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EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

Wednesday 5 May 2010

Session 3

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EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE
13th Meeting 2010, Session 3

CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER

Kenneth Gibson (Cunninghame North) (SNP)

COMMITTEE MEMBERS

*Claire Baker (Mid Scotland and Fife) (Lab)
Aileen Campbell (South of Scotland) (SNP)
*Ken Macintosh (Eastwood) (Lab)
*Christina McKelvie (Central Scotland) (SNP)
*Elizabeth Smith (Mid Scotland and Fife) (Con)
*Margaret Smith (Edinburgh West) (LD)

COMMITTEE SUBSTITUTES

Ted Brocklebank (Mid Scotland and Fife) (Con)
Hugh O'Donnell (Central Scotland) (LD)
Cathy Peattie (Falkirk East) (Lab)
Dave Thompson (Highlands and Islands) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Adam Ingram (Minister for Children and Early Years)
Laurence Sullivan (Scottish Government Legal Directorate)
Denise Swanson (Scottish Government Children, Young People and Social Care Directorate)

CLERK TO THE COMMITTEE

Eugene Windsor

LOCATION

Committee Room 5

Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 5 May 2010

[The Convener *opened the meeting at 10:02*]

Children's Hearings (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning and welcome to the 13th meeting in 2010 of the Education, Lifelong Learning and Culture Committee. We have received apologies from Kenneth Gibson and Aileen Campbell, who are both unable to join the committee due to illness. The committee wishes them a speedy recovery.

I remind all those present that mobile phones and BlackBerrys should be switched off for the duration of the committee meeting.

Our first item is our final evidence-taking session on the Children's Hearings (Scotland) Bill. I welcome the Minister for Children and Early Years, Adam Ingram; and his officials, Denise Swanson, the senior policy and programme manager for the children's hearings system reforms branch of the Scottish Government, and Laurence Sullivan, the senior principal legal officer in the children, education, enterprise and pensions branch of the Scottish Government.

I invite the minister to make an opening statement.

The Minister for Children and Early Years (Adam Ingram): I am pleased to be here to discuss the Children's Hearings (Scotland) Bill. I have taken great interest in the evidence that has been heard by the committee recently, much of which has also been expressed to me and bill team officials since last summer.

I hope that the committee found helpful the evidence that was provided by the bill team in March and also the letters that I sent recently to address issues around children who accept offence grounds and to clarify some issues in relation to the oral evidence sessions.

The landscape is complex, with many conflicting constituent interests within the same system. However, the committee's evidence sessions have time and time again referred to a need for consistency, higher standards and, therefore, change. The bill is necessary if we are to not only strengthen but protect our unique children's hearings system.

I am in no doubt that the bill complements the getting it right for every child programme by improving support for our most vulnerable children. Some 47,178 children were referred to the reporter in 2008-09, and that represents 47,178 reasons why we need a strong, modern children's hearings system.

Much of the discussion in evidence has been around the case for change, in particular the structure of the reform that is outlined in the bill, and whether the proposals are the right ones. I accept that things could be done without legislation to improve elements of the system, but there are definite limits to that. We need a bill. We need this bill.

Attempts to change the system from within have not brought a standardised, consistent approach to panel recruitment, support or training. The establishment of the national convener and children's hearings Scotland will deliver that change, and I am heartened to see that the submission to this committee from the children's panel chairs group says that 86 per cent of panel chairs support their establishment.

Most important, we need change so that our children receive the best decisions from hearings—decisions that are taken in their best interests, wherever they live in Scotland. If you are in any doubt about that, ask yourself the following questions. Is it right that a child could be seen by a hearing that is made up of panel members whose knowledge is outdated because they have not attended refresher training for 20 years but are still being reappointed? Is it right that those who recruit and assess panel members for reappointment are not accountable to anyone? Is it right that we continue to hear about how standards, the sharing of best practice and other tasks can be dealt with locally, yet we still await the introduction of effective, consistent measures? Is it right that decisions that are made by children's hearings—statutory, independent tribunals—are effectively being ignored in some cases? I do not think that those things are right.

Let me be clear that we are not proposing to make changes to the role of children's hearings as tribunals, nor are we fundamentally changing the role of the principal reporter or local authorities. However, we need this bill to transfer the right responsibilities to the right people.

The national convener is the right person to promote consistency, and they should have a dedicated body to support their work in supporting the national children's panel. That is wholly appropriate when you consider that, although the children's hearings system is the biggest tribunal in Scotland, it is the only one without a national supporting body. That is incredible, especially when you consider that it supports Scotland's

most vulnerable children and is largely delivered by volunteers.

The bill does exactly what was asked of it. It retains local support for panel members, local authority involvement in that support and the voluntary aspect of this part of the system. What the bill adds to that support is standardisation, consistency and, most crucially, accountability.

As with all legislation, alternatives were fully explored and discussed with partners. None of the alternatives could provide the full package of local support, consistency and accountability—accountability has proved to be the most difficult issue to address. If we are serious about making the principles into the reality, they must be guaranteed in every hearing, for every panel member and, most important, they must be guaranteed for the benefit of every child who goes through the system. The bill guarantees that full package of local support, in local areas, provided by local people in a standardised, consistent and accountable way.

At the forefront of our minds when drafting the bill was the aim of improving outcomes for children. We can provide better outcomes only when we get right everything that I have outlined. At the moment, we do not do that consistently enough. If we are inconsistent, we are letting down children in Scotland—our most vulnerable children, at that. Children deserve change. Children need the national convener and the procedural changes that you have before you. Children need this bill.

In his report, Lord Kilbrandon said that willingness to consider new ideas and methods is important to the essential flexibility of approach. Let us respond to that challenge, in children's interests.

The Convener: Thank you for that opening statement, minister. I am sure that the committee will want to follow up a number of issues in your statement.

Let us start with the issue of local versus national. You referred to the establishment of the children's hearings system and said that local resolution of local problems was key to the Kilbrandon principles. However, several witnesses have, both orally and in writing, expressed to the committee concerns that that local connection and local accountability will be lost. How will you address those concerns and what guarantees can you give that those fears are unwarranted?

Adam Ingram: The core of the Kilbrandon ideal of local involvement is that local lay people make decisions for vulnerable young people within their local communities. Local people bring to those decisions a knowledge and understanding of local circumstances and a sympathy for the welfare of local children. That situation is being protected under the bill—guaranteed, cast iron.

Local involvement does not mean local authority control of the panel system. Local authorities' main role—indeed, their duty—is to implement the decisions of children's hearings. Nevertheless, we want local authorities to play a role in the provision of support to local panel members, and the bill will enable them to do that through both the strategic development of area support teams and the membership of those teams. The ball is firmly in the court of local authorities in that regard.

Although the Convention of Scottish Local Authorities is opposed to the model that is set out in the bill, many of the local authorities that have submitted evidence to the committee support it. Those include Glasgow City Council, which has by far the largest number of panel members and hearings—it holds more hearings than all the other councils. Like us, COSLA wants to abolish the existing local support mechanism—the children's panel advisory committees—but wants to bring CPAC functions under the direct control of local authorities. In my view, that would create an obvious and dangerous conflict of interest with local authorities' primary function. Local authorities' having responsibility for appointing and supporting panel members on one hand, and implementing panel decisions on the other, would give rise to a major conflict of interest and we would not support that in any way.

The Convener: Local authorities and COSLA seem to think that there is a real issue about the local delivery of the service. What is broken in the local organisation that only the bill can fix?

Adam Ingram: Essentially, there is a lack of accountability in the system. The children's panel advisory committees are not accountable to anyone, and there is no mechanism in place at the moment to establish standards and monitor performance against those standards. That is what we have set out to do by introducing a national body and a national convener, which will enable us to drive up the level of performance locally.

The Convener: Where and how will you introduce that new form of accountability? I would have thought that there is a degree of accountability at the moment. CPACs are resourced and supported by local authorities, which are subject to the best form of accountability in that they are democratically elected by the people who live in their areas. As far as I can see, although some structures might be in place to delineate responsibility for certain things, there will in fact be no democratic accountability in the new set-up with regard to the operation and local delivery of the children's hearings service.

10:15

Adam Ingram: At the moment, there is no democratic accountability with CPACs, which are independent and do not account for themselves to local authorities, local authority chief executives or whatever. COSLA's proposal to transfer responsibility to local authorities is, in our view, dangerous. If a local authority has a statutory obligation to implement panel decisions, you do not want it to appoint and support panel members. There would be a clear and outstanding conflict of interests in that respect.

On the other hand, the national body will be directly responsible for the panel system's performance at a local level through the functions that it will take over and will have an independent function. Children's hearings Scotland will be accountable to the Scottish Parliament in much the same way that the Scottish Children's Reporter Administration is accountable through the normal non-departmental public body rules and obligations. That is a safer, more secure and more powerful way of introducing accountability into the system.

The Convener: But it is a very centralised form of accountability, centred as it is in the Parliament here in Edinburgh, and runs counter to the idea of local delivery and provision that was so central to the original Kilbrandon principles.

Adam Ingram: I have already laid out what the Kilbrandon principles were all about. On the one hand, lay people from the local community were to be involved in taking decisions for vulnerable young people. Those people need to be supported, and I argue that a national body and a national convener can do that much better. On the other hand, local authorities' primary statutory responsibility is to implement children's hearings' decisions in the provision of local services. To my mind, an independent function needs to be maintained.

The Convener: Does the Scottish Government feel that in light of the outcomes of CPACs and the local implementation of children's hearings an effective case for the system having failed has been made and there is no other choice but to take this action?

Adam Ingram: It is certainly true that there have been attempts in the past to introduce not only national standards but a performance network to maintain them. Indeed, four or five years ago, the children's panel advisory group had a standardisation working group tasked with that very job. However, it has been unable to implement the approach across the country, precisely because the system is local, not national, and it has been impossible to achieve a spread of best practice. In that respect, you could argue that the current system has failed to introduce best practice and drive up standards.

The Convener: Did the previous work on standardisation really have no effect? Is there any evidence that the change was beginning to deliver results and drive up standards?

Adam Ingram: I have seen no evidence that that was the case.

The Convener: What will be the difference in structures, responsibilities and duties between what we have now and what we will have under the bill?

Adam Ingram: The functions and tasks will be largely the same as those that we have now. However, they will be redistributed between the various bodies. The national body will take on responsibility for recruitment, training and support for panel members. Some tasks that the Scottish Government and local authorities currently carry out in support of the CPACs will be transferred to the new national body. No significant additional tasks or activities are required; what is required is a redistribution of the current activities. That means that each individual player in the system will have an independence, if you like, that is not evident in the current system. We will have children's hearings Scotland, which will be responsible for support for panel members. We will have the Scottish Children's Reporter Administration, which will be responsible for the professionals in the system—the reporters. Local authorities will be responsible for implementing the decisions on the provision of services. Of course, the tribunal will retain its independence.

The Convener: If the functions and tasks will remain relatively unchanged, what is the purpose of the bill? What is the driver for change?

Adam Ingram: The underlying driver for change is to improve outcomes for vulnerable children and young people. We all have a duty to try to achieve that. As I have already described, the current system hinders that through the inability to drive up performance, particularly because of a lack of consistent support for panel members up and down the country. We are all aware that cases that come before panel members these days are a lot more complex and difficult than they were maybe 20 or 30 years ago. Panel members deserve the systematic support that the new body will be able to deliver for them. That is the principal thrust behind the major change of the introduction of the new body children's hearings Scotland and the national convener.

The Convener: You say that outcomes will be better. What modelling has the Scottish Government done to lead you to that conclusion and what evidence can you provide to the

committee that there will be improved outcomes for children?

Adam Ingram: The committee has heard evidence from a fairly large number of players in the system that leads them to the conclusion that the support system that we are introducing is required.

The Convener: I am not asking about witnesses who gave evidence to the committee, although I must say that I do not recall too many people giving us a categoric assurance or evidence that outcomes will be improved. I am asking what work the Scottish Government has done to model the outcomes for children, which we all care about, including you, minister—I have no doubt about that. What work has been done to show that the outcomes will be better as a result of the structural changes?

Adam Ingram: As you know, we set up a strategic board to consider how to change the children's hearings system through the bill. Various working groups were established, including a training working group. They examined the issues in detail and worked through what appeared to them to be the best settlement for the children's hearings system to provide the results and outcomes that we seek.

The Convener: You set up a strategic board and it has done some work. Can you give the committee just one or possibly even two examples of how outcomes will be better?

Adam Ingram: One example is the training of panel members. You have heard evidence from training officers and others that training is inconsistent. People's knowledge and understanding of the system and how to deal with particular circumstances varies throughout the country. If we can address that, and drive up standards throughout the country so that the knowledge and understanding of panel members, and the support for them, is improved, we will get better quality decisions and, by inference, better outcomes for children.

The Convener: Last week's evidence from the trainers was pretty mixed on that issue. There is no guarantee that by giving responsibility for training to the national convener we will drive up standards and ensure that all panel members take part in training.

Adam Ingram: We will provide a guaranteed package of support for panel members, which cannot be done under the current system. We will also have a performance-monitoring framework, which the national convener will introduce. It is incontrovertible that outcomes will improve as a consequence of that. I disagree with your premise. To be honest, I thought that the training officers were very positive about the introduction of the national body and the national convener.

The Convener: I am playing devil's advocate here, but they had a point of view that they wanted to put forward. It is much easier for them to control and be in charge of something if they have easy access to a central person with whom they can engage. It is not as easy for them to have control or set the agenda when they have to deal with 32 different CPACs. That does not necessarily mean that standards will be better because they are dealing with only one person or one national body as opposed to 32 different CPACs.

Adam Ingram: We are going to have to agree to disagree on our interpretation.

The Convener: I have a couple of questions about the finances. How much will the structural changes cost? Does the Scottish Government have a business case for the changes? What consideration have you given to the conclusions of the Finance Committee, which said in its report on the bill that it has reservations about the changes? In case anyone has not seen the Finance Committee's report, it says:

"The Committee appreciates that there are areas of the Bill where COSLA and the Scottish Government are in agreement. However, the Committee cannot ignore the strength of evidence received from COSLA and local authorities and in particular the significant uncertainty on the likely costs of this Bill. The Committee is concerned that the lack of detail makes it exceptionally difficult to assess whether the FM is accurate and therefore recommends that the lead committee raise these issues with the Cabinet Secretary."

Since he is not here, we will raise them with you.

Adam Ingram: The Finance Committee highlighted the strong opposition from COSLA. However, I argue that COSLA provided no evidence that our costs were underestimated or inaccurate. I appreciate that COSLA would find it hard to do that because our costs were largely based on a survey of local government that we undertook to put together the financial memorandum. Out of the 32 local authorities, 28 responded to the survey. I take a great deal of issue with COSLA's criticism, which is not backed up by substance.

The financial memorandum clearly sets out the costs of the new body and that local authorities will retain their existing level of funding, despite some of the panel support functions that we talked about earlier being transferred to the new national body. All the figures in the financial memorandum were based on a survey of all local authorities, and the £3 million that local authorities currently expend will stay with them.

10:30

As I indicated earlier, we are dealing with a redistribution of tasks and activities. We are not adding any significant activities—although perhaps the feedback loop is one such. However, it is reasonable to base estimates of future costs on the current level of costs that are expended in performing the activities in question. That is my response to the Finance Committee's criticisms.

The Convener: The Scottish Government estimates that it costs local authorities approximately £3 million to administer the children's hearings system. How did the Government reach that figure?

Adam Ingram: As I indicated, we undertook a survey of all local authorities and asked them to spell out to us precisely what their costs were. The £3 million figure also includes an estimate of in-kind costs that are not easily quantifiable, such as costs for the provision of meeting rooms, administrative support and so on. Those are built into our estimates.

The Convener: So if the bill is passed, the £3 million will be added to the concordat settlement in the future.

Adam Ingram: The additional burdens that we talked about were from the introduction of a feedback loop. We did not include detailed cost estimates for that, but I guess that asking people to provide generalised information to local panel members and the local area support teams will not be hugely expensive. I cannot see that absorbing all the resources that have been released to local authorities from being relieved of, for example, funding CPACs or paying panel member expenses. In terms of giving comfort to local authorities that they will not be imposed upon by any additional costs, I think that we can guarantee that by allowing them to retain their current level of funding.

The Convener: So there will be no additional costs; they will just have to keep on meeting their current costs.

Adam Ingram: Yes.

The Convener: Okay.

Adam Ingram: No—we are transferring functions from local authorities to the new body children's hearings Scotland and the national convener. For example, local authorities are currently tasked with funding CPACs, expenses for panel members and training on a local basis. All those tasks and functions will transfer to children's hearings Scotland, which will pick up the tab for the costs.

The Convener: Okay, but if you have done all that work and had the consultation, why is COSLA still so concerned? Is it just scaremongering? Is it just moaning for the sake of it? Or does it have legitimate concerns?

Adam Ingram: COSLA might have concerns or fears, but I do not think that they are well founded. You will have to ask COSLA about that.

In the responses that I have given, I think that I have clearly laid out the role for local authorities, as I see it. Local authorities have a role in supporting panels locally, in relation to some of the issues that we talked about, such as the provision of accommodation and general support for panel members. I want there to be local authority involvement in area support teams. The bill will ensure that authorities can have significant input into the strategic development of area support teams and it will allow authorities to nominate team members. We want local authorities to be fully involved in the system.

Most local authorities that we have talked to—if not all—want to retain their involvement with panel members. What we disagree on is the shape of that involvement. I am very much opposed to handing over control of local children's panels to local authorities, for the reasons that I stipulated.

The Convener: Therefore, if the bill is approved by the Parliament and receives royal assent, local authorities will have no need to worry. There will be more than enough money to cover any costs that they will incur as they implement the bill.

Adam Ingram: In terms of the bill's financial implications, yes. However, you know as well as I do that we are entering a particularly difficult time in public finances, so there will be pressures on local authorities and indeed the Scottish Government in the context of public expenditure. Local authorities will suffer as a consequence of that.

The Convener: Will local authorities have the resources to enable them to cover the costs of implementing the bill's provisions?

Adam Ingram: As I said, local authorities will retain the £3 million that they currently receive from the Scottish Government, even though they will undertake fewer functions.

Elizabeth Smith (Mid Scotland and Fife) (Con): In its submission to the Finance Committee, COSLA referred to

"The opacity and inconsistency in the way the Financial Memorandum has been developed",

and went on to say that

"the additional costs associated with this Bill will result in a consequent reduction in resources available elsewhere in the public sector".

Will you comment on COSLA's comments on the financial memorandum?

Adam Ingram: I would ask COSLA where is its evidence for making such assertions. I do not see it.

In the financial memorandum, we have considered the costs of delivering the current system. As I said, functions and tasks will be largely unchanged, so it is reasonable to take the position that costs will be roughly in line with what is currently expended on those tasks and activities. Of course, we would like to make efficiency savings, if possible. The training group that was established under the strategic board indicated that significant efficiency savings could be made, while providing a much more coherent system. We look for best value when we consider such matters.

Elizabeth Smith: That is an interesting point, which we can pursue. The Government will argue that the move to a national body will generate greater efficiency savings as well as leading to better training and so on. As I understand it, COSLA is arguing that a number of local authorities do not accept that a national body will deliver those outcomes, although some authorities think that it will. There is quite a difference of opinion between the Government and a number of local authorities. Is that a matter of concern to you?

Adam Ingram: The level of opposition from COSLA is obviously a concern for me. COSLA may have its own reasons for that. It is attracted to the notion of local control of the panel system, but I think that there are real dangers in that, as I have articulated. Perhaps COSLA believes that local authorities might be sheltered from the external imposition of costs, but the primary costs come from the obligation on them to implement hearing decisions.

Elizabeth Smith: Do you accept that there is a concern among some local authorities that the national structure that you intend to introduce will not deliver some of the improvements that you want? Some local authorities think that it might, but others are pretty sure that it will not. We therefore have a difficulty in being able to assess the outcomes. We all agree on what the outcomes should be and that the child should be at the centre, but there is a problem about how that can be delivered.

The problem takes us to the heart of the question about how we establish the principles of the bill. There is a strong argument that we need a bill to ensure compatibility with the European convention on human rights and to tidy up some things. However, do we actually need as big a bill as we have, or is it too bureaucratic and, in effect, a sledgehammer to crack a nut? That is what some local authorities are telling us.

Adam Ingram: I argue strongly against that. We have tried alternative ways of raising performance and improving quality and they have failed—largely on the basis that there is a lack of accountability in the system. In the current system, CPACs are not accountable to anyone.

What we are trying to do is set up a support system for panel members that is parallel to the support that the professionals have through the SCRA. Given the huge contribution that they make, panel members deserve that level of support, which they have not had in the past. That is why we need a new national body and a national convener with the functions that are proposed.

Elizabeth Smith: I can accept that argument for the local authorities that say that there can be improvements, but I return to the fact that we have a lot of evidence from local authorities that feel that that is not the case. They are concerned that we are creating a big structural change that will not necessarily help them because they believe fundamentally that they are delivering quite a good service. They would like some changes, but they do not believe that we need such extensive legislation to introduce them. As a committee, we have to decide whether that is an appropriate view or whether we agree with those who have argued otherwise.

Adam Ingram: I ask you to look at the evidence that COSLA presents to justify its view, and I suggest that it does not have much evidence. A lot of it is assertion or feeling—

Elizabeth Smith: As I read it, COSLA thinks that there is “opacity” because too many parts of the bill are vague and unclear, so it is difficult for it, as it is for the rest of us, to establish the fundamental costs that are attached to it. That point also came through the Finance Committee.

Adam Ingram: One area in which we do not have the detail is the make-up of area support teams, and that clearly needs to be worked through. Ultimately, the national convener will have the responsibility for the membership and functions of the area support teams. I accept that there is a degree of uncertainty around the shape of them. However, we have enabled—and we continue to encourage—local authorities to get engaged in the discussions on how we put together area support teams. We are not cutting local authorities out of the loop, so I hope that some of their fears will be allayed if they get engaged with the process. The invitation is there for them to do that.

Elizabeth Smith: Do you accept that clarity about what we are trying to achieve and about the structures that will go along with that is crucial in determining costs, particularly at a time when local

authorities are not exactly flush with money? Local authorities want to know exactly what extra costs might be put on them, but we will not know what those costs are until certain aspects of the financial memorandum are clarified.

10:45

Adam Ingram: As I have said, I do not see where extra costs would come from. The only additional activity that we are talking about is through a feedback loop. I acknowledge that there would be a huge bureaucratic burden if, for example, that feedback loop was for every individual case, but we are not advocating that; rather, we are advocating generalised feedback in order to inform panel members so that they can develop their understanding of how compulsory supervision orders are implemented and why some might not be implemented, for example. We want to broaden and deepen panel members' knowledge and understanding. That is what is driving our proposals. I think that local authorities fear that the national convener will somehow monitor their performance and criticise or expose their failings. I note from their evidence that they seem to be afraid that there will be an extra burden of scrutiny on them, but it is not our intention to place an extra burden of scrutiny on them. The national convener will be responsible only for his own functions: scrutiny of local authorities will not be one of those functions. We want the feedback loop to help to develop panel members and give them a broader understanding of how services are provided locally.

Elizabeth Smith: If we pursue the national structure, what kind of person do you foresee being the national convener, given that it has been flagged up to us that the national convener might have a conflicting role in being a champion of the system and trying to monitor standards? What kind of person would that role attract?

Adam Ingram: Obviously, a person specification that will be tailored to the national convener's functions will be developed as part of the public appointments process. I point out that the national convener will have a limited number of statutory functions. We are not talking about a jack of all trades or somebody who will dominate the whole system. The statutory functions that will be vested in the national convener will include the appointment and training of children's panel members, the selection of members for local children's hearings, the provision of advice to hearings, and responsibility for the functions, establishment and maintenance of the area support teams. The national convener will be responsible only for ensuring the effective performance of his own independent functions. That is it.

Margaret Smith (Edinburgh West) (LD): Good morning, minister. We have already heard about the tensions between the local and national levels, which are obviously among people's big concerns. I would like to focus on the concerns that COSLA has expressed to the minister and the committee. Even COSLA, which opposes a national body for children's panels, argues in favour of a national panel of safeguarders, as many of the committee's consultees have, including the Scottish Safeguarders Association, which did so in its written and recent oral evidence to the committee. Why is it cost effective to replace the 32 children's panels with a single national body, but not cost effective to replace the 32 safeguarders' panels with a single national body?

Adam Ingram: We do not believe that it would be proportionate to set up a bespoke national body for the fewer than 200 safeguarders, who are involved in a tiny proportion of hearings. By comparison, we have more than 2,500 panel members, who are involved in something like 47,000 hearings a year.

Lord Gill's review recommended a consistent approach to recruitment and training for safeguarders, reporting officers and curators ad litem, as well as a system of national standards. The bill makes provision for the setting in place of such consistency and national standards through regulation-making powers, which would allow us to implement the Gill reforms, subject to decisions on their implementation being made. I should also point out that the safeguarders are content that the proposed provisions will address their main concerns, so it appears that the safeguarders are less concerned than the local authorities about being placed within local authorities. Lord Gill's review did not suggest the establishment of a separate safeguarders body. His suggested reforms can be taken forward through the powers in the bill—in section 30—regarding the training, operation and management of safeguarders.

Margaret Smith: That is quite welcome, minister. Apart from anything else, that answer probably saves me from having to ask my next question. I accept that the need for greater consistency was one of the main issues about safeguarders. In effect, are you saying that you intend to use the regulation-making powers in the bill to introduce, on the back of the implementation of the Gill review reforms, greater consistency in respect of safeguarders? Certainly, some confusion seems to have been caused by the fact that different parts of the country appear to deal with safeguarders and curators in different ways. That perhaps points to a lack of clarity, not so much in the bill as in the way the system currently works. Do I interpret the minister correctly as saying that it is his intention to address that lack of consistency and clarity?

Adam Ingram: Yes. As the SCRA's principal reporter mentioned previously, some areas—such as the Western Isles, I think—do not have local safeguarder panels, so safeguarders need to be brought in from elsewhere. We need to address that.

Margaret Smith: Before moving on to more general questions on legal aid, I want just to pick up on one issue. Given that the bill will allow safeguarders to appeal decisions in their own name, it is noticeable that section 178 makes no provision for a safeguarder to be awarded legal aid to do so. Is that—dare I say it?—an accidental omission, or are there policy reasons why safeguarders should not be eligible for legal aid?

Adam Ingram: My compatriot here—Laurence Sullivan—is telling me that we will consider that for stage 2, so we obviously had not considered that point.

Margaret Smith: Having brought the point to the Government's attention, I think that we are happy to wait until stage 2 to receive greater clarification.

I will move on to more general issues about legal aid. By comparison with the existing rules, the bill will substantially restrict legal aid for the appointment of legal representatives, but will allow ministers to extend that eligibility by regulation. Given that such an extension seems necessary to meet the ECHR requirements on effective participation, why, in moving on from the interim arrangements that are currently in place, does the bill not simply set that out rather than provide that further regulations be made?

Adam Ingram: If I may, I will ask my legal colleague to answer that.

Margaret Smith: Please feel free to do so.

Adam Ingram: I am afraid that legal aid is not my area of expertise.

Laurence Sullivan (Scottish Government Legal Directorate): As you will have noticed, the legal aid provisions in the bill are complicated. Essentially, because the entire system is being moved from panels of solicitors appointed by hearings and run by councils to the Scottish Legal Aid Board, we are having to hook on to the different types of legal aid that already exist: there are different types of legal aid, such as advice and assistance, advice by way of representation and children's legal aid. Some of the complexity is necessary to hook in to the way the Scottish Legal Aid Board already runs the normal legal aid system.

The criteria for when a child and/or a relevant person gets legal representation at a children's hearing or at a sheriff court proceeding will not change. It will still be decided on the same criteria as in the Children's Hearings (Legal Representation) (Scotland) Rules 2002, in consequence of the S v Miller case, and the 2009 amending rules, in consequence of the SK v Paterson case. There will be a couple of nuances, but that is the basic principle, which will be provided for through a combination of different types of legal aid—principally ABWOR and children's legal aid—although we are, as Margaret Smith said, bound to have the level of representation that is required by ECHR, as expounded in those two cases and other Strasbourg jurisprudence. Who is eligible will therefore not change, but it will be done by a combination of provision under the bill and under the regulations. Other powers in the Legal Aid (Scotland) Act 1986 will also ensure that that is the case.

Margaret Smith: So you are saying that who is eligible will not change and that the proposals will not affect children's rights to representation. What changes, if any, are happening in respect of relevant persons or other people who are not relevant persons? I presume that some of this happens before people have a right to go to a pre-hearing to determine whether they are a relevant person and so on?

Adam Ingram: That is a matter that we need to address. The deeming of a relevant person at a pre-hearing is certainly an issue. Legal aid would come in if the person who is applying to be deemed a relevant person is knocked back. They would have recourse to an appeal to the sheriff court and could, I think, apply for legal aid. Is that right?

Laurence Sullivan: Yes.

Margaret Smith: The bill suggests at section 28(1) that at emergency hearings, for example after the granting of a child protection order that will remove a child from their home, legal aid is automatically available for the child but not for the relevant person. From where is the relevant person to get funded representation to argue that their child should be returned home and should not be kept from them? Is it via ABWOR or do you intend to extend the rules on emergency legal aid to cover such a situation?

Laurence Sullivan: Some of that provision would not be covered in the bill because it would be provided for by the ABWOR rules under the Legal Aid (Scotland) Act 1986. The intention is that ABWOR would be the usual aid type for funding proceedings before a hearing, and that the automatic children's legal aid to which you refer in relation to a child at a child protection order hearing would be used to cover such an emergency situation when ABWOR would not suffice.

Margaret Smith: As far as I understand it, there is a failure to provide for legal aid at sheriff court hearings that deal with child protection orders. Is that a policy decision or an oversight?

Laurence Sullivan: That is an oversight. We propose to lodge a stage 2 amendment to add a couple of sections on sheriff court hearings in consequence of child protection orders. Children's hearings in consequence of CPOs are provided for.

11:00

Margaret Smith: My colleague Ken Macintosh will ask further questions about legal aid. Given that we have already pulled out a couple of omissions and that you intend to make changes, it might be useful if you sent to the committee as early as possible a note to give us the greatest clarification about, and the greatest time to consider, what we all agree is a complicated issue.

I return to costs. What are your comments on SLAB's suggestion that the legal aid costs under the bill might be greater than those in the financial memorandum?

Adam Ingram: The financial memorandum includes estimates for legal representation that are much higher than current costs, so we believe that we have taken on board the need to address the fees issue.

Denise Swanson (Scottish Government Children, Young People and Social Care Directorate): SLAB considered that emergency legal aid might be needed in more emergency hearings or in more types of hearing than the bill indicates. The different figures that SLAB has provided encompass more emergency hearings than we envisage.

Margaret Smith: So you still disagree with SLAB's interpretation.

Denise Swanson: We based the figures on SCRA information about hearings that have taken place—we adjusted that information.

Ken Macintosh (Eastwood) (Lab): One concern that has been flagged up is that using the Legal Aid Board to determine the payment of legal representatives could add delay to the system. What mechanism will you use to prevent such delay?

Laurence Sullivan: After consultation with SLAB, we do not think that that will be a problem. In the legal aid system for civil and criminal cases, SLAB is well used to providing legal representation at short notice when necessary. Hooking into SLAB's existing processes and procedures will mean that legal representation and the appointment of legal representatives are more standardised and consistent than at present, when decisions are made by panels throughout the country.

Ken Macintosh: If the system has no delays, how long does SLAB take to make decisions about legal aid?

Adam Ingram: In emergencies, legal aid is automatic, is it not?

Denise Swanson: Yes.

Adam Ingram: We hope that such situations are addressed.

Denise Swanson: One reason why ABWOR was selected is that solicitors make decisions on criteria, and cases do not need to be referred to the Scottish Legal Aid Board, which minimises delays. As the minister said, emergency hearings will not require an eligibility test—the entitlement will be automatic.

Ken Macintosh: When a child has a solicitor, legal aid will be governed by ABWOR rules, but when a child does not have a solicitor, the decision will be for the Legal Aid Board. Do you suggest that the decision in every such case will be made under emergency legal aid rules rather than children's legal aid rules?

Adam Ingram: My understanding is that in that sort of situation a list of approved solicitors will be provided to the child or relevant person and they will be able to choose which solicitor they want.

I know that you had a particular issue, Mr Macintosh, about consistent support from a solicitor through the whole process. My understanding is that solicitors are registered with the Scottish Legal Aid Board and that such solicitors would be able to take a case all the way through. I do not know whether that was one of your concerns.

Ken Macintosh: That is helpful, but there are a number of concerns. The argument that putting all the decisions to the Legal Aid Board could introduce an element of consistency is quite a strong one, but there are a number of other problems. The issue is incredibly complex to follow. We are talking about changing the Legal Aid (Scotland) Act 1986 and using the ABWOR scheme, emergency legal aid and children's legal aid—it is not immediately clear in each case. At present, children's legal aid is a means tested scheme but most children going through the scheme, and most families in the children's panel system, will qualify automatically. Why is means testing being kept in place?

Adam Ingram: Again, I will refer to Laurence Sullivan.

Laurence Sullivan: At the moment, the normal SLAB rules about eligibility criteria and

contributions do not apply to children's hearings because they are not within the SLAB system. In the future, they will do so. For children's hearings, for example, children's legal aid will automatically be available a couple of days after a child protection order has been granted, usually at the instigation of the local authority. In other circumstances, under ABWOR, the normal eligibility and contributions rules will apply. That is, obviously, of substantially more relevance to relevant persons than to children. Nothing bespoke or different is being done with regard to how those normal legal aid rules will apply to children's hearings compared with how they apply to the rest of the legal aid system.

Ken Macintosh: My concern is this. If legal aid is means tested, will a means test be conducted before a decision is made on legal aid or will it be conducted retrospectively and the money claimed back?

Laurence Sullivan: It will continue to be done as it is at present. The current system is that a solicitor usually makes that assessment when someone comes to see him or her. The solicitor deals with SLAB as to whether any contributions come from the client. That will still be done, but with the extra provision for circumstances where a child must have legal representation, such as if a hearing is considering a secure accommodation authorisation. In a situation like that or in a hearing subsequent to a CPO, children's legal aid would automatically be given to the child so that he or she would be legally represented at a hearing that was making a decision of that nature.

Ken Macintosh: Am I right in thinking that most of those decisions would be taken at a pre-hearing? My understanding is that there will be a pre-hearing at which the question whether either the child or a relevant person should have legal representation will be decided. Is that the case?

Laurence Sullivan: That would happen in some cases. Because we are moving to the legal aid system there will be various chances for children and relevant persons to get legal aid. If it looks as if a secure accommodation authorisation might be in prospect, or if it is obvious that the relevant person is not capable of effectively participating themselves, that is something that will be known to the social workers dealing with the families. A social worker or children's reporter should suggest that the child or relevant person gets a lawyer. If they get to a pre-hearing and still do not have a lawyer, the pre-hearing would suggest it. Indeed, if an individual ends up getting to a hearing without a lawyer and it is obvious that they need one to participate effectively, possibly because they have limited capacities, the hearing would also be able to ensure that the person got a lawyer. It is intended that there would be various steps along the way to ensure that someone who should have legal representation would be given repeated opportunities to get it.

Ken Macintosh: The opportunities for a child to get legal representation are relatively clear. However, the opportunities for a relevant person to get it are not in the bill at all. That is why we are waiting for regulations. When is a decision taken about a relevant person and who takes it? Will a delay be built into the system if the relevant person is then means tested for legal aid? That is not clear to me at all. It could introduce an extra layer of delay, cost and legalisation to the system.

Laurence Sullivan: The criteria for when a relevant person would get legal aid would, in essence, be the same as under the Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009 and as set out in proposed new section 28K that section 178 of the bill would insert into the Legal Aid (Scotland) Act 1986 and which sets out similar criteria. Those are based on the nature of the decision that is made, especially when it engages the relevant person's article 8 ECHR rights in relation to their relationship with the child and when legal representation would be necessary to ensure that relevant person's effective participation at the hearing.

Ken Macintosh: I want to clarify that, because I might have got it wrong. Are you saying that new section 28K, which the bill will insert into the 1986 act, covers the rules of eligibility for relevant persons and adults?

Laurence Sullivan: New sections 28K(3) and (4) set out the criteria but, as I said, there are distinctions between the different existing categories of legal aid, ABWOR and children's legal aid. In addition to new section 28K, there are already regulation powers in the Legal Aid (Scotland) Act 1986, such as section 9, that would set the same criteria for the different categories of legal aid.

Ken Macintosh: I am sorry to interrupt but I want to rewind a moment. Does new section 28K apply to relevant persons or does it just apply to children?

Laurence Sullivan: It applies to children's legal aid but children's legal aid is not only for children.

Ken Macintosh: It applies to relevant persons.

Laurence Sullivan: Yes.

Ken Macintosh: Will the interim arrangements that the 2009 rules put in place be written into statute? Will they remain as agreed to last year or will they be revised?

Laurence Sullivan: The provisions in new sections 28K(3) and (4) are identical to new rules

3A and 3B that the 2009 amendment rules inserted into the Children's Hearings (Legal Representation) (Scotland) Rules 2002. The 2009 rules would not be revoked until full provision was in place in relation to ABWOR and children's legal aid to mirror exactly the criteria for appointment that are set out in the 2002 rules as amended by the 2009 rules.

Ken Macintosh: So the 2009 rules will not be revoked until other rules are in place, but will the other rules be put in place by the bill or by regulation?

Laurence Sullivan: They will be put in place using a mixture of the provisions in the bill and existing legislation. Section 178 of the bill inserts 15 new sections into the 1986 act, so they are not standalone provisions at all. As well as those 15 new sections, the 1986 act contains existing provision on ABWOR that will also be used.

11:15

Ken Macintosh: I understand that you do not want the bill substantially to change the numbers of people who qualify for legal aid and assistance. Is that right?

Adam Ingram: Yes.

Ken Macintosh: However, the eligibility tests for legal aid and assistance are changing. The main change is that you are replacing the test of the best interests of the child with a simple reasonableness test. Why are you doing that? Will the change mean that the numbers change, too?

Adam Ingram: We need to address such issues and I am grateful to the committee for raising them. We need to respond to all your detailed questions.

To be frank, I do not have detailed understanding or knowledge of the legal aid rules. I understand that the criteria for the availability of state-funded legal representation that we established when we amended the interim scheme last year will apply. For a relevant person, it will be about the person's need to be able to participate, given their capacity issues; for a child, it will be related to the nature of the decision that is being made, for example if consideration is being given to authorising secure care, where loss of liberty is involved. I understand that such principles in relation to who gets state-funded legal representation will remain the same—am I wrong in that interpretation?

Laurence Sullivan: No.

Adam Ingram: Thank you.

The Convener: You are not wrong, but Mr Macintosh was asking about legal aid for a child who comes before the court and I think that you were talking about legal representation at a children's hearing. The two systems are different.

Ken Macintosh: That demonstrates the difficulty of asking questions on the subject—never mind answering them.

There are different tests. In the court, the test will change. Currently, both the best interests of the child and reasonableness are considered; the bill will remove the test of the best interests of the child. I understand that there is another issue in relation to hearings, which is to do with effective participation. Despite our discussion, I am still not sure whether the effective participation test will remain. Can you comment on the two separate issues: the best interests of the child test in relation to the court and the effective participation test?

Laurence Sullivan: It might be best if we tried to clarify the matter in the letter that we have agreed to send to the committee.

Through a combination of the proposed new provisions in the Legal Aid (Scotland) Act 1986 and the existing provisions in the 1986 act, the criteria for when a child or relevant person gets legal representation at a hearing will remain the same. There are differences, which depend on whether the approach will hook into ABWOR or children's legal aid, which are established categories of legal aid as run by SLAB. When one of those categories has been hooked into and children's hearings have been put into the legal aid system—which will be a novel thing to do—the existing legal aid rules will in essence apply as they currently do, with some caveats and nuances to ensure that children definitely get legal representation.

When a secure disposal is possible, the child will not be able to refuse a lawyer, even if the child thinks that that is a sensible course of action.

We know that this is very complicated, as you will have gathered. We are continuing to look at it. It might be best if we tried to clarify some of the points in writing and then saw what gaps remained.

Ken Macintosh: That would be helpful. I have one more question about the broader area of paid representation and the appointment of curators as opposed to safeguarders. The original draft of the bill contained a section that said that sheriffs could not appoint curators and should always appoint safeguarders, but that is no longer in the bill. That implies that it is still up to sheriffs to decide whether they appoint safeguarders or curators, who are paid at different rates and do similar but slightly different jobs. It will introduce inconsistency yet again. Was there a reason for taking that section out of the bill?

Laurence Sullivan: You are correct that there was a provision in the draft bill to remove curators from the system. Our understanding is that sheriffs would appoint curators only in particular areas of the country. We are not entirely clear why that should be, and we would like to move towards a position where safeguarders are appointed in such circumstances. The draft bill last June sought to achieve that by prohibiting the appointment of curators, but some stakeholders did not like that and raised some issues from their perspective about the quality of safeguarders. In light of that, and of Lord Gill's review, the long-term aim is to use the powers that we have taken in the bill for the operation, management and training of safeguarders to ensure that the quality of safeguarders is increased to such a level that the appointment of curators by some sheriffs in some parts of the country would no longer be thought necessary.

Ken Macintosh: Convener, if I may, I will summarise my thoughts. We have spent some time discussing what will happen, so we have not really had the chance to discuss whether it should happen or concerns about what might follow because we are not entirely sure of the process.

My concerns are that we have a new system in which curators, safeguarders and various forms of legal representation will be appointed at various parts of the process, either through the hearings or by the courts. They can be appointed by the Scottish Legal Aid Board or by others, they will be paid at different rates, and will do slightly different jobs. Some of the rules for the appointment of each of those functions are in the bill, but some are not. That creates a difficult picture, and it is hard to see the principles that run through it.

I am aware of the minister's overall intention but, in each case, it is difficult to see what the practical effect will be of each of those changes. The worry is that each change will complicate the system, rather than making it simpler, easier, better for children, ECHR-compliant, and better for the adults who are involved in the system. It would be useful to have clarity. This enormous and complex bill rewrites the whole system from scratch. Why not put everything into it, as opposed to putting most of it in, but leaving some provisions to regulations, and others to be followed up in a way that cannot be scrutinised by the committee or by witnesses and others who have an active and on-going interest?

Then there is the result of all the changes. The minister will know from our evidence sessions that we worry that there will be an increase in legal representation at children's hearings. Our fundamental concern is that the system for protecting children's welfare, which is not based on lawyers interpreting laws but on the input of lay people who are concerned about children's welfare and live alongside their families in the community, will become over legalised. We are also concerned that extra costs will be involved, none of which—or few of which—are for the benefit of the child. They are about improving the decision-making process, rather than investing in outcomes for the child.

We have many concerns. I do not want the letter to be overly long, but it would be useful if you could get at some of those issues—not just the complexity of legal aid but the impact of the changes and whether the fears that I have outlined will be realised.

Adam Ingram: The overall intention is to ensure that those who need legal representation get it. I agree with your sentiments entirely: we do not want to expand the criteria that we established last year for who should get state-funded legal representation and we do not want the system to be inundated with legal representatives. I shall undertake to respond to Mr Macintosh and the rest of the committee on not just the points of detail but the points that he raised latterly.

Christina McKelvie (Central Scotland) (SNP): Good morning, minister. I want to move away from legal aid and on to grounds for referral and the age of criminal responsibility. You will understand that I have been following that line throughout the evidence that we have taken on the bill. Section 65 sets out a list of grounds for referral. Some of the evidence that we have taken suggests that there should be a change, and that the grounds should be made a bit simpler. One suggestion, which a number of people made, was that there should be one general ground, which could be something along the lines of "the child is in need of compulsory measures of protection, guidance, treatment or control." Would the Government consider that suggestion?

Adam Ingram: I noticed that that point arose in your evidence sessions. I do not think that what you suggest would necessarily be a good idea from the perspective of the child and relevant persons. I think that they deserve a clear exposition of why they are being called before a children's hearing. I do not think that one general catch-all ground for referral would provide the transparency and clarity that children and relevant persons need. On that basis, I would need a great deal of convincing that we should move to that kind of approach.

In general terms, it is fair to say that the grounds for referral have been tidied up. There has not been a great reduction in the number of grounds for referral. We have dropped some that are perhaps outdated and have introduced others, such as domestic abuse, which I think is an important addition. That is my overall view.

Christina McKelvie: Do you think that the grounds as a whole distinguish sufficiently between children who need state intervention and children for whom state intervention would not be appropriate?

11:30

Adam Ingram: We believe so. Obviously, there are a couple of additional categories such as close connection and domestic violence that we have already discussed. We think that those grounds are an improvement on current grounds in allowing for situations in which people who are not only co-resident with a child but closely associated with them might give sufficient cause for concern—with regard, for example, to sexual offences and the like—to constitute grounds for referral. As for the domestic violence ground, there is a bit of a gap in that respect at the moment. After all, it is probably rather unfair for a parent who is a victim of domestic abuse to be called to a children's hearing on grounds of lack of care or whatever. It is important that such grounds are introduced.

Christina McKelvie: Evidence suggests that there might be a lack of understanding among panel members of how to apply the new close connection and domestic abuse grounds. What guidance will you give panel members on distinguishing between abuse and domestic abuse and on how those grounds might be applied?

Adam Ingram: Well, I think that reporters would do that.

Denise Swanson: It is important to note that a child who does not need state intervention will not necessarily be called to a hearing. Before a child is referred to a hearing, two tests need to be met: first, that there are sufficient grounds for referral; and, secondly, that the child needs compulsory supervision measures. The reporter determines whether there are sufficient grounds for referral. Detailed practice guidance on frameworks for decision making in that respect is already in place and would, in any case, be produced for new legislation.

Laurence Sullivan: Section 65(3) sets out when a child is to be regarded as having a close connection with a person. The general point about the grounds for referral, which we considered in great detail, is that overlaps are not a problem but gaps are a big problem. We have therefore erred on the side of having overlaps and ensuring that there are no gaps.

Christina McKelvie: I have just asked whether the list of grounds could be simplified but, believe it or not, it has been suggested in evidence that the ground of forced marriage should be added. Could that be included in the bill?

Adam Ingram: That could be considered for stage 2.

Christina McKelvie: It was suggested that that gap has been missed and that, although the issue might not have been relevant in the past, it is certainly becoming more so now.

Adam Ingram: Do we know why that ground was not included in the bill?

Laurence Sullivan: We can look at it for stage 2. There might be a good argument that some of the other grounds, especially with regard to conduct such that

"the child's health, safety or development will be seriously adversely affected",

might cover a child forced into marriage against their will but, if it turns out that the bill does not obviously cover forced marriage, we can look again at the issue to see where we can make that more explicit.

Adam Ingram: Given that we are working on the basis that overlap is better than gap, we should perhaps consider the matter.

Christina McKelvie: Absolutely. That is welcome.

Another issue that I have been pursuing is the consequences of the increase in the age of criminal prosecution to 12. Will you update us on your thinking on the consequences for children aged between 8 and 12 and between 12 and 18 of being referred on offence grounds?

Adam Ingram: The committee has had sight of my letter to the convener on that topic. The proposal to raise the age of criminal prosecution is under parliamentary discussion as part of the Criminal Justice and Licensing (Scotland) Bill. If it is approved, children under 8 will continue conclusively to be presumed not to be guilty of an offence, so they will be referred to the children's hearings system only on welfare grounds. Children aged between 8 and 12 will be dealt with for offending only through the children's hearings system, but referral on an offence ground will still be competent. Children aged between 12 and 16 will be prosecuted if the offence is serious enough to be dealt with on indictment. The Lord Advocate issues guidance on that. Otherwise, they will be dealt with by the children's hearings system. Children aged 16 or 17 who remain on supervision through the children's hearings system will continue to be managed in the system or can be prosecuted. The decision on that will be made between the procurator fiscal and the reporter.

That is our understanding of the changes and what they will mean if the bill is passed.

Christina McKelvie: The consequences that a child's acceptance of an offence at a hearing can

have for their future plans and career have been a big topic in the evidence that we have taken. I have a copy of your letter and I welcome the fact that the Government is examining how the disclosure system affects people who accepted an offence when they were young and what impact that has later in life. Can you give the committee a further update on how that is progressing?

Adam Ingram: We propose to introduce the new ground that the child's conduct has had or is likely to have a serious, adverse effect on the health, safety or development of the child or another person. That includes behaviour that might previously have been thought of as criminal. We expect that the new ground, rather than the existing offence ground, will be used for minor offending behaviour. I know that the issue has concerned the committee.

Where offence grounds for referral are accepted or established, we believe that serious offences should continue to appear on disclosure certificates in the interest of public safety. However, we are keen to end the situation whereby, in some circumstances, offences are disclosed over a long period and in a manner that is disproportionate to the offence. We want to try to ensure that we strike the correct balance between the rehabilitation of individuals who conducted offending behaviour as children and the public safety of children and vulnerable adults, but we recognise the issues that the committee has raised and we intend to address them at stage 2.

Ken Macintosh: I was going to ask about appeals to the sheriff, but can I continue Christina McKelvie's line of questioning for a moment? I welcome the minister's letter and his comments this morning. However, I want to clarify something. Children will still be referred on offence grounds, although you hope that the new grounds will be used for more minor matters. Whose decision will it be to refer a child on offence grounds or on the new criteria?

Adam Ingram: Normally the reporter makes such decisions.

Ken Macintosh: Another issue is whether a child, when an adult, can appeal against a childhood offence whose grounds they accepted at the time but which is now on their disclosure record. At the moment, I believe that it is very difficult for such a person to have that considered. Will you look into it?

Laurence Sullivan: The Children (Scotland) Act 1995 provides that a child, even when they are an adult, can challenge the grounds of referral that were established or accepted by them when they were a child—for example, if new evidence comes to light. That ability to review the grounds of determination is carried over into the Children's Hearings (Scotland) Bill.

Ken Macintosh: Assuming that no new evidence comes to light, we are talking about children who accepted grounds five or six years previously without realising the implications of what they were doing. I know of one case in which a young man accepted grounds that described his offence as a sexual assault, but it was actually at the relatively less serious end of the scale of such assaults. Sexual assault is a serious term and issue, but this was not quite on that scale. That offence is on his record, yet there are no grounds on which he can appeal it. Would you look at that kind of issue?

Adam Ingram: Yes. Perhaps Laurence Sullivan will say more on that.

Laurence Sullivan: That is a different issue from the review of the grounds determination. Offences such as the one that you mention would carry on to adult disclosure and under amendments that we propose to lodge at stage 2, the normal weeding rules would apply to it. Appeal would depend on the nature of the offence. The scenario that you outline in which someone accepts grounds without realising the consequences of doing so needs to be dealt with as a practice issue. I understand that the SCRA currently gives people leaflets that explain the situation and that it is also a practice matter for training panel members so that they make sure that a child is fully aware of the consequences of accepting a ground that might involve some kind of sexual offence and that the consequences of doing so might be with them for many years to come. On that basis, the child would make an informed decision about whether they wanted to accept the ground or whether they would like to go to the sheriff court to have the ground established conclusively by the sheriff.

Ken Macintosh: Will the most minor sexual assaults—I am not sure whether I can use the word "minor", but the less serious sexual assaults—be treated under the new grounds that you are talking about introducing or, by definition, will all sexual assaults be treated as serious matters?

Adam Ingram: When defining what is a minor assault, one has to look at the individual circumstances of each case. I suggest that the reporter is in the best position to do that. However, I imagine that the principal reporter will issue guidance to reporters on the decision-making process. We need to explore the issue a wee bit further and I am more than happy to do that. We plan to lodge amendments at stage 2, but I would welcome a dialogue on the matter.

11:45

Ken Macintosh: That is gratefully received. The system is based on protection of the child's welfare, so it is anomalous to burden a child with carrying a potentially serious and damaging criminal record into adulthood. We must get the balance right.

Let us move on to appeals and the role of the sheriff. The bill will extend sheriffs' ability to implement different disposals. At the moment, a sheriff is able to overrule the decision of a panel on appeal but, under the bill, even when an appeal to a sheriff on a children's panel decision has been unsuccessful, the sheriff will be able to change the decision on the basis that circumstances have changed. Why do you want to extend the power of sheriffs? Do you want them to have a far more senior, dominant role in the children's hearings system?

Adam Ingram: No is the short answer. The bill substantially restates the provision for the sheriff to conduct a wide review of the issues that a hearing considers in making its decision if the sheriff thinks it appropriate to do so. In practice, the power is used infrequently, so it should be regarded as a potential facility that depends on the circumstances rather than the norm. I am thinking, for example, of situations in which the circumstances of a child in residential or secure care have changed significantly. The sheriff will be able to release the child from the accommodation immediately without the child needing to wait for another hearing. I reiterate that we do not expect the power to be used frequently; nevertheless, it is appropriate for the sheriff to have that facility available to him.

Ken Macintosh: When we heard evidence on the subject, we were told that there was quite strong resistance to the original power of appeal back in 1995 although the system has now grown accustomed to it. The power is rarely used, so I am interested in hearing why there is any need to extend it in the bill. Children's panels can sit at short notice to consider cases when circumstances change. There is an underlying anxiety that the Government is extending the power because it is worried about the ECHR compliance of the tribunal system and therefore wants to involve the sheriff more.

Laurence Sullivan: The background to this is that there are varying interpretations of the extent of the current appeal power in section 51 of the 1995 act. As you say, the power was a matter of significant debate when that bill was before the Westminster Parliament. The children's hearings system was set up by the Social Work (Scotland) Act 1968 and was amended by the 1995 act, which added appeal provisions with the clear and deliberate parliamentary intention of widening the scope of the review somewhat. Since then, there have been varying interpretations and some different case law on the matter. Our view—some stakeholders would not entirely agree with us—is that section 51 of the 1995 act already provides the facility for the sheriff to conduct a wide review when they consider that necessary. That argument was given significant credence in the SK v Paterson judgment last year, when the Court of Session referred specifically to the sheriff having investigatory-type powers.

Our general aim is to remove the potential for misinterpretation of the power in the 1995 act in order to make clearer what that act did.

That is all in the context of there being perhaps fewer than 500 appeals to the sheriff each year from children's hearings. People will have the facility to do that if they so wish, but we are not in any significant way extending the provision. It is a facility for the sheriff to consider all the circumstances and to have a wide scope of review when the particular circumstances of a case justify that. However, that is not expected to be the norm.

On ECHR compliance, the Government's view is that the children's hearing itself is an article 6 compliant tribunal. It is perfectly reasonable to allow appeals from one article 6 compliant tribunal to another, in the same way as there can be appeals from the sheriff court to the Court of Session or from the Court of Session to a supreme court, when all those bodies are regarded as article 6 compliant tribunals.

Ken Macintosh: That is helpful. One final point in passing is that a couple of witnesses have pointed out the anomaly that there can be an appeal to the sheriff court and to the Court of Session and that those can be pursued simultaneously by a relevant person or the child. In fact, people can claim for legal aid in both cases. Is the minister aware of that and, if so, does he intend to address it?

Adam Ingram: I was not aware of that, but we shall address it.

The Convener: I had hoped that the evidence session would be finished by 12 o'clock, but we have three remaining substantive issues to cover. I suggest that we take a short comfort break. The committee will reconvene no later than 12 noon.

11:51

Meeting suspended.

12:00

On resuming—

The Convener: I reconvene the meeting and invite Claire Baker to ask her questions.

Claire Baker (Mid Scotland and Fife) (Lab): I have a couple of questions on the definition of the term "relevant person". The bill proposes a significant change from the 1995 act in relation to who is defined as a relevant person. Concerns have been raised that the narrowing of the definition will exclude people such as long-term foster carers or grandparents who look after children. I appreciate that such people could be given the status of relevant person through the hearings process, but what is the thinking behind the changes? Is the definition being narrowed with the intention of excluding certain groups, including foster carers?

There is also the issue of unmarried fathers. I have an additional question on that, but you might want to mention it now, too.

Adam Ingram: The intention is to clarify the criteria for who will automatically receive relevant person status. That is defined in section 185. As you rightly say, in addition there is to be a test to allow someone to be deemed a relevant person, which is set out in section 80. That is intended to ensure that there is a route to inclusion for those who can demonstrate that they exercise significant control over the way in which a child has been raised, rather than day-to-day control on a temporary or short-term basis. As you suggest, grandparents who look after a child for a good part of the working week or long-term foster carers would certainly come into that category.

Claire Baker: Is there a danger that that will introduce a fairly complex mechanism for such people, when it is currently simpler for them to be identified as a relevant person? Is there a problem with those groups having that status that has led to the proposed changes?

Adam Ingram: There are problems with establishing who has relevant person status. That is why we set out to clarify exactly who should have that status automatically. However, we know that there are grey areas. A process has been put in place to clarify the situation of individuals who are in those grey areas. That is a sensible approach.

Claire Baker: We received evidence that there should be a mechanism to review the status of relevant person, because the person's role in the child's life might change during the hearing process. Has the Government considered that?

Adam Ingram: That can perhaps be done through the hearing review process.

Laurence Sullivan: The intention is that when someone seeks to be deemed a relevant person, that will be established at the outset by a pre-hearing panel. That is obviously best for everyone, because the child, the potential relevant person and any other relevant persons will know who will be at the hearings and involved in them. It is intended that that will be an up-front one-off decision. We are considering whether it would be necessary to try to build in a provision for reviewing that decision if a new potential relevant person emerged who was not there at the start, or someone was deemed not to have relevant person status during the course of the hearing or the hearing process. That will partly depend on how long the child might be in the system. We are considering that matter to ensure that we get things right.

Claire Baker: The other group that I mentioned was unmarried fathers. Unmarried fathers with children who were registered prior to the Family Law (Scotland) Act 2006 would have a status that would be different from those with children who were registered after it was passed. Do you want to make additional points about unmarried fathers? Concerns have been expressed about the status of unmarried fathers in the new system and whether the provision is ECHR compliant in respect of the right to family life.

Adam Ingram: Under the 1995 act, a contact order is not sufficient for an individual to be a relevant person. Only a parent who enjoys parental responsibilities or rights under part 1 of that act, or any person in whom parental responsibilities or rights are vested by virtue of that act, is a relevant person. There is a further category in the 1995 act: those who appear ordinarily to have charge of, or control over, the child. That is a question of fact, and the full circumstances need to be considered. As we have just discussed, the reporter will initially determine whether a person meets the test, and they can refer to that in a pre-hearing. However, a person who claims to be a relevant person has no legal right to have their case considered by a panel, and they do not have any right to attend a business meeting or pre-hearing to make their case. It is not appropriate that the reporter who is the adversary of the relevant person should have a role in deciding who is or is not a relevant person.

The bill will put in place a process in which there will be a clear right of consideration of a person's relevant person status by a hearing. Once a person is deemed to be a relevant person, they will have the rights of a relevant person. Obviously, quite a difficult decision might need to be made in a pre-hearing. We think that independent advice from the national convener would be required on such issues.

Claire Baker: You recognise that the pre-hearing panel might need to make a difficult decision on whether an unmarried father should have relevant person status. I am reluctant to go back to the legal aid discussion. For clarification, however, I think that you said, when we were

discussing legal aid, that a person who was going through the pre-hearing panel process would not be able to claim legal aid at that stage, but would have access to legal aid if there was an appeal to the sheriff court.

Adam Ingram: That is correct.

Christina McKelvie: I would like to move on to issues relating to implementation and enforcement. The bill will slightly change the provision on a hearing's being able to request that the reporter ask for an enforcement order against a local authority, by transferring the power from the reporter to the national convener and by removing the discretion on whether to pursue with the sheriff. Will you give us an understanding of the impact of that? Should we consider that matter further?

Adam Ingram: We are trying to ensure that the discretion belongs to the children's hearing. Essentially, we are reinforcing the status of the children's hearing as an independent tribunal. We have an opaque process at the moment. We have reviews, and it is remitted to the principal reporter to engage with local authorities on compulsory supervision orders. However, that process does not include the child or the relevant person in any discussions. We think that the process ought to be more transparent and open.

Local authorities, in particular, may fear that there will be an immediate leap towards an enforcement order, but that is not the case. There will have to be two full review hearings, with plenty of opportunity to engage with all the partners before the national convener will be allowed to apply to the sheriff court for an enforcement order. We have introduced the measure primarily for the sake of openness and transparency, and to underline and reinforce the status of the children's hearing.

Christina McKelvie: Currently, how many cases go as far as the sheriff for enforcement? Are issues usually resolved within the process?

Adam Ingram: The feedback that we have received from the children's reporter service indicates that no cases have gone to the sheriff.

Denise Swanson: The policy memorandum indicates that 10 cases were reported but none reached the final stage.

Laurence Sullivan: The existing enforcement mechanism, under the 1995 act, was inserted by the Antisocial Behaviour etc (Scotland) Act 2004, so it has been in force for only a few years. That probably explains why the number of cases that have been reported is small. Prior to the 2004 act, the only way in which to enforce a supervision requirement from a children's hearing was to take an action to the Court of Session, which seems somewhat disproportionate.

Adam Ingram: I re-emphasise that the national convener has no powers of enforcement over local authorities. In this instance, they will be the conduit for a decision by a children's hearing to take a case to the sheriff court. They will not be an active player in the process.

Christina McKelvie: One issue that caused the question to be explored was the fact that, in some cases, the circumstances of the child change a few weeks after the decision has been made, so there is discretion to proceed or not to proceed. Will the procedure that you have described—the two meetings—be enough to ensure that, if a child's needs change, those changes are taken into account and the best decision for the child is taken?

Adam Ingram: In such circumstances, the local authority has a duty to instigate a review hearing, at which the circumstances should be addressed. However, the possibility that the local authority will not do that is a cause for concern. The ball is in the local authority's court—it must ensure that it fulfils its functions. I am sure that children's hearings will discuss any changed circumstances and make appropriate changes to the orders on which they originally agreed. With the provision, we are trying to encourage a partnership approach between children's hearings, local authorities and others.

12:15

Christina McKelvie: We heard in evidence that health, especially adolescent psychiatric services, plays a huge part in the holistic needs of a child. How will the children's hearings system take that into account? Should health also be subject to enforcement?

Adam Ingram: It is important that there are clear lines of accountability. That is why the local authority has the statutory obligation to deliver.

Obviously, we want appropriate multi-agency arrangements to be brought into play. However, we do not want to dilute the local authority's responsibility for implementing the decisions of children's hearings, which is why we want to maintain that clarity around local authorities' obligations.

I recognise that other agencies ought to play their part. As you know, we are trying to encourage multi-agency working in a range of areas. I would be prepared to consider any relevant amendments on that.

Christina McKelvie: In my experience, a few care plans fell down because the health element was not happening as well as it should and there

was no access to services. I would welcome any exploration of that, so I might take up your offer that you would consider an amendment on the issue, if I were to lodge one.

Elizabeth Smith: On secure accommodation, could you clarify whether it is envisaged that the hearing's decision and the decision of the chief social worker can be appealed against, or is the latter meant to supersede the former?

Adam Ingram: Both.

Elizabeth Smith: Both?

Adam Ingram: There is an additional right of appeal on the chief social worker's decision.

Elizabeth Smith: I have to say that that is not particularly clear from the bill. How will the changes in secure accommodation authorisations and implementations address the ECHR concerns that have been expressed by one or two people who have provided us with evidence?

Adam Ingram: The bill makes provision for a right of appeal to a sheriff with regard to the implementation by the chief social worker of secure accommodation authorisation. That is an additional right of appeal. Given the nature of a secure accommodation placement, which involves the deprivation of a young person's liberty, our position is that it is absolutely right that we retain the part of the process that allows for a professional judgment about whether a placement in secure accommodation is in the best interests of the child at that point in time.

There is uniform agreement that only young people who must be in secure accommodation ought to be there. When the idea of removing the discretion of the chief social work officer was consulted on, the proposal found no favour with our consultees.

The Children's Hearings (Scotland) Bill therefore acts to make the entire process transparent. That is why it provides for the setting of standards of decision making through regulations, and for a right of appeal to the sheriff in respect of the decision of the chief social work officer.

Elizabeth Smith: Are the two things tied together? Was the right of appeal against both persons something that bothered you about ECHR compatibility, or was that a separate issue?

Adam Ingram: It was a separate issue. There was concern about the transparency of the process whereby the chief social worker and the head of the secure unit were making a decision. That concern involved the reasons for that decision—for example, whether it was cost driven. We need to make that process much more transparent, and the bill addresses those issues.

The Convener: That concludes our questions to the minister today. Thank you for your attendance. We look forward to receiving your supplementary written evidence on legal aid.

Adam Ingram: I will try to ensure that it is understandable.

The Convener: It would be helpful to the committee if it could be written in simplistic and easy-to-understand terms. I think that the only person around the table who truly understands the legal nature of the issues is the committee's adviser, Professor Norrie. Of course, that is what keeps him in a job. [*Laughter*.] Would it not be nice if we did not have to keep too many lawyers in jobs?

We will suspend briefly to allow the minister to leave.

12:21

Meeting suspended.

12:22

On resuming—

European Commission Work Programme

The Convener: The second item on our agenda concerns consideration of a letter from the European and External Relations Committee on the European Commission's work programme.

The letter includes an analysis of the work programme by the Parliament's European officer and invites us to consider the areas of the work programme that fall within our remit and agree a course of action. The areas of the work programme that relate to education, lifelong learning and culture are set out in annex B. The clerks have prepared a paper on the issues, which has been circulated to members. Are we content with the recommendations that are outlined in paragraph 11?

Members *indicated agreement.*

The Convener: That brings today's meeting to a close. The next meeting of the committee will be on 12 May.

Meeting closed at 12:23.

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