why that is the case.

The Convener: Scott Barrie will, no doubt, declare his interest.

Scott Barrie: Former interest, perhaps.

I agree with the sentiments that Michael Matheson's amendment expresses. However, as the minister said, the problem with seven days is that it is a very tight time scale. The amendment does not say "seven working days"—even social workers are entitled to holidays. Some social work authorities take a whole week's break at Christmas, for example, which would make a seven-day time scale impossible. However, everyone would support the sentiments that Michael Matheson has articulated.

Gordon Jackson: Michael Matheson is right to say that there should be a time scale and that this should not be left open. I suspect that seven days is too tight, but I hope that the Executive will come back with a time scale, although I do not know what it should be.

12:00

Angus MacKay: We are not disagreeing on the principle that is at stake. I am trying to ensure that we come up with a time scale that is not only specified, but deliverable by the social work authorities. I am happy to undertake to return to Mr Matheson and the committee if, following consultation, we are unable to do that for any

reason. We hope to find a resolution that will satisfy Mr Matheson and members of the committee.

Amendment 113 agreed to.

Amendment 77 moved—[Angus MacKay]—and agreed to.

Amendment 258 not moved.

Amendment 78 moved—[Angus MacKay]—and agreed to.

Section 69, as amended, agreed to.

Amendment 114 moved—[Angus MacKay]—and agreed to.

Section 70, as amended, agreed to.

Section 71—Amendment of registration under section 55 on events affecting guardianship or death of adult

The Convener: Amendment 79, in the name of the minister, is grouped with amendments 259 and 260, which are also in the name of the minister.

Angus MacKay: Amendment 79 is a technical amendment that removes subsection 69(2)(a) from a list of guardianship orders that are relevant to heritable property. Subsection 69(2)(a) refers to an adult who has as a welfare guardian the chief social work officer of a local authority. Heritable property would not, therefore, be involved.

Amendments 259 and 260 are also technical amendments that ensure that the Keeper of the Registers of Scotland takes the correct action when he or she receives an application from the public guardian to update his or her records, regarding events that affect guardianship or the death of the adult.

I move amendment 79.

Amendment 79 agreed to.

Amendments 259 and 260 moved—[Angus MacKay]—and agreed to.

Section 71, as amended, agreed to.

The Convener: That concludes our business on parts 4 and 6, with half an hour in hand. There will be no Justice and Home Affairs Committee meeting tomorrow morning—which, I am sure, will come as a great blow to everybody. I remind members to keep a close eye on the business bulletin, which will indicate the business for next week and how far we expect to be able to go at that meeting, which will take place on Tuesday morning and will continue into the afternoon if required. I shall see everybody next Tuesday.

Meeting closed at 12:03.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178