EDUCATION COMMITTEE

Wednesday 21 December 2005

Session 2

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EDUCATION COMMITTEE
25th Meeting 2005, Session 2

CONVENER

*Iain Smith (North East Fife) (LD)

DEPUTY CONVENER

*Lord James Douglas-Hamilton (Lothians) (Con)

COMMITTEE MEMBERS

Ms Wendy Alexander (Paisley North) (Lab)
*Ms Rosemary Byrne (South of Scotland) (SSP)
*Fiona Hyslop (Lothians) (SNP)
*Mr Adam Ingram (South of Scotland) (SNP)
*Mr Kenneth Macintosh (Eastwood) (Lab)
*Mr Frank McAveety (Glasgow Shettleston) (Lab)
*Dr Elaine Murray (Dumfries) (Lab)

COMMITTEE SUBSTITUTES

Richard Baker (North East Scotland) (Lab)
Rosie Kane (Glasgow) (SSP)
Michael Matheson (Central Scotland) (SNP)
Mr Jamie McGrigor (Highlands and Islands) (Con)
Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Scott Barrie (Dunfermline West) (Lab)
Robert Brown (Deputy Minister for Education and Young People)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Mark Roberts

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 6

Scottish Parliament

Education Committee

Wednesday 21 December 2005

[THE CONVENER *opened the meeting at 10:03*]

Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Bill: Stage 2

The Convener (Iain Smith): Good morning and welcome to the 25th—and final—meeting in 2005 of the Education Committee. Today is the shortest day. Perhaps we can make this meeting the shortest meeting in 2005. Who knows?

The only item on the agenda is stage 2 of the Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Bill. I welcome the Deputy Minister for Education and Young People, Robert Brown, who is accompanied by four officials: Maureen Verrall, Jackie Brock, Andrew MacLeod and Rosemary Lindsay. I remind the officials that only members may speak at stage 2, but they should feel free to advise the minister as appropriate—I am sure that he will not need them.

The Deputy Minister for Education and Young People (Robert Brown): I can tell you that I probably will need them.

The Convener: I also welcome Scott Barrie, who is here to speak to and move amendment 12, which is the first amendment that we will deal with. Obviously, he is welcome to stay for as much of the meeting as he wants, but he might want to go elsewhere once we have dealt with his amendment.

Members should have a copy of the groupings of amendments, a marshalled list and a copy of the bill. If they do not have those documents, they should ask the clerks for them now.

Section 1—Joint inspection of children's services

The Convener: The first group of amendments is on consultation with children. Amendment 12, in the name of Scott Barrie, is the only amendment in the group.

Scott Barrie (Dunfermline West) (Lab): Thank you for your kind offer to stay for the remainder of the meeting, but I am supposed to be at the Communities Committee at the moment. I sneaked out to speak to and move my amendment.

The definition of children's services in section 7 is as follows:

"'children's services' means services provided predominantly to, or for the benefit of, children to which the provisions of section 15(1) of the Local Government in Scotland Act 2003 (asp 1) apply".

Under section 15 of the Local Government in Scotland Act 2003, local authorities and other community planning partners have a statutory duty to consult and to co-operate with community bodies, including young people's and youth work bodies.

Amendment 12 would ensure that the joint inspection team assesses the extent to which service providers have consulted and co-operated with children in the development and delivery of children's services in accordance with their statutory duty. That does not appear to be fully reflected in the six key questions to be answered in relation to service provision. According to the consultation document from Her Majesty's Inspectorate of Education, consultation and co-operation will provide the focus of the proposed joint inspections.

Agreement to my amendment, or a detailed response to it by the minister, would provide inspection teams with useful clarity when they think about the extent to which they will be required to consider whether service providers have fulfilled their statutory duty to consult and co-operate with children under section 15 of the 2003 act.

I move amendment 12.

Fiona Hyslop (Lothians) (SNP): I have great sympathy with the sentiments behind amendment 12, as it is of serious concern if providers of services to children have not been reviewing and evaluating their consultation with children. However, my concern is whether it is appropriate to deal with that matter in the bill. Although I value the amendment greatly, there is probably a variety of areas—not least child protection and health service provision for young people—that would qualify as areas that should be inspected. We could provide a whole list of such areas.

The issue is the appropriateness of including consultation with children's groups in the bill, as such consultation is exactly what we would expect inspectors from HMIE to carry out. Should we specify that in the bill, or would it be more appropriately dealt with elsewhere? I am interested in the minister's response, as this important amendment is relevant.

Mr Kenneth Macintosh (Eastwood) (Lab): I am also sympathetic to Scott Barrie's amendment. Since the bill is very child centred, I would expect it to be child centred in its implementation. I look forward to hearing the minister's remarks on the amendment.

Robert Brown: I am grateful to Scott Barrie for lodging the amendment, as it raises an extremely important point for which there is general sympathy in the committee. We all have an interest in and a commitment to ensuring that the joint inspection teams include, as part of their evaluation, a review of how effectively the views of children are taken into account in planning and delivering services.

The principle of involving children in how services are provided to them, which echoes the UN Convention on the Rights of the Child, is laid down in more general terms in the Children (Scotland) Act 1995. More particularly, under section 15 of the Local Government in Scotland Act 2003, local authorities are required to consult appropriate persons on the development of their community plan.

Guidance on the production of children's services plans, which sit under the umbrella of the area community plan, states that engagement with children, young people and families is a vital component in the planning and delivery of children's services. That covers a wider area than what might be described as child services in the normal sense. Children's services plans will be the starting point for the inspection of children's services by the joint inspection teams. One of the key strategic issues to be evaluated will be the extent and quality of consultation with all relevant groups, and primarily children and their families.

As Ken Macintosh rightly points out, the bill has a child-centred purpose. The quality indicators that the joint inspection teams will use to evaluate services will include whether children are listened to, understood and respected, and how well children and their families are involved in the development and delivery of children's services in their area.

I would like to give some further reassurance that the pilot joint child protection inspections used a variety of methods to secure the views of children, including one-to-one meetings, focus groups of children and meetings with children's rights officers. Scotland is well ahead of the field in a whole range of issues in this area.

As part of the development of the wider joint inspections of children's services, joint inspection teams will introduce a range of ways to include children in the development of the approach to joint inspection. It is welcome that amendment 12 raises such issues, but the children's services planning guidance deals with them and, for joint inspections, they would be more appropriately dealt with as part of the consultation on and development of the joint inspection methodology, rather than in legislation. Fiona Hyslop made that point in a slightly different way.

On the basis of the background explanation that I have given, I ask the committee not to support the amendment and I hope that Scott Barrie will not press it.

Scott Barrie: The minister's statements are welcome. In successive pieces of legislation, we have successfully built on the Children Act 1989, which set out the framework for children's services plans. Since the 1989 act was passed, an awful lot of work has been done to ensure that we consult children adequately. When the 1989 act came into force, some of the first drafts of local authority children's services plans omitted full consultation of children. The Children (Scotland) Act 1995 built on some of that work. If the general principle is accepted that we will be keen in guidance under the bill to emphasise that young people are consulted adequately and are key to the process, I will be satisfied, and I ask to withdraw the amendment.

Amendment 12, by agreement, withdrawn.

The Convener: The second group of amendments is on confidential information and other codes of practice. Amendment 1, in the name of the minister, is grouped with amendments 1B, 1A, 14, 3, 15, 16, 4 and 8.

Robert Brown: The group contains many bits and pieces, so I ask members to forgive me if I take a little time to explain the interrelation. The group principally combines two substantial matters: the code of practice with consent and the duty of confidentiality.

Amendments 1, 1A, 1B, 15 and 16 deal with the code of practice. The committee's interest in the important protocol was stressed at stage 1, both in committee and in the chamber debate. I agree with the recommendation in the stage 1 report that providing a statutory basis for the protocol would strengthen the arrangements for the conduct of joint inspections and help to build confidence in the process—that aim underlies some of what we are trying to do.

Amendment 1 will give ministers the power to issue a code of practice, which is the term that we are now using to describe the protocol. Joint inspection teams will be required to have regard to the code when conducting joint inspections—that is the statutory link. Similar statutory provision is made in, for example, section 66 of the Education (Scotland) Act 1980, under which ministers can provide guidance that HMIE takes into account in its inspections.

The code will address a range of issues in relation to the joint inspection process, but its fundamental purpose will be to explain how a joint inspection team exercises its powers on access to and sharing information and to deal with the level of consent that is to be used. A particular purpose

of the code is to explain to and reassure all relevant parties that personal confidential information will be handled sensitively and in full compliance with data protection legislation and European convention on human rights requirements.

Amendments 1A, 1B, 15 and 16 allow me to reassure the committee about how the important issue of seeking consent will be addressed in the code. In the stage 1 debate, the convener was right to ask for the principle of implied consent to be clear and unambiguous. However, consent is different in different circumstances, particularly in relation to the inspection of child protection services and the inspection of children's services. The code that will apply to the joint inspection of child protection services will proceed on the basis of implied consent. I hope that that provides the clear reassurance that the convener wanted. There is widespread agreement that, with one or two exceptions, seeking express consent for access to the records of children who may still be traumatised by or in some agitation about their experiences would be unacceptable. I have been clear about that from the beginning of the discussion.

That is why we cannot support amendment 15, which is in the name of Lord James Douglas-Hamilton and is supported by Rosemary Byrne. Paragraph (b) of the proposed new subsection that would be inserted by amendment 15 would require records to be anonymised, which would make the joint inspection arrangements unworkable. The purpose of joint inspections of services for children is to put together the child's records so that an evaluation can be made of how effectively services across different departments and different agencies have worked. That could not be done if records from different agencies were anonymised before they reached the inspection team.

10:15

In the evidence that it gave to the committee on 16 November, HMIE described the process. It said that the inspection note that was made from the records would be anonymised and would be destroyed after 12 months, following publication of the inspection report. That is the proper way to proceed. Anonymisation can take place only once the linkages between reports and records that have been compiled in different situations have been identified.

The stage 1 report asked for consideration to be given to having an opt-out on implied consent that would apply in such cases. In his letter to the committee of 15 December, Peter Peacock explained why there could not be a blanket opt-out in child protection cases. The code should set out the process for handling any concerns about access to records. In child protection joint inspections, if a child or their parent objects to access being given to the child's records, the matter would be discussed with them, with relevant professionals and with the health board's Caldicott guardian, who is the person responsible for overseeing access to personal health information. However, in child protection cases, each case must be considered individually. We have heard it said on a number of occasions that child protection trumps consent in such situations.

That is partly why I am reluctant to agree to amendments 1A and 1B, in the name of Fiona Hyslop. We do not want the code inadvertently to establish a set of requirements and circumstances that might be too prescriptive and inflexible for the individual circumstances that a child and their family face to be taken into account. I do not disagree with what Fiona Hyslop seeks to do, but that is covered by the use of the word "access" in amendment 1; there is no need to be more prescriptive or to provide more detail in the amendment, as that could have unintended consequences. I take the view that simplicity of expression in statute is helpful.

I expect the principle of consent to be applied differently for the wider children's services joint inspections. The code as it will apply in that situation will be developed hand-in-hand with the methodology for the wider joint inspections, which is still under consideration and will be subject to consultation throughout the early part of next year. The code will state how consent will be sought when particular services are to be inspected and whether consent needs to be applied differently to reflect the age and stage of development of the individual children involved. We know that a number of issues are involved in that area.

The committee asked for a further review of the legislation and of the code to be conducted prior to the introduction of the joint inspection of wider children's services, which is planned for 2008. Members might find it helpful to know that we will conduct a further review of the legislation and the code and that the committee will be involved in that process. I will have to come back to the committee on the timescale and the details, but it will be able to take into account the results of next year's consultation before the planned pilots in 2007.

Amendment 1B proposes that the phrase "any codes of practice" be inserted in amendment 1. I am advised that the present wording, "any code of practice", is legal drafting that allows for both the singular and the plural. I hope that Fiona Hyslop will accept that legal reassurance. I ask the committee not to agree to amendment 1A, either.

Our proposals are an effective way of taking into account the range of factors and issues that need

to be considered in the code. If I may say so, I think that they are better than amendment 16, in the name of Lord James Douglas-Hamilton, which is rather vague and which, again, we cannot recommend that the committee accept. The other codes of practice to which he refers are not statutory—they are used for purposes other than those of the bill. Although we would want to draw on any relevant information and suggestions in those codes when it would be appropriate to do so, it would not be appropriate to give them statutory standing by including reference to them in the bill.

I turn to amendments 3, 14, 8 and 4, which address confidentiality. In its stage 1 report, the committee stated that it considered that additional reassurance was required that a joint inspection team would not disclose personal, confidential information. The committee was particularly concerned about health records, but the same concerns apply to social work, education and other records. In our recent correspondence and during the stage 1 debate, Peter Peacock and I have indicated that we are sympathetic to the committee's views. That is why we lodged amendment 3, which provides for the inclusion of a duty of confidentiality in the bill. The duty will enshrine in statute the requirement on members of the team not to disclose personal, confidential information.

The matter is complex. We had to balance the real concerns of the committee, the need for reassurance to be provided to a range of interests and the need to ensure that the important duties and powers that are currently held by inspectors in the interests of children and the public will remain unchanged. Amendment 3 therefore identifies some exceptions to the duty of confidentiality, which would otherwise be absolute. It is clear, however, that the need for those exceptions will arise only rarely.

Paragraph (a) of the proposed new subsection that would be inserted by amendment 3 provides the power to enable a joint inspection team to share confidential information within the team. That is, of course, one of the key objectives of the bill, and the reason for that provision is, I think, fairly obvious. Paragraph (b) provides for the disclosure of confidential information where that is required under other enactments or court orders. Again, the reason for that is obvious, but an example would be section 52 of the Children (Scotland) Act 1995, which covers the grounds for referral to a children's hearing. If an inspector came across a record that suggested that a child was living at the same address as a person who had been convicted under the sexual offences legislation, and if the record indicated that no action was being taken, the inspector would have to report the case to ensure that the necessary action was taken under the 1995 act.

Paragraph (c) provides for the joint inspection team to disclose confidential information to protect the welfare of the child—for example, in a case in which the child's record leads to concerns about their current position or the position of other children in the family or care home. Of course, the provision will be used only if it is evident that those concerns are not known to the responsible bodies that are involved in the matter. However, it is important that we should not prevent an inspector from disclosing relevant information in order to protect a child's welfare.

Paragraph (d) is perhaps the one that will give the committee the greatest difficulty. It takes into account the inspectors' common-law power—I stress that it is a power, not a duty—in relation to reporting an offence. We intend to leave that power unchanged. Like all members of the public, the inspectors have a common-law power to report a crime. A statutory duty always overrides a common-law power and the statutory duty of confidentiality would have that effect if it was not for the exceptions. We do not want to remove the powers that inspectors have when they conduct singleton inspections or, indeed, when they act as private individuals.

The provision might be used in a case in which matters are uncovered that require an investigation into possible historic abuse. That situation would not be covered by the other exceptions but it might need to be reported. I stress the word "might", as it is a discretionary matter for the inspectors to consider. The provision is permissive and not mandatory, but if we did not include in the bill the exception in paragraph (d) and the duty of confidentiality was absolute, inspectors would be prevented from reporting the offence. In such cases, inspectors could not rely on the protection of children exemption in paragraph (c) because no child would be at immediate risk.

We also state that the inspector needs to consider any disclosure of information to be "necessary". That sets a high bar for disclosure and it will help to prevent the unjustified sharing of information outwith the joint inspection team. We do not state that information may be disclosed if the inspector considers that to be convenient, reasonable or sensible.

I hope that the bill—including the regulations and the code of practice—provides the committee with sufficient reassurance. As I said at stage 1, inspectors will also be bound by their contract of employment and by professional codes. That will ensure that information is handled confidentially. I cannot conceive of a situation in which inspectors would breach confidentiality.

In introducing an amendment that provides for a duty of confidentiality, a definition of "confidential information" is required. That definition is provided by amendment 8. Proposed new subsection (4) clarifies that information is confidential information if

"the identity of an individual is ascertainable"

from it and if the source of the information has a duty of confidentiality. That duty, together with existing professional codes and contracts of employment, should reassure everybody that inspectors take confidentiality extremely seriously and that a robust framework of practice is in place. We are not aware that any complaint about a breach of confidentiality has ever been received by HMIE or any other inspectorate. I therefore ask the committee to reject amendment 14, in the name of Lord James Douglas-Hamilton. I hope that he will accept that the framework that we have put in place is sufficient and that he will not press his amendment.

The first part of amendment 8 is proposed in response to the Subordinate Legislation Committee's recommendation that the definition of social work services functions should be placed in the bill rather than in regulations. We agree with that, and proposed new subsection 2 in amendment 8 lists all the enactments—at least, we hope that it does—that set out social work services functions that will be subject to inspection by the Social Work Inspection Agency.

Finally—members will be glad to hear that word—amendment 4 clarifies that section 3(2) refers to the whole of section 3, not a subsection of it, because amendments that would insert further subsections between sections 3(1) and 3(2) have been lodged.

I move amendment 1.

The Convener: This group is crucial to the debate, so I will try to ensure that members have adequate time to raise any points that they have about it.

I call Fiona Hyslop to speak to amendment 1B and the other amendments in the group. She also must move amendment 1B, as it is an amendment to amendment 1.

Fiona Hyslop: The group is critical and large and covers a lot of areas, so I will try to segment it into those different areas, as the minister did.

I thank the minister for his positive response to the concerns that were raised in the stage 1 report and for his correspondence with the convener, Ken Macintosh and Eleanor Scott, which has helped to clarify the Executive's thinking. That has been helpful.

The code of practice, as the protocol is now called, is crucial. We should welcome the fact that the minister has lodged amendment 1 to specify that there will be a code of practice and what it will cover. My concerns are about how the bill will be interpreted and about the process of inspection, on which the minister touched.

The process of joint inspection, and communication about such inspections, will be critical. Many of us have spoken to general practitioners, who have particular concerns. There is still complete ignorance of the bill throughout Scotland, and we should be alive to the potential for concerns and negative responses from health centres throughout the country.

With amendments 1B and 1A, I would like to help to reassure GPs in particular that child protection services and general children's services will be treated differently—which is what the British Medical Association asked for—but that that will be ensured not in the bill, but in how the codes of practice apply to consent. My understanding from what the minister has said is that there will be separate codes for the inspection of child protection services and general children's services; that the code of practice for child protection inspections will cover implied consent—I see the minister nodding—and that the code of practice for general children's services inspections will cover express consent.

I imagine that, once the initial child protection inspections are done and we move in 2008 to joint inspections of general children's services, the code of practice for the inspection of general children's services will come into force. There might then need to be an extra review of how the code of practice works but, because the bill has been fast tracked, we should send out a strong message to ensure that GPs are aware that the Executive accepts that consent will be implied for child protection inspections and express for inspections of general children's services. That is why amendment 1B talks about the fact that there will be more than one code. I understand that, in legalese, "code" can be used to include the plural, but part of the reason for amendment 1B is that it is a signal of the minister's thinking.

Amendment 1A is a bit more explicit. I understand what the minister says about amendment 1A possibly constraining the areas that the code of practice could legally cover. However, paragraph (a) of the new subsection that would be inserted by amendment 1 states that the code will give

"practical and general guidance on matters relating to such an inspection (including, without prejudice to that generality, such matters as …)".

The statement in brackets is vague. I do not think that amendment 1A will trap the Executive and constrain its room for manoeuvre, although I appreciate the minister's concerns.

I have a slight difficulty with amendments 15 and 16, in the name of Lord James Douglas-Hamilton. I accept what the minister says about paragraph (b) of the proposed new subsection that would be inserted by amendment 15, which talks about records being rendered anonymous. If it had said that statements would be rendered anonymous after the records had been pulled out, that might have made amendment 15 more manageable, but I will reflect on that and listen to what Lord James has to say on it.

10:30

Amendment 16 probably gets to the nub of an important issue, as committee members are sympathetic to the idea of respecting the codes of practice of professional organisations, such as those that represent consultants and general practitioners. Peter Peacock's letter to Ken Macintosh states explicitly:

"I do not intend to use the Code of Confidentiality model. That Code was drawn up as part of the settlement of the GP contract."

The letter states clearly that the code of confidentiality will not form the basis of the code of practice.

However, in a letter to Lord James—I hope that he does not mind my referring to his correspondence—the BMA suggests that a code of confidentiality should accompany the bill, but it does not clarify whether such a code should evolve from the code that was agreed under the GP contract. The fact that, even at this late stage, such matters are a cause for concern probably reflects the speed with which we have had to move through the legislative process. I have a great deal of sympathy for amendment 16 because it would require ministers "to have regard to" such codes of practice. That would be a signal of our respect for the BMA and GPs.

Amendment 14 would be helpful, as it would clarify that we recognise that offences can work in two ways. That is probably the import behind the amendment, so I have some sympathy with it.

Having covered a great deal of ground, I will speak last of all to amendment 3, which deals with the third of the three issues—the codes of practice, the regulations requiring information to be anonymised and the duty of confidentiality—that we are considering. That third issue is important, so I am grateful that the minister has recognised the committee's concerns by lodging amendment 3. It is important that the duty of confidentiality is placed on the face of the bill, although I appreciate that there are legal concerns about doing so.

I want to raise an issue about paragraph (d) in amendment 3, as that cuts to the heart of concerns about the presence of police officers in inspection teams. In his December letter to the convener, the minister refers to the fact that

"The committee expressed concerns about the implications of reporting an offence as a result of accessing personal information that could lead to the prosecution of an individual."

It will be helpful if I quote the final paragraph of that section of the minister's correspondence:

"In asking for an assessment of the likelihood of this being an issue, I have been advised that it is highly improbable that in the course of a joint child protection inspection, the inspection team would uncover evidence of a crime where a victim can be identified and that has not already been reported. However, if this did occur, no-one would argue with an inspector's duty to act and therefore any duty of confidentiality would be only one factor to take into account."

I absolutely accept that that will be the case for child protection inspections, but I still have a concern about the role of police officers in general children's services inspections.

For example, if an inspection requires access to the medical files of a 13, 14 or 15-year-old girl who has asked for contraceptive advice, the police inspector might have conflicting views as to where his duties and responsibilities lie. A similar issue could arise in the context of drug misuse, even if the person is older than 16. The minister's reply is fine for child protection inspections, but I have an outstanding concern about the presence of police officers in an HMIE inspection that involved accessing the medical files of young people who had been involved either in underage sex or drugs. The last thing that we want to do is to send out signals that interfere with sexual health strategies for young people, who might not seek advice if they think that their files could be accessed if the police are present in a children's services inspection. That is the one area of outstanding concern.

I move amendment 1B.

Lord James Douglas-Hamilton (Lothians) (Con): I welcome the constructive spirit in which the minister has approached the subject, as I appreciate that the bill seeks to deal in particular with children at risk. I have lodged three amendments, which were suggested by the British Medical Association and are supported by the Royal College of Physicians of Edinburgh.

Amendment 14 would provide offences and sanctions. The amendment is intended to provide for a regulation-making power to create offences relating to the misuse by inspectors of information that they have obtained for the purposes of an inspection. It is my conviction that sacking, as for a disciplinary matter, might not always be the most appropriate sanction for breaching confidentiality, depending on the circumstances, as for example

in the case of an individual who inadvertently allows a letter to drop out of a pocket.

Some years ago my attention was drawn to a similar occurrence. Two civil servants who possessed letters that were intended for me left them in a Rose Street pub. The next day, the headline read, "Rifkind's secret papers found in pub". A row of civil servants came to apologise to me and were taken aback by my somewhat irreverent response, which was, "Now we know how to get on to the front page of the *Edinburgh Evening News*."

However, there can be far more serious cases and the inspection of child protection services is extremely sensitive. It is desirable to give the signal that we treat any significant breach of confidentiality as such an important matter that a sanction would be imposed. I suggest that imposing a fine is considered and that failure to protect information that is gathered by inspectors for an inspection should not just be an internal disciplinary matter. I hope that if a sanction were available, then, like an insurance policy against a rare occurrence, it would not be particularly likely to be employed. However, it would give confidence to all those who are subject to and affected by joint inspections. Therefore, it is worthy of sympathetic consideration.

It is not clear from amendments 2 and 5 on levels of fine whether they would apply to breaches of confidentiality. If the minister can assure me that they would cover such cases, I ask him to consult the BMA, at the very least, in working up regulations.

Amendment 15 is about consent and I lodged it as a probing amendment. It relates to regulations that provide for the sharing and production of information, including medical records, for the purposes of inspection. The amendment is intended to ensure that medical records are shared with inspectors only when the person to whom the records pertain has given express consent for that to happen. In all other cases, especially when consent is implied, medical records should be anonymised.

It is clear from submissions to the Education Committee and from the oral evidence that we have gathered that medical organisations have substantial concerns that unless robust safeguards are in place to ensure that patient anonymity is preserved, the relationship of trust between patients and doctors will be damaged. In its written submission to the committee, the BMA stated:

"Confidentiality of personal health information is the cornerstone of the patient/doctor relationship. Young people need to be reassured that their health information, which they share in confidence with a doctor, will be treated confidentially otherwise they may feel unable to trust and seek help from healthcare professionals."

The minister has already said that there will be a review. I hope that he can give an assurance this morning that when that review takes place, he will at least take into account the BMA's practical and genuine concerns about the matter.

Amendment 16 is about having regard to codes of practice when making regulations. The context of the amendment is what the BMA stated in its letter, which I have put before the minister. It said:

"The Scottish General Practitioners Committee of the BMA has recently agreed a code of practice on Confidentiality and Disclosure of Information with the Scottish Executive Health Department for the purposes of accessing and disclosing confidential patient information for audit purposes under the terms of the new GMS contract. This code outlines a procedure whereby patients will be informed that their information may be accessed and by whom (usually in patient information literature). This literature should also outline the patient's rights in relation to the disclosure of such information and include any procedures for complaint or objection … The BMA believes that this code should be reflected in the primary legislation to engender trust in the inspection process, protect the doctor/patient relationship and to maximise co-operation with the Inspectorates."

I am aware that the minister has spoken to amendment 1, which is to provide for inspectors to

"have regard to any code of practice prepared and issued by the Scottish Ministers".

Amendment 1 will go some way to providing reassurance to medical practitioners by including in the bill mention of the protocol on information sharing and best practice. I hope that the minister can reassure us that the code with which medical practitioners are familiar will be recognised and that he will consult the BMA in working up the protocols.

Therefore I have three requests for the minister. First, on sanctions, I ask him to consult the BMA in working up regulations. Secondly, on the consent issue, I ask that when a review takes place he takes into account the BMA's practical concerns. Thirdly, on the issue of codes, I ask that he consult the BMA in working up the protocols. Given the greatly truncated and accelerated timescale, I feel that we will be reassured if he works closely with the BMA. I very much hope that the minister can respond favourably to my requests.

Dr Elaine Murray (Dumfries) (Lab): I am grateful to the minister and, indeed, to members of the committee who have done their best to address some of the problems that were flagged up to us at stage 1. Amendment 1A, in the name of Fiona Hyslop, rather reminds me of the amendment that I lodged to the Education (Additional Support for Learning) (Scotland) Bill, when it looked as if a change of tense would make things a little bit clearer. However, we were advised that legal language is such that we must adhere to methods of expression that are not quite

as clear to the rest of us as they seem to be to the legal profession. That seems to be the way of it.

On amendment 13, I have not yet got my head round the argument for inserting "and health" after "medical". I wonder whether the minister can clarify that.

Fiona Hyslop: That amendment is in the next group.

Dr Murray: On the marshalled list, it seems to be in the same group as the others.

The Convener: No, it is in the next group, which is on the meaning of "information".

Dr Murray: That is perhaps why it is not in this group, then—I was worrying about that because amendment 13 appears on the marshalled list before amendments 2 and 14, which seem to be doing much the same sort of thing.

On amendment 3, obviously paragraph (d) of the proposed new subsection in section 3 is causing the most concern, particularly on the issue of young people under 16 seeking contraceptive advice. As far as I understand it, a young person under 16 who seeks such advice is not committing a crime; it is an older person who has sex with a child under 16 who is committing a crime. I cannot envisage any reason why a GP would even ask a child whom they intended to have sex with or whom they had had sex with; nor can I envisage any reason why such information would be recorded in the child's medical records. I would have thought that the sort of information that a young person might be concerned would be revealed would not be revealed by medical records as such. Social work records, rather than medical records, could be sensitive in that direction.

Under paragraph (d), information can be disclosed only

"to the extent considered necessary … for the … prevention or detection of crime".

The minister has explained that that overrides the duty of confidentiality, which reflects to an extent what happens in child protection anyway. When a GP has a fear about the abuse of an individual child, they can override their duty of confidentiality in order to protect the child. I imagine that it is unlikely that the inspectors would ever get to that stage. There is more chance of individual GPs or social workers perceiving that a child was in danger. However, in the unlikely event that the inspectors unearthed something that indicated that a child was in danger, we still must have protection for the child because the protection of individual children is more important than other aspects—that is the nub of it. Although paragraph (d) looks a bit draconian on first reading, I understand where the minister is coming from in feeling that the provision must be included in the bill.

My final comment is on amendment 16. I inform Lord James that I am not sure what it would make ministers do. It states that they would have

"to have regard to … codes of practice of … professional organisations and associations as they consider appropriate."

I am not sure what that would tie ministers to doing. If they do not want to have regard to a code of practice, they can always say that they did not think that it was appropriate for them to do so. I am not sure what force the amendment has.

10:45

Ms Rosemary Byrne (South of Scotland) (SSP): I will concentrate on amendment 15, as I strongly support it. Indeed, I lodged a similar amendment because of the concerns that were expressed to me in correspondence from the departments of family planning and sexual health of a number of health boards. I will cite one or two of those concerns and ask the minister to provide assurances in respect of some of the issues that have been raised.

The professionals say that the bill

"could … undermine the work of sexual health services for young people, and could make the very children who most need help less likely to seek it. This could harm the vulnerable children the bill seeks to help by ensuring good quality services.

The … strategy states that 'a competent person under 16 is owed the same duty of confidentiality as an adult'. This Bill completely contradicts that statement, to the extent that some adults (aged 16 and 17) will be subject to a reduced level of confidentiality."

They say that they

"support the aim of improving child protection services but consider that if case notes are to be looked at, either consent must be sought or information anonymised"—

hence the amendment. They continue:

"The proposed bill needs to be more explicit about the information to be collected from notes and how it will be protected."

The professionals seek clarification from Robert Brown

"about the outcome indicators that the executive would hope to find in case notes".

They also seek clarification

"as to whether the notes of all children or just those subject to child protection procedures would be read"

and

"as to whether the act will be retroactive i.e. can information gathered before the law was passed be read when the young people could not have been informed that their notes might be read in the future for audit purposes by social workers and policemen."

The departments of family planning and sexual health have very relevant concerns. Given the sensitivity of the work of those departments, we must preserve young people's access to the services without prejudice and ensure that they can access services without the fear that something may be uncovered later. I would be grateful if the minister could reassure me on that point.

Mr Macintosh: I, too, thank the minister for giving a positive response to the committee's stage 1 report. I would like to raise a number of issues. Like all colleagues, I have notes on five bits of paper, so excuse me if it takes me time to find my way through them.

The minister made some very helpful comments about the distinction between implied and express consent in the bill. I thank him and his colleague Peter Peacock for the letter that I received before stage 2. At stage 1, I flagged up the attraction of a procedure that is outlined in the GPs' code of confidentiality, which seeks to strike the right balance between the need to access information and the patient's right to privacy and confidentiality. It involves using patient information literature to outline to patients in exactly what circumstances and with whom information from their medical records can be shared. That literature gives patients the chance to complain about or to object to the procedure.

I welcome the minister's letter. It states:

"I want you to know that I do not intend to use the Code of Confidentiality model. That Code was drawn up as part of the settlement of the GP contract. The provisions on access are for a very different purpose—to enable GPs records to be audited. It is a tool for verifying that payments to GPs are accurate rather than one based on quality assurance. There are also some important restrictions placed on accessing these records, not least that access is only allowed to a medically qualified professional."

I accept those arguments. We heard evidence from GPs, although we did not see a copy of the code of confidentiality at stage 1. I accept that the code itself would not be applicable.

Could the minister clarify whether he would be attracted to the idea of having the code of practice that we are drawing up refer to the use of patient information literature to let patients know exactly how their information may be accessed? Will there be an opportunity for patients to indicate their dissent or objections in advance? I am very pleased about the statutory link that the minister has made between the bill and the code of practice. That is exactly the sort of additional reassurance that the committee has sought on behalf of others.

The bill wraps a number of restrictions around the whole issue of information sharing. It is clear that the circumstances in which information will be shared are very limited. Those circumstances go no further than those in which doctors already have a professional duty to break a confidence, for example when a child's health or protection is an issue. The bill goes no further than that. I welcome the further reassurances from the Executive today not just on the statutory link but on the description of the obligation and duties that will be placed on inspectors. I refer in particular to the description of the circumstances in which information could be divulged or shared.

Amendment 3 covers the circumstances in which inspectors may share confidential information. It says that

"the authorised person shall not use or disclose that information other than"

in the circumstances that are set out. What penalty would apply if that provision was broken? Lord James Douglas-Hamilton is asking that we create offences for inspectors. Would a penalty apply if that obligation were not fulfilled?

Fiona Hyslop: Amendment 2 covers that.

Mr Macintosh: I would like clarification that amendment 2, which refers to offences

"punishable on summary conviction by a fine not exceeding level 4 on the standard scale",

applies to the proposed provisions in amendment 3. My reading is that it does, but it is not 100 per cent clear.

Although I have sympathy with amendment 16, in the name of Lord James Douglas-Hamilton, and I would expect the Executive to have regard to professional codes of practice, it is not helpful to put that in the bill, for several reasons. As has been said, the wording of the amendment is rather vague. It does not say exactly what ministers must have regard to. The bill is about joint inspection. Its ethos lies in underpinning the way in which people work across professional boundaries. It seeks to remove professional barriers in relation to child protection. It is not helpful to place a specific obligation in the bill to reinforce the importance of one profession's duties. The message that we are trying to convey is that in child protection, no matter what a person's professional obligations are, it is better for them to share information. That is the essence of the bill. Amendment 16, well-meaning though it is, runs counter to that and is not helpful in that regard.

The Convener: I would like Robert Brown to confirm something for the record about an important aspect of confidentiality. In his letter of 29 November to me as committee convener, Peter Peacock indicated that, essentially, child protection inspections would relate only to cases that had been live in the past 12 months. People will have gone on to or come off the register in the

previous 12 months and fairly old cases will not be reopened. Recording that point in the *Official Report* will assure younger people to a degree that their records will not be dug up several years after the event.

The second point that I want to make relates to reporting crimes. I accept the point that was made about a young person who is seeking contraceptive advice. That in itself does not constitute a crime, but it could constitute evidence that a crime is being committed. The concern is about ensuring that young people who are subject to a joint inspection should be no more or less likely to be subject to a criminal investigation than are other young people in society. We should ensure that they can go to their GP or social worker or anybody else confident that their behaviour will not be subject to an investigation to which any other member of society would not be subjected. I would like an assurance about paragraph (d) in amendment 3. I certainly accept that it is legitimate to report evidence that a young person is being groomed for sexual purposes or is being used for the sex trade, for example, and that such evidence should be reported in any case, but if there is simply evidence that a young person has sought contraceptive advice because they are partaking in sexual behaviour in which children of that age partake, there should not be a criminal investigation. I would like an assurance that that is the intention behind the amendment and that there is no intention to subject people who are, essentially, under the state's care to greater inspections than anybody else.

Minister, will you respond to the many points that have been made in the debate, including the points that I have made? You should feel free to take as long as you need in order to do so.

Robert Brown: I hope that the committee will forgive me for giving what might be a rather confused, bits-and-pieces response.

I echo a point that Fiona Hyslop made. Obviously, there were concerns among committee members and more widely about the urgency of the bill. I am reassured by the process that has been gone through, by the committee's careful scrutiny, and by the range of points that have been made at stage 1 and this morning. Everyone with an interest in these matters should be reassured by the scrupulousness with which the Executive and the committee have approached the difficult task of dealing with the rather complicated bill that we are discussing.

I think that Ken Macintosh said that the need to ensure that the protection of children is everybody's duty lies behind the bill. That is the purpose of the bill and it is what we are trying to achieve in practice. It was also the purpose of the inspections that took place before the flaw in the current legislation came to light and we must view everything that we say against that background. Members are well aware that the gaps between different agencies and different services have been the major difficulty. The concept of everybody having a duty and a personal responsibility is therefore important.

I think that Fiona Hyslop talked about implied and express consent. Implied consent certainly forms the basis of what we are trying to do with respect to the inspection of child protection services. However, I have made the point that there are a number of circumstances—which I hope will not often arise—in which child protection would trump confidentiality and even override people's wish to opt out of giving consent. It is important to make that point.

There is another point to make about something that underlies the bill. The way in which medical practitioners and others approach their duties is not based on an absolute duty of confidentiality in every circumstance. Exceptions that are made in medical practice are echoed and reflected in the exceptions in the bill. One exception relates to the protocols that medical practitioners operate for the purposes of audit. Information is shared with other people for audit purposes and the circle of confidentiality is widened on the basis of implied consent from patient information and documentation. I say in passing that it is very much intended that the information for patients that is made available under the GP contract will contain information about the way in which this will operate—indeed, it already does for those other purposes. That is a part of the development of the protocol—we now call it the code of practice—that it is important to reflect on.

11:00

I have said that the second code, which relates to children's services, is being developed. I do not want to pre-empt the outcome of that consultation. Express consent will certainly be the basis of that code, but I am not in a position to say absolutely and entirely that in no circumstances would express consent not be the basis for proceeding. That will emerge from the consultation and we will take account of all parties' interests in considering that.

Lord James Douglas-Hamilton made a more general comment about consulting the BMA. The BMA has been involved in consultation on the bill and the protocols and will continue to be involved, as will other interests, including children—that relates to amendment 12, in the name of Scott Barrie. I hope that the process will reassure medical interests, but I accept that some work will have to be done on communication with ordinary GPs, who are probably not party to much of this

stuff, on the effects of the bill when it is passed. A job will have to be done to provide information generally and on inspectors' inspections of services in particular situations. We will reflect on the best way to ensure that that happens on the ground; such matters are very much part of our thinking.

As for anonymity of information, I have said that we cannot accept that it should not be possible to link information from social work services about a child with information from medical or other services about that child. However, the report that will emerge about processes—which are what inspections are all about—will not refer to particular children. The bill does not provide the power to make inquiries into individual children's situations. It is intended to allow for inspection of the processes that operate, how well agencies join their activities together and how well everybody takes responsibility for what they should take responsibility for. I give the absolute assurance that the inspector's report at the end of the process will not identify individuals. As I have said, inspectors will get rid of their notes and other information along the line after a period.

The question of offences is quite tricky. I understand that no inspection agency in Scotland is subject to an offence of breach of confidentiality. Is such an offence needed? Do we need to create an offence for an evil that we have not had to tackle? I said that no complaints have been made about breach of confidentiality. My view is that sanctions such as disciplinary procedures or dismissal, if appropriate, are substantial and would fit the bill for dealing with the situations that we are likely to meet. I am averse to creating a specific offence of breach of confidentiality.

Lord James Douglas-Hamilton talked about the regulation-making power. I think that I am right in saying that it will include the power to create such offences if we were so minded. However, I will write to the committee about that, in case I have got that slightly complicated matter wrong.

I do not think that an offence of breaching the duty of confidentiality in the bill could be created in regulations, because a power to create penalties for breaching regulations cannot also be used to create penalties for breaching something in a bill, if members follow me. That is a contorted matter. The drafting would not allow us to create a direct penalty, but we could make regulations, if that was the desire. I have said that I do not want to proceed in that direction but, for clarity, I will write to the committee about that.

Quite a lot of concern has been expressed about information in children's records on sexual health and drug use. I am bound to say that many such matters are more likely to be in social work records than in health records, but far less concern is felt about the social work end. However, it is reasonably clear that the exceptions to the duty of confidentiality that are set out in the proposed new subsection in amendment 3—particularly in paragraphs (c) and (d)—refer to powers not duties. Those are discretionary powers that are to be used in extreme circumstances and which are unlikely to arise in most situations. For example, they could be used if it were discovered in records that a child under the age of 13 was having sex with an adult, which is a serious offence. The discovery of such a matter could lead to the need to take action in the unlikely event of the matter not having been followed up on by somebody else in the meantime. However, it is necessary to have exceptions in order to cater for such extreme situations.

I foresee no circumstance in which routine sexual health information or information about modest matters of drug misuse would be used or disclosed. The necessary phraseology of the exceptions puts no duty or pressure on inspection teams to proceed in the direction of disclosure. Indeed, there is quite a bar to overcome. It is important to bear in mind the phraseology when we deal with these matters.

I dealt with the codes of practice in my introduction, but I would like to stress again what I said. The codes that the bill sets up are robust. They reflect in many respects arrangements that general practitioners and other professionals use when carrying out their duties. I have already said that GPs do not operate absolute confidentiality in all circumstances. The bill widens the circle of confidentiality in certain limited circumstances for necessary child protection purposes in particular. The suggestion that ministers should have regard to other codes of practice and protocols does not add anything. To a degree, we are happy to draw on any relevant information that such protocols may contain—and I think that we have done that. However, creating a statutory obligation to consult such codes of practice as ministers consider appropriate adds nothing to the bill, as Elaine Murray pointed out.

Rosemary Byrne was particularly strong on the need not to undermine sexual health services. I want the strong message to go out that the bill has no intention of doing that. The bill's provisions exist for very good purposes and I think that the committee has generally accepted the need for them. However, the bill will be retrospective in the sense that it applies to existing records and I appreciate that there are issues involved in that. Nevertheless, it is not intended that joint inspection teams will start just with new records; that would handicap what we are trying to do.

In response to the convener's point, I should say that we do not intend to go into the historical

details of an individual's circumstances if the cases have been dead for 12 months or more. The phraseology of the minister's letter shows that we have no desire to proceed along that route. Indeed, revisiting dead cases under the inspection regimes would not shed much light on the current processes.

I have dealt with the point that Ken Macintosh raised about patient information literature, and we certainly intend to move in that direction. We have also dealt with the matter of penalties and with the issue of reporting a crime. I hope that Iain Smith will accept my reassurance on contraceptive advice and linked matters. There are exceptions to the duty not to disclose information, but they would be appropriate only in very extreme circumstances involving the potential commission of serious offences, not minor, fringe matters that would be unlikely to be taken forward. Generally, the confidentiality arrangements are intended to replicate the current law. Therefore, there is no indication that anybody would be more likely or less likely to be the subject of a report of a crime under the provisions of the bill than they have been until now.

One or two other points are worth drawing in about paragraph (d) in amendment 3. The Data Protection Act 1998, on which paragraph (d) is based, states:

"Personal data processed for any of the following purposes—

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders, or

(c) the assessment or collection of any tax or duty or of any imposition of a similar nature,

are exempt from the first data protection principle".

Paragraph (c) is not relevant in this context. The 1998 act recognises that there are overriding considerations in some circumstances that apply to the release of data protection. In short, I hope that my opening comments and those that I made in the debate reassure committee members about the effect of the bill and of the Executive amendments.

I am not minded to ask the committee to accept any of the other amendments in the group, for the reasons that I explained, although I confess that I have some sympathy with amendment 1B, which proposes to replace "code" with "codes". We have explained the legal technicality of that. I say once again that there will be two codes and not one and that that will be made clear in the information and publicity from the Executive and other agencies.

The Convener: Thank you. Before we vote on amendment 1, we have to deal with the amendments to amendment 1. I ask Fiona Hyslop to wind up on amendment 1B and to indicate whether she wishes to press or withdraw it.

Fiona Hyslop: I accept the minister's comments. The debate on the area was helpful, if long. Communication and publicity will be important. There is only so much that one can do in statute; we have to create a culture of co-operation and respect for the professional judgments of those concerned.

In light of the minister's comments and reassurances, I hope that he will ensure that information about the duty of confidentiality, criminal offences, codes, express consent and so on is well communicated to all the relevant bodies. He might want to reflect on that and tell us before stage 3 how the Executive envisages communicating not just with the national bodies but with local GPs and with those who work in sexual health in particular, because that is an area of concern.

I will not press amendment 1B.

Robert Brown: I am happy to give that assurance. Fiona Hyslop's explanation was helpful. I will come back to the committee on that if I can presume on the convener's consideration.

Amendment 1B, by agreement, withdrawn.

Amendment 1A not moved.

Amendment 1 agreed to.

Section 1, as amended, agreed to.

Section 2 agreed to.

Section 3—Regulations for purposes of joint inspection

The Convener: We have dealt with the longest group of amendments and now move to group 3, which is on the meaning of "information". Amendment 13, in the name of Fiona Hyslop, is grouped with amendment 18.

Fiona Hyslop: I hope that we can be briefer on section 3. Amendment 13 arose from concerns that the bill concentrates on references to medical records. I understand that the terms "medical records" and "medical practitioner" have particular definitions in law, but the concerns presented to us in written and oral evidence were that the records of nursing staff or health visitors were as important as GP records and should be treated as such, not only in the spirit but in the content of the bill. In an effort to clarify that, the suggestion is to ensure that any reference to the type of information that is kept under section 3(1)(a) includes not only medical records, but health records.

The bill specifies by whom those records may be held. Members will notice that section 7 provides definitions only of "medical records", "medically qualified inspector" and "registered medical practitioner". Amendment 18 recognises the fact

that not only social work and medical records are to be accessed. New paragraph (a) reflects the current definition in the bill and refers to medical records and practitioners. New paragraph (b) covers practitioners registered with the Health Professions Council and new paragraph (c) covers practitioners registered with the Nursing and Midwifery Council. The amendment would ensure that the records of nursing staff and health visitors were included in the definition of "health records".

I am happy to hear what the minister has to say about how the provisions that I have outlined fit in with the legislation. However, amendments 13 and 18 reflect the committee's concerns that access to health records is as important as access to other records.

I move amendment 13.

11:15

Robert Brown: I understand that Fiona Hyslop's amendments relate only to part 1 of the bill. We have already explained that in part 2 of the bill there is a different definition of "relevant medical records", which has been carried over from the social work legislation and kept the same for that purpose.

The intention of section 3 is to ensure that all records held on the child, including those that relate to their physical and mental health, can be accessed and shared by the joint inspection team. It is irrelevant who has written the records and to which professional body they belong. I draw Fiona Hyslop's and the committee's attention to section 7, which defines "medical records" as

"records relating to the physical or mental health of an individual".

That is a broad statement. The section does not define them as records held by doctors, nurses or anyone else. The issue is the nature of the records.

Amendment 13 is not required, because the definition is self-contained. There does not need to be a reference to "health records", because "medical records" are defined as

"records relating to the physical or mental health of an individual".

That definition should be adequate to cover everything that we want to be covered. If any record helps with the evaluation of the services required by the child, it should be subject to the joint inspection process. We are not trying to distinguish between records held by various branches of the social work or education professions—or, indeed, anyone else—because the records fall into the same category. The definition is not a technical one that refers to records held in GPs' surgeries or anything of that sort. It refers to medical records according to the general English meaning of the term—the commonsense interpretation. Fiona Hyslop's amendments are not necessary and cause some confusion, because they narrow down the general definition of "medical records" in section 7. That is especially true of amendment 18.

Fiona Hyslop: I am grateful to the minister for explaining that the definition in the bill is wider than the definition that I wanted to include. The only remaining issue is whether, under the current definitions, access to records will be restricted to registered medical practitioners. The minister talked about the particular provision relating to part 2 of the bill. Because of that, it may not be necessary to provide for health visitors or nurses to access records, because we are being quite particular about who can access records under part 2, as opposed to part 1. On that basis, I am happy not to press my amendments.

Amendment 13, by agreement, withdrawn.

The Convener: Group 4 concerns levels of fine. Amendment 2, in the name of the minister, is grouped with amendment 5.

Robert Brown: Amendments 2 and 5 are relatively straightforward. They reflect the committee's desire for a provision relating to levels of fine to appear on the face of the bill, which is appropriate. It is standard practice to provide for offences in legislation, if a person or body does not co-operate with an inspector who is lawfully carrying out their functions. That practice applies to a number of inspectorates. Section 3 gives ministers the power to create offences to enforce the regulations. The power to create offences is unaffected by the amendments, but we accept the Subordinate Legislation Committee's recommendation that the maximum penalty for such offences—a fine of £2,500—should be included in the bill. That also reflects the comments that were made by the Education Committee.

I move amendment 2.

Lord James Douglas-Hamilton: The amendment is welcome.

Amendment 2 agreed to.

The Convener: Amendment 14 has already been debated. Does Lord James wish to press the amendment?

Lord James Douglas-Hamilton: I thank the minister for his reassurances. However, it appears that his eventual answer is no. In those circumstances, I wish to return to the issue at stage 3. I will not press amendment 14, given that the minister said that he will write to the committee about the matter.

Amendment 14 not moved.

Amendment 3 moved—[Robert Brown]—and agreed to.

The Convener: Amendment 15 has already been debated. Does Lord James want to move amendment 15?

Lord James Douglas-Hamilton: In view of the minister's assurances, I will not move amendment 15.

Amendment 15 not moved.

The Convener: Does Lord James want to move amendment 16?

Lord James Douglas-Hamilton: In view of the minister's assurance that he will continue to consult the BMA, I will not move amendment 16.

Amendment 16 not moved.

Amendment 4 moved—[Robert Brown]—and agreed to.

Section 3, as amended, agreed to.

Section 4 agreed to.

Section 5—Functions of inspectors

Amendment 5 moved—[Robert Brown]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Regulations and orders

The Convener: Group 5 is on ancillary provisions. Amendment 6, in the name of the minister, is grouped with amendments 7 and 11.

Robert Brown: I am grateful to the Subordinate Legislation Committee for its recommendation that ancillary provisions should be included in the bill. I am told that the drafting is standard. The amendment will enable ministers to make by statutory instrument any changes to the bill that might be necessary in future. The standard technical wording in the amendments in group 5 will deal with the matter. Amendment 6 provides for orders under the act to be annulled and amendment 7 will require any order that affects provisions in any act to be made by the affirmative procedure.

I move amendment 6.

Amendment 6 agreed to.

Amendment 7 moved—[Robert Brown]—and agreed to.

Section 6, as amended, agreed to.

Section 7—Interpretation

The Convener: Group 6 is on the meaning of "child". Amendment 17, in the name of Rosemary Byrne, is the only amendment in the group.

Ms Byrne: I lodged amendment 17 because there was some discussion about ages during the committee's consideration of the bill at stage 1. My amendment also reflects the concerns that were expressed by mental health professionals. I want to clarify the matter. I understand that the age in the bill was set at 18 because of the Children (Scotland) Act 1995. However, the minister stated that it could be as low as 16 or as high as 25. Given that young people can get married and hold down a job at 16, I am concerned about the many anomalies, which we should consider and discuss more fully. I am interested in what the minister has to say, which may lead to progress.

I appreciate the concerns about looked-after young people, who can be in local authority care until the age of 18. However, many young people will not be aware that, under the bill, a child will be defined as being under 18 and not 16. We must find a way of informing and educating people if we are going to stick to 18 rather than move to 16. The haste with which the bill, by necessity, has proceeded means that the issue has not been discussed as widely as some of the organisations reflecting the views of young people and I would have liked. I wonder how much consultation with young people went into the decision. I am looking for clarification and answers about the depth of the discussions on this aspect of the bill. Those are my concerns and I am interested to hear what Robert Brown has to say about them.

I move amendment 17.

Fiona Hyslop: The amendment gives rise to a useful discussion. The various age limits for different purposes in different acts are a perennial problem in Scots law. The code of practice might usefully address the matter that Rosemary Byrne has raised. I suggest that there would be limited circumstances in which access to records of 16 and 17-year-olds in particular would be necessary. There is sympathy with the idea of having the higher age in relation to looked-after children. We do not want the bill to prohibit rather than enable someone who wanted to carry out a joint inspection of children's services as they relate to looked-after children. We might be able to give a helpful signal through the code of practice, given the concerns about sexual health strategies that arose from our discussions. The code could cover the circumstances in which medical or social work records for 16 and 17-year-olds could be accessed. I respect the minister's concerns about reflecting the definitions under the Children (Scotland) Act 1995, but we should pursue the matter further. Rosemary Byrne's amendment has helped us to have a useful discussion.

Robert Brown: The discussion has been helpful, but I believe that it is important that the age should remain at 18. We made general

comments about the series of issues that underlies the amendments in our consideration of consent and sexual health issues. However, those issues apply only in general terms. We have deliberately worded the bill to go with the grain of current legislation. The Children (Scotland) Act 1995 is central in that regard. It cannot be disregarded as just another act; it is the central act defining a child as a person under 18.

The issue is important in relation to the definition of children's services in section 7 of the bill, which states that

"'children's services' means services provided predominantly to, or for the benefit of, children"—

fairly obviously—

"to which the provisions … of the Local Government in Scotland Act 2003 … apply".

If the amendment were agreed to, a raft of services, including universal health and education provision, would be excluded from the joint inspection. Crucial services, such as throughcare and aftercare for children coming out of care, youth justice services and youth work provision, would probably not predominantly count as children's services—there would at least be doubts on the edge.

It is important that we recognise that, against the background of the range of different ages of majority for different purposes in Scotland, we are dealing with a changing position. Children do not all of a sudden become adults at the click of a finger; the transition is a process. The consent arrangements that we discussed earlier do not come into effect when the child is 16; they come into effect when the child is of an age to comprehend and assess the information that comes to him or her, which could be at age 11 or 12, depending on the child.

In some ways, the age of 16 is not a useful cut-off point, but the age of 18 is, for a series of reasons. Eighteen is the age limit that defines eligibility for children's services and it is used to define a child in the Children (Scotland) Act 1995. The use of 18 as a cut-off point will be practical in allowing the sorts of services that I have mentioned to be the subject of inspection. Although Rosemary Byrne was right in saying that people who are aged 16 may make all sorts of adult decisions, such as that to get married, they can also be the subject of abuse and exploitation. We want to deal adequately with that possibility, which particularly affects vulnerable children who are in care establishments.

If we reduced the age limit in the way that amendment 17 suggests, we could find ourselves in a position in which a series of important services could not be the subject of inspection. Against the background of that explanation, I ask the committee to stick with the current proposal and I invite Rosemary Byrne to consider withdrawing amendment 17.

11:30

The Convener: I ask Rosemary Byrne to wind up and to indicate whether she wishes to press or to withdraw amendment 17.

Ms Byrne: I am not wholly satisfied with the answer that the minister has given, but perhaps we can have further discussion on the matter. I will not press amendment 17 at the moment, although I might return to it at stage 3.

Amendment 17, by agreement, withdrawn.

The Convener: Group 7 is on the definition of "children's services". Amendment 19, in the name of Rosemary Byrne, is grouped with amendment 20.

Ms Byrne: I am concerned about the possibility of young people falling out of the loop because the organisation with which they are involved is voluntary. Numerous voluntary organisations work with young people and I am worried that their work might be hampered by the proposals in the bill. Better neighbourhood services or family support workers might refer a child to a voluntary organisation such as Barnardo's or Quarriers, which then takes on the weight of fulfilling a child protection role.

Amendment 19 is a probing amendment. I seek assurances on how the bill will work across the different sectors. I do not want my amendment to hamper the work of voluntary organisations, but I would like an explanation of how we will ensure that services are joined up, that the links are there, that any work that has to be done by the voluntary sector is carried out fully when inspections take place and that no one can slip through the safety net.

I have given more serious consideration to pressing amendment 20, which relates to housing. When I raised the issue before, I was not satisfied with the answers that I got. I am thinking about young children who live in temporary accommodation, such as hostels, and who are moved from home to home and from school to school because of the chaotic lifestyles that their drug and alcohol-misusing parents lead. They can easily slip through the net of the homelessness teams, which makes them highly vulnerable. We must have stronger reassurances. I know of children who have had 15 different accommodations in 18 months as a result of living with a drug-misusing parent who has a chaotic lifestyle. When the homelessness teams eventually find such families a permanent home, the lack of social housing means that they are put

into a bad area, with the result that the child often has to change school again. I have strong concerns about the position of children who move from one vulnerable situation to another and I seek a great deal of reassurance from the minister on the matter.

I move amendment 19.

Dr Murray: If a local authority commissions voluntary organisations to provide certain services, surely the local authority has the primary responsibility for those services. Some voluntary organisations raised the almost converse concern that they may be subject to additional inspection under the bill. We said that that would happen only in relation to services that are provided for local authorities. In a sense, amendment 19 is unnecessary, because the matter is covered by the fact that the primary responsibility lies with the commissioning agent, which will be the local authority.

I understand why Rosemary Byrne lodged amendment 20 and why she expressed concerns about the issue, but it is not necessary to specify that children's services include housing services. The primary responsibility for providing housing and care for young people with chaotic lifestyles is surely with social work services, not housing services. Housing services are unlikely to provide social rented accommodation for children. Surely the care and accommodation of such children is the responsibility of social work services.

Lord James Douglas-Hamilton: I ask the minister whether amendment 20 is rendered redundant by his amendment 8 and whether housing services fall under the definition of "social work service".

Robert Brown: I understand and share Rosemary Byrne's sentiments—I have a lot of sympathy with her reasons for lodging amendments 19 and 20.

As voluntary sector services are captured by the definition of "children's services" in section 7, amendment 19 is unnecessary. They are captured because the term "children's services" means services that are provided predominantly to or for the benefit of children, to which the provisions of section 15(1) of the Local Government in Scotland Act 2003 apply. As Rosemary Byrne will be aware, that act defines community planning in such a way as to include

"such community bodies and other bodies or persons as is appropriate".

The definition of "children's services" also covers voluntary sector bodies that provide commissioned services for the local authority, as Elaine Murray mentioned. Those services are part of the definition and will therefore be inspectable. I hope that that gives Rosemary Byrne a degree of reassurance. Even if that was wrong, such services would fall under section 15(1) of the Local Government in Scotland Act 2003. Given that technical point, amendment 19 would not widen the definition. There is an issue of principle and a technical point. I hope that the member will be reassured by what I have said. For what it is worth, Lord James Douglas-Hamilton's helpful comment does not apply, because amendment 8 relates to the definition of "social work service".

I have a track record on the issue that amendment 20 raises. As Fiona Hyslop probably remembers, when we considered the Housing (Scotland) Bill in 2001, I lodged a successful amendment that required local authorities to have regard to the best interests of dependent children in carrying out their housing and homelessness functions. How far sighted I was at that time. Under section 3(4) of the Housing (Scotland) Act 2001, local authorities have a general duty in that regard.

However, we are talking about the inspection of social work and health services and children's services more generally. Housing services probably fall outwith that, but that is not to say that they are not inspectable or that, if an issue arose during an inspection by a joint inspectorate team, it would not be passed on to the appropriate inspectorate or body for action if the impact on the child would form part of the child's record. Inspectors will be able to take account of such matters, because they will be inspecting children's services, which are widely defined. More important, they will be able to pass on generic issues, such as the availability of housing in a local area—if they think that that is important in the context—to the appropriate regulatory or inspecting body, such as Communities Scotland, to consider. I imagine that inspectors might wish to do that in certain situations.

I hope that my comments reassure Rosemary Byrne that sufficient statutory provision exists. It is not appropriate to include amendment 20, as the bill deals with the rather narrower inspectorate function relating to children's services.

The Convener: I invite Rosemary Byrne to wind up and to indicate whether she wishes to press or withdraw amendment 19.

Ms Byrne: I am happy with the minister's response on amendment 19, so I shall seek leave to withdraw it.

On amendment 20, I have to say that I am still concerned. My problem is that homelessness teams are working with the housing department, not the social work department. Even when interventions are made to the social work department, which may be working with the family

concerned, there does not seem to be a great deal that social workers can do, given the lack of social housing, to support people in such situations. I have raised a concern that had probably not been noted and I think that we may need to look further at the matter.

I would be satisfied if I could have a discussion with the minister to raise my concerns about that before stage 3. I have had personal experience of such casework, which frightens me and gives me real concerns. My concern is that those children might not be on the at-risk register, which would mean that their cases may not come into play in inspection, even though those children may be on the cusp. Although they may be known to social services, they might not be on the at-risk register and they might be moving so often that they could slip through the net and not be noted until some time had passed. If the minister would agree to have a discussion with me about that, I would be content not to move amendment 20 at the moment.

Robert Brown: I am more than happy to have a meeting with Rosemary Byrne or with any other members of the committee who have concerns about aspects of the bill. With that assurance, I invite her to make arrangements to have a discussion with me about the matter.

Ms Byrne: Thank you.

Amendment 19, by agreement, withdrawn.

Amendments 20 and 18 not moved.

Amendment 8 moved—[Robert Brown]—and agreed to.

Section 7, as amended, agreed to.

Section 8—Consequential amendment and repeals

The Convener: The final group concerns amendments to existing legislation. Amendment 9, in the name of the minister, is grouped with amendment 10.

Robert Brown: Amendments 9 and 10 are consequential. Amendment 9 updates the Children (Scotland) Act 1995 and clarifies that people authorised to enter hospitals and nursing homes for the purpose of investigating the welfare of the children in those premises will not be affected by the repeal of section 6 of the Social Work (Scotland) Act 1968. Similarly, amendment 10 amends the Management of Offenders etc (Scotland) Act 2005, so that the definition of "a social work inspector" is the one in the current bill rather than the one under the 1968 act.

I move amendment 9.

Amendment 9 agreed to.

Amendment 10 moved—[Robert Brown]—and agreed to.

Section 8, as amended, agreed to.

After section 8

Amendment 11 moved—[Robert Brown]—and agreed to.

Section 9 agreed to.

Long title agreed to.

The Convener: That concludes stage 2 consideration of the bill. I am sure that we are all looking forward to stage 3 early in the new year, but meanwhile I thank the members and the clerks for getting me through my first stage 2 as a convener without any major hiccups. I am grateful.

Robert Brown: I, too, thank those who have helped me through my first stage 2 consideration as a minister. My return to the committee has been an interesting experience.

The Convener: This was our final meeting in 2005.

Fiona Hyslop: Do we have a date for stage 3?

The Convener: We have a provisional date of 19 January, but that has not yet been confirmed by the Parliamentary Bureau or agreed by the Parliament.

Finally, before we go, I thank members for their support during my first few months as convener of the committee. I wish everyone a very happy Christmas. In particular, although she is not here, I extend our best wishes to Wendy Alexander, who will be absent for the next few months, adding to the population group for which the committee is responsible. My best wishes to Wendy, and to all of you, for the new year. There are some mince pies available for members.

Meeting closed at 11:45.

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