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EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

Wednesday 2 March 2011

Session 3

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EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE
7th Meeting 2011, Session 3

CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

COMMITTEE MEMBERS

*Alasdair Allan (Western Isles) (SNP)
*Claire Baker (Mid Scotland and Fife) (Lab)
*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 ALSO ATTENDED:

Fiona Hyslop (Minister for Culture and External Affairs)

THE FOLLOWING GAVE EVIDENCE:

David Roy (Scottish Government Directorate for Learning)
Michael Russell (Cabinet Secretary for Education and Lifelong Learning)
Laurence Sullivan (Scottish Government Directorate for Legal Services)

CLERK TO THE COMMITTEE

Eugene Windsor

LOCATION

Committee Room 2

Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 2 March 2011

[The Convener *opened the meeting at 10:38*]

Public Records (Scotland) Bill: Stage 2

The Convener (Karen Whitefield): I open the 7th meeting in 2011 of the Education, Lifelong Learning and Culture Committee. I remind all those present that mobile phones and BlackBerrys should be switched off for the duration of the meeting.

The first item on our agenda is the committee's consideration of the Public Records (Scotland) Bill at stage 2. First, I apologise to the Minister for Culture and External Affairs and to her officials for keeping them waiting and for the late start to the committee. I am pleased to welcome to the committee Fiona Hyslop, the Minister for Culture and External Affairs. Ms Hyslop is joined by George MacKenzie, who is the keeper of the records of Scotland, and Bruno Longmore, who is the bill team leader, from the National Archives of Scotland. They are joined by Lindsey Henderson, who is a principal legal officer for the Scottish Government, and by Willie Ferrie from the office of the Scottish parliamentary counsel. I thank you all for your attendance.

Section 1—Records management plans

The Convener: Amendment 29, in the name of Elizabeth Smith, is grouped with amendments 30, 32, 38, 40 to 42, 44, 5A, 5B, 45, 46 to 48, 7A to 7E, 49 to 54, 57 and 59. I draw members' attention to the pre-emption information on the list of groupings.

Elizabeth Smith (Mid Scotland and Fife) (Con): I am pleased to speak to what I consider to be probing amendments. I do so following one or two concerns that I had at stage 1 and the representations that some voluntary sector groups and the Convention of Scottish Local Authorities have made to me since that time, although I also state my support for the main principles of the bill and for the Scottish Government's desire to ensure that there is improved record keeping across Scotland, which will best be achieved by more transparent, democratic and efficient means of storing relevant information.

Although I believe that those principles are central to the Scottish Government's thinking, I would like further assurance—especially in respect of situations in which it has been proved that potential difficulties exist because there has been either an absence of records or ineffective record keeping—that the relationship between the keeper of the records of Scotland and public authorities will be one of mutual agreement, rather than one that may, in certain circumstances, involve a more top-down approach, thus denying the relevant authorities sufficient scope to contribute to the debate about what constitutes best practice. In such situations, it is essential that there is complete clarity about the process and that, through the consultative process, all stakeholders in promoting good record keeping are in total agreement—I have chosen those words carefully—about the way forward. It is imperative that those who are responsible for keeping records are part owners of the process rather than, as they might be in some circumstances, on the receiving end of instructions about how records should be kept. The Scottish Government is probably extremely well intentioned in that respect, but I would like the minister to provide clarification.

I move amendment 29.

Ken Macintosh (Eastwood) (Lab): I speak in support of Elizabeth Smith's amendments. The key point about the amendments is that they would improve the tone of the bill and strike the right balance between working with the voluntary sector and local authorities, and applying actions or telling them what to do. My reading of the amendments is that, in effect, they will not make much difference, in the sense that they will not limit the power of the keeper or of the Government to improve record keeping, and that they could, therefore, be accepted without difficulty. I would welcome the minister's comments on that.

The Minister for Culture and External Affairs (Fiona Hyslop): I will respond to all the amendments in the group, with the exception of amendment 42, to which I will return later. Elizabeth Smith has made some important points. I hope that, in my letter to the committee following stage 1, I made it clear that our intention is that authorities should be fully involved in decisions by the keeper, as she suggests.

Continued dialogue with stakeholders throughout the process has resulted in consensus on a number of issues. However, I am aware, as are members of the committee, that the issue of the keeper's powers to approve and reject an authority's records management plan has remained a concern, particularly for COSLA.

As has been indicated, the amendments would result in a change in terminology. They would not alter the position of the keeper, who would still need to be content that records management plans that were submitted to him made proper

arrangements for the management of records. If he was not content, he would be able to return them, in accordance with section 4(6).

Elizabeth Smith's amendments are consistent with the spirit of the Government's amendments to the terminology in sections 6 and 7—to which we will come later—in that they, too, change the language of the bill to focus on continuing improvement rather than on failure. To that end, I support her amendments on the change of language. I intend to return at stage 3 with some minor amendments in relation to terminology.

Amendment 42 proposes to delete section 4(4). The amendment does not relate to a change in terminology. Section 4(4) provides that it is for the keeper to determine what constitutes "proper arrangements" in any particular case. If the subsection were removed, the keeper would still have to assess whether a draft records management plan made proper arrangements for the records that it covered. If it did not make such arrangements, he would have to return the plan to the authority under section 4(3)(b), but amendment 42 would remove a provision that makes it clear that the keeper's judgment of what he considers proper arrangements should be made on a case-by-case basis. That issue came up at stage 1. We do not want a one-size-fits-all proposal.

10:45

Guidance and the model records management plan will be relevant in determining whether a particular plan makes proper arrangements for the records of a particular authority, but guidance alone cannot provide the answer because what is required is a case-by-case judgment. The keeper must also take the individual characteristics of an authority and its records into account when deciding whether the plan that is proposed by the authority will make proper arrangements for its records. That is why amendments 4 and 5, which we will come to later, will require the keeper to take into account the nature of an authority and its records and any representations from the authority when deciding whether to agree or return plans. I think that that is what the committee wanted at stage 1. The keeper needs to take both general guidance and individual circumstances into account in making decisions, thereby ensuring there will not be a one-size-fits-all approach. Amendment 42 gives the opposite message and could suggest that a one-size-fits-all approach is appropriate.

I therefore ask Elizabeth Smith not to move amendment 42. However, the amendments on terminology go in the direction that we all want to take.

Elizabeth Smith: That is very helpful. We are more or less on the same page. As Ken Macintosh said, it is also a matter of tone. I note what the minister said about amendment 42, which we will come to a bit later.

Amendment 29 agreed to.

Amendment 30 moved—[Elizabeth Smith]—and agreed to.

The Convener: Amendment 1, in the name of the minister, is in a group on its own.

Fiona Hyslop: Amendment 1 addresses the issue of how risk should be taken into account in records management planning. It makes it clear that the assessment of risk is primarily a matter for authorities when deciding how to manage their different records.

Section 1(1) places a duty on named public authorities listed in the schedule to prepare records management plans that set out proper arrangements for management of their public records.

Amendment 1 makes it clear that an authority's records management plan may make different provision for different kinds of public records and that, in doing so, it may take account of the different levels of risk associated with management of different kinds of records. That should be done according to the authority's own assessment of the risks relating to their management.

For example, every records management plan will include a retention schedule and an information security policy. The retention schedule will set out different periods for how long different categories of records need to be retained—whether they can be destroyed after very short periods or need to be kept for longer. The information security policy will set out the rationale for assigning different security markings for different categories of records, depending on the sensitivity of the information that they contain.

Amendment 1 makes it clear that an authority should take its own decisions about risk and apply them as necessary. For example, an authority will be empowered to assess risks over, say, the loss of records about vulnerable people, as against the lesser risk over the loss of records about the purchase of library books.

Amendment 1 addresses concerns that have been raised by the voluntary sector and COSLA that the bill should focus on records that are considered to be high risk. It recognises, however, that records management plans need to address all of an authority's records. It allows authorities to use their own expert knowledge when making decisions about different types of records, determining their status and whether different

management regimes might be appropriate. Those decisions could take into account other statutory obligations already in place, such as The Looked After Children (Scotland) Regulations 2009.

I move amendment 1.

Ken Macintosh: I welcome amendment 1. The issue raised concern among all members of the committee and our witnesses at stage 1. Although there might be some concern among the voluntary sector that the amendment does not quite go far enough, it is certainly a step in the right direction and we should support it.

The Convener: Minister, do you wish to wind up?

Fiona Hyslop: No. I just acknowledge that Ken Macintosh and Claire Baker raised the issue at stage 1. One of the reasons why we lodged amendment 1 was to reconcile matters that people had raised.

Amendment 1 agreed to.

The Convener: Amendment 31, in the name of Ken Macintosh, is grouped with amendments 2, 2A, 36, 39, 43, 56, 16, 16A, 17, 17A, 18 and 58. I draw members' attention to the pre-emption information that is also shown in the groupings.

Ken Macintosh: I welcome the amendments that the Government has lodged—amendments 2, 16 and 17—which will ensure that the keeper consults widely. That is something that the Convention of Scottish Local Authorities and the voluntary sector in particular will welcome. I am pleased to support the amendments. Amendments 2A, 16A and 17A are designed simply to build on the Government's amendments by including a duty to consult contractors, which will ensure that voluntary sector bodies are consulted, as well as the local authorities.

It is important that, when the keeper draws up the guidance, he deals not only with the local authorities but with others who may be directly involved. We heard from organisations including Barnardo's that they already have quite robust systems of record keeping. The guidance that is drawn up must have regard to their systems as well as to the systems of local authorities. Amendments 31 and 56 build on that by suggesting that there should be guidance about the relationship between local authorities and the voluntary sector, which the voluntary sector in particular flagged up. The voluntary sector is concerned that risk-averse local authorities will offload all of their problems onto voluntary sector contractors without taking due regard of their needs. Amendments 31 and 56 suggest that any guidance that is drawn up specifically covers that relationship.

Amendment 36 is simply a consequential amendment that will ensure that the references to contractors are relevant to the whole of part 1, rather than only to one section.

Amendments 39 and 43 will improve the process for submitting plans for agreements and ensure that that is covered by guidance, too.

Amendment 55—sorry, that is for the next section.

The Convener: You are jumping ahead of yourself.

Ken Macintosh: Indeed.

Amendment 58 would remove section 9. The amendment was suggested because that section is seen as being unnecessary because, if we put in a lot of information about how guidance should be drawn up, we do not need a separate section that deals with it. However, ministers might wish to have the power to add further guidance at a later stage.

I move amendment 31.

Fiona Hyslop: Section 1 is important and there are a lot of amendments, so I ask members to bear with me.

The Government amendments in the group address concerns that the keeper should involve authorities and other stakeholders when preparing guidance and the model records management plan. They will require the keeper to consult and to have regard to views that are expressed before issuing those documents.

Amendments 31 and 56, in the name of Ken Macintosh, would add explicit references to contractors' records in a number of provisions and would limit the keeper's power in certain areas. I am concerned that some of those references could have unintended consequences and that others could be difficult to work with in practice. I will first address the issues about contractors before addressing the amendments on consultation.

Under section 1(3), the keeper must issue guidance to authorities about the form and content of records management plans. Under section 8, he must also issue a model records management plan. Guidance that is issued under section 1(3) and the model plan already have to cover contractors' records, because those are a form of public record and each authority's records management plan will have to cover all the authority's records, including its contractors' records.

In practice, RMPs will need to set out how contractors' records are to be managed. That is likely to be closely based on the contractual terms that are agreed between the authority and the

contractor. The keeper must return a proposed plan if it fails to make proper arrangements to manage contractors' records. That might happen if, for example, the plan suggested that contractors' records should be retained for an unreasonable period.

Amendment 31 would require the keeper to include in the guidance

"information on how such plans will relate to functions delivered on behalf of authorities by contractors."

Amendment 56 would require the model records management plan to

"cover the relationship between an authority's records management plan and that of a contractor carrying out the authority's functions."

There is a delicate balance to be struck. Although the guidance and the model plan will cover contractors' records, I do not consider it appropriate for the keeper to go further and to seek to dictate how authorities and contractors regulate their relationships. Amendments 31 and 56 would result in the keeper producing an extraordinary amount of guidance that would dictate the relationship between authorities. It is important to reflect that the issue is not just about child care in the voluntary sector. It would require in law guidance that dictated the contractual relationships of authorities including prisons, health boards and the police. The list of authorities that are covered in the schedule is extensive.

As drafted, the bill places the onus on authorities to manage their records. It does not impose duties on contractors and nor does it interfere with, or give the keeper power to interfere with, existing relationships between public authorities and contractors. The terms on which a contractor may carry out functions on behalf of an authority are for those two parties to agree separately.

As the guidance and the model RMP already cover contractors' records, I am concerned that amendments 31 and 56 seek to go further and would require the keeper to instruct authorities and contractors on how their relationship should work. That runs contrary to the arguments that Elizabeth Smith made earlier. That situation could be seen as the keeper dictating contract terms and interfering with the freedom of authorities and contractors to negotiate their contractual relationships. That is against the light-touch intentions of the bill.

In addition, amendment 56 refers to the records management plans of contractors, which is misleading. The bill does not require contractors to have records management plans although, as Ken Macintosh said, many do. In practice, contractors might decide to have plans, but that is a decision for them and will not be a result of the bill. Instead, an authority must ensure that records that relate to functions that are carried out on its behalf by contractors are managed in accordance with the authority's plan.

Rather than dictating contract terms, I intend the keeper to facilitate discussions between authorities and contractors about the management of contractors' records. The discussions on those issues will take place in the newly constituted stakeholder forum. Detailed contractual terms will still be for contractors and authorities to agree, but the keeper will be on hand to provide advice and assistance on the management of contractors' records. I therefore invite Mr Macintosh to seek to withdraw amendment 31 and not to move amendment 56.

I turn to amendments 2 and 16 to 18, which relate to consultation. Amendments 2 and 18 will require the keeper to consult on the guidance that is issued under sections 1(3) and 9. He must consult the authorities that he considers will be affected by the guidance and such other persons as he considers appropriate. That will cover consultation of stakeholders, including contractors. The amendments also require the keeper to have regard to the views that the consultees express, and they clarify that the keeper may issue different guidance in relation to different authorities, where appropriate.

Amendments 16 and 17 make similar provision in relation to the model records management plan. They require the keeper to consult on drafts of the first model plan and revised versions. He must consult each authority on the first model plan, because each will be affected but, after revisions, he must consult only authorities that he considers will be affected. As with amendments 2 and 18, he must also consult such other persons as he considers appropriate, which again includes stakeholders and, importantly, he must have regard to the views that are expressed.

11:00

Amendments 2A, 16A and 17A would amend amendments 2, 16 and 17 to provide an additional duty on the keeper to consult bodies representing contractors on the guidance under section 1(3) and on the model plan. I am concerned that the duty to consult contractor's bodies would be difficult to operate in practice. It would require the keeper to identify contractors for more than 200 bodies, to find out which bodies represented the contractors and then to decide whether they need to be consulted. The amendments would require consultation of such bodies representing contractors as the keeper considers will be affected by the guidance or the model plan, but the bill does not place any duties or obligations directly on contractors and those bodies will not be

obliged to have regard to the guidance or the model plan. As a result, they will not be directly affected by the guidance or the model plan and the keeper will not be able to assess whom to consult. There is a danger that these amendments to amendments would add lots of bureaucracy but add no value to front-line services, which is a concern that the committee expressed at stage 1.

That is not to say that those bodies would not have an interest in the guidance and the model plan—Ken Macintosh is right. They would clearly have an interest, in the sense that the authorities that they deal with would have to have regard to the guidance and the model plan. That is why amendments 2, 16, 17 and 18 already provide for contractors' organisations to be consulted by requiring the keeper to consult

"such other persons ... as the Keeper considers appropriate".

I therefore invite Mr Macintosh not to move amendments 2A, 16A and 17A but to support amendments 2, 16, 17 and 18.

Amendments 39 and 43 would amend section 4, which deals with the keeper's role in agreeing to plans that are submitted by authorities. Amendment 39 would replace the keeper's power to make a separate determination about the form and manner of the submission of particular plans with a requirement to comply with guidance under section 1. Section 4(2) is intended to give the keeper flexibility about the administrative arrangements for the submission of plans. It is not a power to determine the content of plans and could not be used as a means of placing undue burdens on authorities. Replacing that with a reference to section 1 guidance would reduce the keeper's ability to make individual decisions, in conjunction with authorities, about what was appropriate in different cases.

Amendment 43 would amend section 4(4) by requiring decisions about whether a proposed plan made "proper arrangements" to be based solely on guidance. The concept of proper arrangements is key to the keeper's decision about whether to agree any records management plan. However, it would be inappropriate to rely solely on guidance to assess whether a particular plan made proper arrangements for the records of a specific authority. Ken Macintosh's amendments would diminish the keeper's ability to be responsive to individual authorities' needs—another theme that came through at stage 1. Instead, the keeper should take into account the general guidance and model plan and the individual characteristics of the authority. Section 4(5) already requires the keeper to take the guidance and model plan into account. Amendments 4 and 5, which we will come to in a later group, will also require the keeper to take into account the individual characteristics of an authority and any representations that are made by it.

Together, those provisions will ensure that any decision about whether a plan makes proper arrangements will be based on the correct combination of general guidance and individual circumstances. Like amendment 42, amendment 43 would prevent the keeper from making the necessary case-by-case assessment. If the amendment were accepted, it would suggest that the keeper ought to adopt a one-size-fits-all approach in deciding whether to agree or return records management plans. It is important that the keeper retain the power to make case-by-case decisions.

Amendment 58 seeks to remove section 9, which allows the keeper to issue guidance about authorities' duties under the bill and requires authorities to have regard to it. The power is likely to be used to promote examples of best practice and generic records management tools that are drawn up by sector professionals, as well as to give guidance on the reviewing of records management plans. It is clear from responses to the original consultation and from discussions with stakeholders that the dissemination of guidance will be crucial to successful implementation of the bill. The power to issue guidance under section 9 is a key part of that, which is why we are concerned about the proposal to remove it. In its stage 1 report, the committee was supportive of the need for guidance, but amendment 58 runs counter to that shared intention. Any guidance that is issued under section 9 or any other sections will be developed in partnership with stakeholders. Amendment 18 will also require the keeper to consult before any such guidance is issued. Removing section 9 would not prevent the keeper from issuing non-statutory guidance about authorities' duties, but they would have no obligation to have regard to it. That would lead to inconsistency of practice when the intention is to develop consistent standard practice across sectors.

I know that this has been an important area of discussion and debate, but I hope that I have been able to explain the problems that would arise from some of the amendments. Accordingly, I ask Ken Macintosh to seek to withdraw amendment 31 and not to move amendments 2A, 36, 39, 43, 56, 16A, 17A and 58.

The Convener: No other member has a comment to make, so I ask the minister whether she has anything further to add.

Fiona Hyslop: No, convener. I think that I have said enough about that group.

The Convener: I am very glad to hear that.

Ken Macintosh: I welcome the minister's lengthy comments because these matters are important, particularly for the voluntary sector and public authorities, which have some concerns about the relationship that we are discussing. In fact, this is all about the relationship between the keeper, the records management plan and the authorities and it is important that we get that balance right.

I have to say that I have been quite convinced by the minister's arguments on all points. For example, the fact that amendment 58, which seeks to remove section 9, would remove not the keeper's power to issue guidance but authorities' obligation to have regard to it does not strike me as sensible, so I appreciate the minister's argument in that respect.

As for amendments 39 and 43, which seek to remove the phrase "may determine", I think that the intention behind them was all about tone and terminology, but the minister has assured the committee that the keeper will take others' views into account in submitting records management plans. That is the important point. In fact, I was also reassured to hear that the stakeholder forum is now up and working, given the initial concerns about that. I point out, though, that none of my amendments is designed to make the bill any more unwieldy or any more awash with guidance or bureaucracy than it already is, which in itself is quite a strong argument in favour of not being overly explicit about some of the guidance that will be necessary.

On amendments 2A, 16A and 17A, the minister said that the keeper would find it difficult to identify the bodies that should be consulted and assured us that amendments 2, 16 and 17 already cover the issue in their use of the phrase

"such other persons ... as the Keeper considers appropriate".

However, if I may, I will rethink the matter before stage 3 to ensure that we and the voluntary sector are happy with that.

On amendments 31 and 56, the minister has suggested that guidance will already cover contractors' records. However, we do not wish the keeper to impose duties in that respect; in fact, this is not about imposing such duties or interfering in that relationship. We want to ensure that the relationship is right, but it is not for the keeper to impose one view on all local or public authorities.

On that basis, I am happy to seek leave to withdraw amendment 31, not to move my other amendments in the group and to support the Government's amendments.

Amendment 31, by agreement, withdrawn.

Amendment 2 moved—[Fiona Hyslop].

Amendment 2A not moved.

Amendment 2 agreed to.

Amendment 32 moved—[Elizabeth Smith]—and agreed to.

The Convener: Amendment 33, in the name of Elizabeth Smith, is grouped with amendments 3, 34 and 35.

Elizabeth Smith: The amendments in my name are probing amendments, and I have heard the minister's very helpful comments.

Amendments 33 and 34 reflect the similar but not identical concerns that I spoke about earlier. We could end up in a situation in which the keeper and the relevant authorities are in disagreement about the way forward when each has chosen a different means of approaching best practice. That might cause confusion or in some cases a dispute, especially if a third party or contractor is involved.

I think that the Scottish Government intends to provide a mechanism by which there could be a common plan, but it would be helpful if we had the minister's reassurance on that.

I move amendment 33.

Fiona Hyslop: Amendment 3, in my name, will help to address voluntary bodies' concerns that they will have to work with multiple records management plans for the different authorities with which they work, and the local authorities' need for flexibility in their plans. We need a balance between those two interests.

Amendment 3 will make it easier for groups of authorities to choose to have common records management plans for separate functions. That approach could be used, for example, in relation to child care functions. I will come back to that amendment later.

Amendments 33 and 34 would remove the keeper's ability to require authorities to use separate plans or common plans, and leave it solely to authorities to decide. The keeper would still have to agree to their proposed use of such plans, but would no longer have the power to require authorities to use separate or common plans if the authorities did not ask to do so.

The power to require the use of common plans, and common plans for separate functions, is considered necessary so that the keeper can deal with voluntary sector concerns about dealing with a number of different plans in relation to the functions that those bodies carry out on behalf of public authorities. That is where the issue of balance between the two sets of interests comes in.

The power to require separate plans for separate functions may also be required in the case of the Scottish ministers, who are listed as one authority in the schedule to the bill but whose functions are wide ranging and disparate.

Amendment 3 addresses concerns that child care organisations in the voluntary sector have raised about having to work with a number of different plans for different authorities, which they say would impose a huge administrative burden on their organisations and take staff time away from the provision of front-line services.

The intention behind the bill as it is drafted is to allow or require groups of two or more authorities to have a common records management plan, which will reduce the likelihood of the scenario that concerns the voluntary sector. Amendment 3 gives groups of authorities additional flexibility to decide whether to make use of separate plans, common plans for all functions or common plans for separate functions.

Section 1(5) currently requires an authority to have separate plans for separate functions, but only on the keeper's initiative. I have explained just now why it is important for the keeper to retain that power. Amendment 3 empowers local authorities by allowing them to initiate that themselves and to choose to do it with the keeper's approval or, as amendment 33, in the name of Elizabeth Smith, suggests, with the agreement of the keeper.

The result would be that, through a combination of subsections (5) and (6), a group of authorities would be able to propose a common plan for some of their functions and separate plans for others. For example, local authorities could together have a common plan for functions that deal with looked-after children while they each have their own separate plans for the rest of their functions. That will remain dependent on the keeper's approval—or rather, given the amendment to which we have just agreed, the keeper's agreement—although it will be for the authorities to make their own assessment of where it is appropriate to have common plans. We are trying to give local authorities the power that they need while balancing the interests of the voluntary sector.

Amendment 35 addresses a similar issue to amendment 3 and would clarify that authorities can have common plans for some functions and separate plans for remaining functions. Amendment 35 is not necessary, because amendment 3 already makes it possible while also giving authorities increased flexibility to ask to have separate plans. We have come at the same issue, and I appeal to the committee to agree that amendment 3 covers all the interests, in which case we do not necessarily need amendments 33, 34 or 35 in that regard.

Ken Macintosh: The minister has already addressed my concerns. We are anxious that when voluntary sector bodies provide common services across different authorities, they do not have a different plan for each one, and that the common plan would be not for authorities, but for the function. Assuming that amendment 3 covers that, I am happy.

11:15

Elizabeth Smith: The minister's clarifications have been helpful. As Ken Macintosh said, it is important that the voluntary sector has that assurance. On the basis that amendment 3 covers the issue, I seek leave to withdraw amendment 33.

Amendment 33, by agreement, withdrawn.

Amendment 3 moved—[Fiona Hyslop]—and agreed to.

Amendments 34 and 35 not moved.

Section 1, as amended, agreed to.

Section 2 agreed to.

Section 3—Meaning of "public records"

Amendment 36 not moved.

The Convener: Amendment 37, in the name of Elizabeth Smith, is in a group on its own.

Elizabeth Smith: As things stand, the bill gives a blanket definition of public records which, as I understand it, encompasses all information that is generated by or on behalf of a public authority or a contractor, plus any information that is generated by another body and held by the public authority or the contractor.

Some voluntary sector groups have said that they are concerned that any information that they hold for virtually any purpose or as the result of a business contract could be deemed to be a public record, when that has traditionally been seen as being more private information.

The Scottish Government has stipulated clearly and carefully that the bill is about the good management of public records rather than about what is or is not held on record. However, there is some concern about the potential for all information to be treated under the same definition, irrespective of its importance or relevance. I understand that that concern was part of the reason why the Scottish Government defined the term "significant risk", which is an important definition. However, I wonder whether that goes far enough in addressing every concern about the relative merits of different types of information and the fact that the keeper could be seen to have considerable powers, even in situations outwith the definition of significant risk.

We are aware that some voluntary sector groups have expressed concerns about additional bureaucracy and further costs. I seek some information from the minister on that point.

I move amendment 37.

Fiona Hyslop: Amendment 37 seeks to remove a crucial part of the bill and cuts to the heart of the bill, which is about the management of records, not the content of records. The definition of public records applies only to this bill and to the management of said records.

Section 3 defines "public records" for the purpose of part 1. The definition is essential and intentionally broad. Public records are the records that must be covered by the records management plan for an authority. Removing the section would leave the bill without a definition of public records and would strike at its very core. A definition is necessary to ensure that those who are responsible for managing records know which records fall within the scope of the bill, and the obligations that will be placed on them. A definition is also necessary to ensure that the keeper knows which records should be covered by an authority's records management plan and can assess whether that plan makes proper arrangements for the authority's records. It is important for the bill to be clear about which records are covered in order to prevent confusion. All public authorities need to be accountable with regard to the range of services that they provide, and to manage all their records properly.

Removing the definition would mean that, although authorities would have a duty to draft and implement a records management plan and the keeper would have a duty to consider whether those plans make proper arrangements for managing records, neither the authorities nor the keeper would be able to judge which records should be covered. The definition is broad to ensure that all records that could be created or held are covered, so that vital records are identified and retained for their correct periods, and time and resources are not wasted in storing less important and ephemeral records. The definition also helps to future-proof the bill, as it must cover records in any format.

The list of authorities that is included in the bill focuses on those record creators that are most closely associated with central Government, such as agencies and public bodies. It also includes local authorities, which are major record creators and play an important role in the provision of services. Records relating to functions that contractors provide are included, to address a key element of the Shaw report. Importantly, only those records that relate to functions that are carried out on behalf of public authorities are covered.

Both COSLA and the voluntary sector have argued that the bill should focus only on high-risk records. Managing only certain records in an organisation is not good records management practice, and the keeper would find it difficult to approve a records management plan that took that approach. It would also create uncertainty about which records were covered and who should decide whether they were low or high risk. As we have debated in the committee previously, that should not be a job for the keeper. Instead of our excluding types of records from the bill, authorities should assess levels of risk and make provision in their records management plans to manage different records differently; they are the ones who can assess the risk element. Earlier, we debated amendment 1, which makes clear that that is how risk should be addressed in records management plans.

The bill would be technically unworkable without a definition of public records. Elizabeth Smith is correct to explore the issues around that, because it has been a central theme in debates. However, unless we have such a definition, it will not be clear to authorities or to the keeper whether a records management plan covers the right records. I invite Elizabeth Smith to withdraw amendment 37, having considered the matter and heard some of the issues that have been raised.

Elizabeth Smith: I have nothing further to say. The minister's comments have been helpful.

Amendment 37, by agreement, withdrawn.

Section 3 agreed to.

Section 4—Approval of plans

Amendments 38 and 39 not moved.

Amendments 40 and 41 moved—[Elizabeth Smith]—and agreed to.

Amendments 42 and 43 not moved.

Amendment 44 moved—[Elizabeth Smith]—and agreed to.

The Convener: Amendment 4, in the name of the minister, is grouped with amendment 5.

Fiona Hyslop: Amendments 4 and 5 will address concerns that the keeper might impose a one-size-fits-all approach when exercising his powers under the bill. The intention has always been that the keeper will work closely with authorities to ensure that the records management regime is applied in a way that takes account of their particular needs and respects the judgments that they make about risk. The amendments will make that intention clearer.

Section 4 sets out clear provision for the keeper to agree or return authorities' records

management plans. Subsection (5) describes the matters to which the keeper must have regard when deciding whether to agree a plan. In deciding whether to agree a plan, the keeper will assess whether it makes proper arrangements for the management of an authority's records.

Continued dialogue with stakeholders throughout the process has resulted in consensus on a number of important issues, but the issue of the keeper's powers to agree or return an authority's records management plan has remained a concern, particularly for COSLA. At the stakeholder forum on 8 February, COSLA representatives expressed their view that having regard to the guidance and the model records management plan was not sufficient for the keeper to determine whether an authority was making proper arrangements for the management of its records. The administrative complexity of local authority organisation means that specific needs and provisions will differ in each authority, and COSLA argued that that needs to be properly reflected in the guidance. The same issues were raised during the stage 1 debate on 10 February.

The bill is sensitive to the individual needs of authorities in relation to their record-keeping requirements. However, I concluded that it would be preferable for it to be adjusted to take account of the genuine concerns that were raised.

Amendment 4 expands the list of matters that the keeper must take into account when deciding whether to agree an authority's plan. It requires the keeper to have regard to the nature of an authority and its public records as well as to any representations by the authority.

Amendment 5 places an obligation on the keeper when he is considering returning a plan to notify the authority so that it has an opportunity to make representations. The keeper must have regard to such representations before making a final decision.

A key element of the keeper's decision will be an assessment of whether a draft records management plan would provide proper arrangements for the management of an authority's records. As the bill is drafted, he must take guidance and the model plan into account in reaching a decision. The amendments will further require him to take other things into account, such as the nature of the authority concerned, the nature of the public records that are covered by the authority's plan and any representations made by the authority. The amendments make it clear that the keeper will not adopt a one-size-fits-all approach to records management planning and must instead take into account the distinctive needs of the individual authorities that are listed in the schedule. He must also take account of an authority's own assessment of how it should approach the risks that it faces in records management. In that sense, the amendments complement amendment 1, which we previously debated. The amendments will also prevent the keeper from returning a plan without discussing the issues with the authority concerned. It is hoped that they address the concerns that COSLA in particular raised.

I move amendment 4.

Ken Macintosh: The amendments are welcome. They help to address the issues of risk, balance and proportionality, and they address the relationship between the keeper and the public authorities without going down the line of being explicit about the nature and content of guidance, which we debated earlier. The committee should support the amendments.

Amendment 4 agreed to.

The Convener: I invite the minister to move amendment 5.

Fiona Hyslop: I am sorry, but I am finding it difficult to hear you, convener. I think that it is my hearing.

The Convener: I am sorry. I am almost deaf with the cold, so I am struggling as well. I am not sure how loudly I am speaking.

Amendment 5 moved—[Fiona Hyslop].

Amendments 5A and 5B moved—[Elizabeth Smith]—and agreed to.

Amendment 5, as amended, agreed to.

Amendments 45 to 47 moved—[Elizabeth Smith]—and agreed to.

Section 4, as amended, agreed to.

Section 5—Review of plans

Amendment 48 moved—[Elizabeth Smith]—and agreed to.

11:30

The Convener: Amendment 6, in the name of the minister, is grouped with amendment 7.

Fiona Hyslop: Amendments 6 and 7 will address the concern that the keeper might exercise his scrutiny powers in a way that places an excessive burden on authorities. The keeper must act reasonably when exercising any of his powers, but the amendments will ensure that he cannot require authorities to review and resubmit their plans too often.

Section 5 places an obligation on an authority to review its records management plan and to submit a revised plan for approval by a date that the keeper sets. Nothing in the bill restricts how often

the keeper can require such a review, although the keeper would of course use that power reasonably.

Amendments 6 and 7 will restrict the keeper's power to require an authority to review and submit its plan for approval. The amendments provide that the keeper must not require a plan to be reviewed less than five years after it was previously approved. The only exception applies when the keeper carries out a compliance review under section 6 and concludes that an authority should review its plan.

I move amendment 6.

Amendment 6 agreed to.

Amendment 7 moved—[Fiona Hyslop].

Ken Macintosh: I suggest that amendments 7A to 7E should be moved en bloc.

Kenneth Gibson (Cunninghame North) (SNP): That seems sensible.

Amendments 7A to 7E moved—[Elizabeth Smith]—and agreed to.

The Convener: Does the minister wish to press or withdraw amendment 7?

Fiona Hyslop: I will press it.

The Convener: I know that asking a minister such a question is unusual, but I did so because the amendments to amendment 7 are extensive.

Amendment 7, as amended, agreed to.

Amendments 49 to 54 moved—[Elizabeth Smith]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Compliance reviews

The Convener: Amendment 8, in the name of the minister, is grouped with amendments 9 to 12, 14, 15 and 20 to 24.

Fiona Hyslop: I will speak to amendments 8 to 12, 14, 15 and 20 to 24—I feel an en bloc coming on. These amendments will address concerns that some of the terminology that is used in the bill emphasises failure. The amendments will replace the term "compliance reviews" with "records management reviews" under section 6, and "warning notices" with "action notices" under section 7.

I wish to emphasise that the main focus of the bill is not about scrutiny but about making and maintaining sustainable improvements to public sector record keeping. The proposed scrutiny role for the keeper is intended to work alongside internal assessment and reporting mechanisms within public authorities. Agreement of records management plans will be an initial exercise to ascertain their fitness for purpose. Thereafter, an authority's records management practices will be reviewed by the keeper only when there are known concerns that the authority is consistently failing in its obligations under the legislation.

COSLA has raised concerns that some of the language used in the bill focuses too much on exposing failure and punishing authorities and says that that runs counter to the stated intention of the bill to foster continuous improvement over time. COSLA points to the terms "compliance reviews" and "warning notices" as being particularly unhelpful.

I agree that it would be helpful to adjust the language of the bill to take account of those concerns and to change the perceived emphasis on failure—that is why I supported the amendments in the name of Elizabeth Smith. Amendments 8 to 11, 20 and 23 will therefore change the term "compliance review" to "records management review", and amendments 12, 14, 15, 21, 22 and 24 will change the term "warning notice" to "action notice".

The amendments will not make any substantive change to the effect of the bill, but they are important because they emphasise the policy of partnership and encouraging continuous self-improvement rather than the Government dictating solutions and focusing on failure and punishment. The amendments should be seen in the context of the wider empowerment of authorities as provided by other amendments, including those on consultation and approval of plans that we debated earlier, and those on procedures before action notices can be issued, which we will come to later. The amendments will also complement the amendments that refer to "agreement" and "return" of plans, rather than "approval" and "rejection", which we discussed earlier.

I move amendment 8.

Amendment 8 agreed to.

The Convener: Amendment 55, in the name of Ken Macintosh, is in a group on its own.

Ken Macintosh: Amendment 55 is about improving the tone of the bill and rebalancing the relationship between the keeper and public authorities so that the keeper is not so much telling the authorities what to do as working with them to improve records management plans.

Section 6(2) says

"An authority must provide the Keeper with such assistance as the Keeper may require".

Amendment 55 would change that to say that the authority must provide the keeper with such assistance "as is reasonable". Public authorities are worried that the wording in the bill as

introduced is too open-ended. Amendment 55 will rebalance the provision and limit its scope.

I move amendment 55.

Fiona Hyslop: I must say that I was interested to hear the arguments behind amendment 55 because it was not immediately obvious to me what Ken Macintosh intended to achieve. It was helpful to get some sense from him of the issues that he seeks to address.

Amendment 55 would make it explicit that authorities needed only to provide reasonable assistance to the keeper when he carried out reviews under section 6, but it would do so in a way that could undermine the keeper's ability to carry out effective reviews. Section 6 allows the keeper to review an authority's compliance with its records management plan. We have previously debated amendments that will rename such reviews "records management reviews".

Section 6(2) requires authorities to give such assistance as the keeper "may require" in carrying out records management reviews. That might include, for example, providing information or documents. Amendment 55 would replace the words "the Keeper may require" with "as is reasonable".

I wish to emphasise the main focus of the bill is not scrutiny but the maintenance of sustainable improvements to record keeping. The proposed scrutiny role for the keeper is intended to work alongside internal assessment and reporting mechanisms in public authorities. An authority's records management practices will be reviewed by the keeper only if there are known concerns that the authority is consistently failing in its obligations under the legislation, even after it has received recommendations for improvement from the keeper. A formal review will take place only when attempts to resolve issues through informal discussions and collaborative working have not been successful.

The keeper is currently under a general duty, under established administrative case law in relation to statutory duties, to act reasonably when he exercises his powers in relation to any of his functions, including records management reviews. Amendment 55 would go further than the explicit restatement of that duty. The important point is that it would replace the keeper's ability to require particular assistance with a general duty on authorities to provide reasonable assistance, but it is not clear who would decide what was required in the first instance. It should be for the keeper to decide what assistance he needs—of course, he must do so reasonably, as administrative law requires.

Amendment 55 would therefore make a significant change to the effect of the provision. It could make it difficult for the keeper to carry out meaningful records management reviews in the few cases in which all other routes had failed and it was necessary for him to rely on his formal review powers to address a known records management problem. Amendment 55 would tie the keeper's hands in the few cases in which all other routes had failed.

I hope that I have explored the issue. The concerns about amendment 55 might not have been obvious to members when they read the amendment. I invite Ken Macintosh to withdraw amendment 55 and reflect on the matter.

Ken Macintosh: I thank the minister for her comments—next time, I will speak to her before I lodge an amendment, to tell her what it is about. She has made it clear that the keeper is already implicitly under a duty to be reasonable, so there is no need for that to be stated explicitly. Also, the replacement of "compliance" with "records management" by amendment 8 affects the tone of section 6. On that basis, I seek leave to withdraw amendment 55.

Amendment 55, by agreement, withdrawn.

Amendments 9 to 11 moved—[Fiona Hyslop]—and agreed to.

Section 6, as amended, agreed to.

Section 7—Warning notices

Amendment 12 moved—[Fiona Hyslop]—and agreed to.

The Convener: Amendment 13, in the name of the minister, is in a group on its own.

Fiona Hyslop: Amendment 13 will address concerns that the bill focuses on scrutiny by the keeper and emphasises failure of, rather than collaboration with, authorities—that is a theme in all the amendments in my name. The intention has always been that the power to issue action notices will be used as a last resort after full discussion with authorities and only when informal attempts to resolve records management difficulties have failed. Amendment 13 will make the intention to involve authorities clearer, by allowing them to make representations before the keeper issues an action notice.

Amendment 13 will empower an authority to make representations about the keeper's decisions. It addresses the issuing of warning notices by the keeper, which will be renamed "action notices" under amendments 12, 14 and 15, which have been debated. Section 7, as amended by those amendments, will allow the keeper to issue an action notice to an authority when it fails to comply with its duties under the bill.

Amendment 13 will require the keeper to notify an authority of his intention to issue an action notice, to provide an explanation of his reasons for doing so and to give the authority an opportunity to make representations. The keeper must then have regard to any representations before he decides whether to issue an action notice.

11:45

The amendment emphasises that there should be full discussion between the keeper and an authority before the keeper exercises his powers to issue a formal action notice under section 7. It addresses concerns that COSLA raised about the level of the keeper's power to issue warning notices without giving authorities the opportunity to make representations and is consistent with the underlying aim that the majority of difficulties should be resolved through discussion and co-operation between the keeper and authorities. The bill is not intended to focus on failure, and the keeper's enforcement powers under section 7 are intended for use as a last resort.

I move amendment 13.

Amendment 13 agreed to.

Amendments 14 and 15 moved—[Fiona Hyslop]—and agreed to.

Section 7, as amended, agreed to.

Section 8—Model records management plan

Amendment 56 not moved.

Amendment 16 moved—[Fiona Hyslop].

Amendment 16A not moved.

Amendment 16 agreed to.

Amendment 57 moved—[Elizabeth Smith]—and agreed to.

Amendment 17 moved—[Fiona Hyslop].

Amendment 17A not moved.

Amendment 17 agreed to.

Section 8, as amended, agreed to.

Section 9—Guidance

Amendment 18 moved—[Fiona Hyslop]—and agreed to.

Amendment 58 not moved.

Section 9, as amended, agreed to.

After section 9

The Convener: Amendment 19, in the name of the minister, is grouped with amendments 25 to 28.

Fiona Hyslop: Amendment 19 addresses a technical issue to do with how the records management duties under part 1 of the bill will apply to records of sheriff courts and justice of the peace courts. It creates a new section that clarifies that sheriffs principal will be responsible for carrying out the management functions for sheriff and JP courts under part 1.

Amendment 25 repeals sections 2(3) and 2A(4) of the Public Records (Scotland) Act 1937, which currently require sheriffs principal to manage records of the sheriff and JP courts that are not transferred to the keeper. Amendments 26 and 27 are consequential on amendment 25.

The effect is that sheriffs principal will remain responsible for the management of sheriff and JP court records, but that responsibility will arise under part 1 of the bill and not under the 1937 act. Amendment 19 makes it clear that, although the sheriff and JP courts are listed in the schedule, the sheriffs principal will be responsible for carrying out functions under part 1.

Amendment 28 is a technical amendment to the long title of the bill in consequence of amendments 26 and 27.

I move amendment 19.

Amendment 19 agreed to.

Section 10 agreed to.

Section 11—Annual report

Amendment 59 moved—[Elizabeth Smith]—and agreed to.

Amendments 20 to 22 moved—[Fiona Hyslop]—and agreed to.

Section 11, as amended, agreed to.

Section 12—Interpretation of Part 1

Amendments 23 and 24 moved—[Fiona Hyslop]—and agreed to.

Section 12, as amended, agreed to.

Section 13—Repeals

Amendment 25 moved—[Fiona Hyslop]—and agreed to.

Section 13, as amended, agreed to.

Section 14—Court records

Amendments 26 and 27 moved—[Fiona Hyslop]—and agreed to.

Section 14, as amended, agreed to.

Sections 15 and 16 agreed to.

Long Title

Amendment 28 moved—[Fiona Hyslop]—and agreed to.

Long title, as amended, agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the minister and her officials for attending the committee.

I suspend the meeting for five minutes.

11:52

Meeting suspended.

11:59

On resuming—

Subordinate Legislation

Public Services Reform (General Teaching Council for Scotland) Order 2011 (Draft)

The Convener: The second item on the agenda is consideration of an affirmative instrument, the first of a number of Scottish statutory instruments on today's agenda. I am pleased to welcome Michael Russell, the Cabinet Secretary for Education and Lifelong Learning, who is joined by David Roy and Laurence Sullivan from the Scottish Government. I invite the minister to make an opening statement.

12:00

Michael Russell (Cabinet Secretary for Education and Lifelong Learning): I am grateful for this opportunity to discuss the draft Public Services Reform (General Teaching Council for Scotland) Order 2011. I welcome the chance to make these opening remarks about the importance of the order and the GTCS itself. I will then, of course, be happy to answer questions.

In simple terms, the order repeals the Teaching Council (Scotland) Act 1965, which governs the way in which the GTCS works, replacing it with an improved constitution. As I am sure the committee is aware, the GTCS is currently an advisory non-departmental public body. The order will alter that arrangement, and the GTCS will become fully independent of the Scottish Government.

The change in the council's status reflects the Government's desire to reduce the number of NDPBs in Scotland. However, more than that, the draft order, and the new constitution that it enshrines, represent nearly 50 years of consistent good performance from GTC Scotland. GTCS has traditionally carried out its functions without significant interference, and the draft order recognises that. Through its history, it has shown a strong commitment to maintaining and improving the standard of teaching in Scotland and the order will allow that to continue and, indeed, intensify.

The order brings in a number of changes to the role of the GTCS and the way in which it operates. Commensurate with the council's status as an independent body, the order gives the GTCS far greater operational flexibility. The structure of the independent council will no longer be bound by a restrictive statutory base. It will be possible to co-opt members more readily and decisions relating to the organisation's finance will be for the council to take. That will be supported by a slimmed-down

council membership, while retaining a teacher majority and seats for representatives of key interests. There will also be an increased number of members who are not teachers.

As for the revised role, I am happy that the order gives the council increased responsibility for setting entry requirements for teacher education courses and for approving the courses themselves. I have taken the opportunity to widen GTCS powers with respect to competence cases. The order places on the council a duty to develop a system of reaccreditation, and development work for that is now well under way.

It is no secret that the teaching profession in Scotland is undergoing a period of significant change. An independent GTCS, with a refreshed constitution, expanded responsibilities and a clear focus on the maintenance and development of teaching standards, will help Scottish education to meet the challenges that lie ahead.

I have gone on record many times, stating my belief that there are hundreds of thousands of good pupils in Scotland, being taught by tens of thousands of good teachers in thousands of good schools. Ultimately, the GTCS regulates those teachers. It helps to drive up standards. In the most serious of cases, it ensures that the most unsuitable teachers are removed from the classroom. Those powers are strengthened under the draft order. The order provides an opportunity for the GTCS to continue, and indeed improve, its good work in helping to ensure that pupils receive the best possible teaching experience.

I hope that those remarks have been helpful. Together with my colleagues, I am happy to answer questions.

The Convener: The committee will have questions for you, but not necessarily about the intention behind the proposed change—which the majority of the committee probably agree with and indeed support, as we think that it will be a positive change. You will be aware that the Subordinate Legislation Committee has contacted the committee to raise its concern that the way in which the Government is attempting to make the changes is perhaps not appropriate. The Subordinate Legislation Committee raised the issue during the consultation period, and the Government chose to continue with its present course of action. Having heard earlier this morning from the Subordinate Legislation Committee's legal advisers, it might be helpful if this committee could now hear from you why you think that the Government has the ability to make the changes in the way that is proposed, and why you think it is appropriate to do so.

Michael Russell: Of course. I will ask Mr Sullivan to address the matter in a moment, but I will make one key point first. I am familiar with the difference of opinion that exists—there is a difference of opinion between my lawyers and the Subordinate Legislation Committee's lawyers. I understand that. Negotiation has taken place, and Mr Sullivan will refer to it.

However, I understand that there is no recommendation to reject the draft order. The ultimate responsibility for the legal position of the order lies with the courts, not the committee or me. Where there is a difference of legal opinion, those who have a vires to raise the matter with the courts may do so. When we reach such a situation, that becomes the resolution.

As you say, convener, the policy intention of the order has been agreed right across the Parliament. Certain things in it are absolutely essential in taking forward the teaching profession—for example, on teachers who are underperforming and reaccreditation. The work that the GTCS has done over the past almost three years is considerable. If there is a difference of legal opinion, there is another place for that to be tested. In my view that would be the right thing to happen, rather than to derail the order at the very last minute—that would be most unfortunate given our shared concern about these vital issues.

I ask Mr Sullivan to address the legal issues.

Laurence Sullivan (Scottish Government Directorate for Legal Services): As the minister said, the order is the first significant use of the powers that the Parliament gave ministers under the Public Services Reform (Scotland) Act 2010. It is therefore entirely right and proper that the Subordinate Legislation Committee has subjected the order to extremely close scrutiny, and we are extremely grateful to it for doing that.

We have had extensive engagement with the SLC's lawyers over the past nearly six months. They raised a number of issues with us and we fully considered and took into account all of them. In consequence of some of its points, we made amendments to the order during the consultation period in the autumn and winter of last year. There are a couple of matters on which we carefully considered their views but chose not to make changes to the order because we were of the view that the order in those respects was and is intra vires.

If the committee wants, I can go into some detail on what I understand are the two outstanding doubts that the SLC has expressed, but—

Michael Russell: I think you should do that.

The Convener: That would be helpful.

Laurence Sullivan: They fall into two categories. The SLC's first concern, as I understand it from the engagement that we have

had, is about the power that the order gives the GTCS to make rules and schemes and whether, by gaining that power, the GTCS is having a function of legislating conferred upon it.

As the committee will be aware, the function of legislating usually lies with ministers, or with the Lord President, in some circumstances, or the Lord Advocate, in others. Under the order, the GTCS will have the power to make various rules and schemes for various matters. We are of the view that the powers that are being granted do not amount to granting a function of legislating and so do not breach section 20 of the Public Services Reform (Scotland) Act 2010. Therefore, they are intra vires. Simply conferring on the GTCS a power to make rules or schemes does not mean that those rules or schemes will be legislating.

On one level, we would view the rules and schemes that the GTCS will have powers to make as being similar to the rules and schemes that any private organisation or club could make. The GTCS is, of course, a very important body, but in the same way as a bowling club or tennis club can make rules governing the conditions of membership of its members, so the GTCS will have the power to do so for people who choose to be registered teachers.

It is important to note that teachers' relationship with the GTCS is based entirely on consent. The requirement for teachers to be registered with the GTCS is based elsewhere. We view it as a body that is being made substantially independent of Government under the order and so it will have the power internally to organise its own rules and schemes and to do things such as making schemes and procedures for the selection of its members. Our disagreement with the SLC is based on what is and is not a function of legislating and whether something must be legislative in nature. We would be of the view that a decision on where that boundary between legislative and non-legislative falls is actually a policy choice for ministers, which is then subject to the approval of the Parliament, and that many of the things that the GTCS will have the power to make rules and schemes about are administrative or procedural in nature rather than legislative.

The second area that remained outstanding following our extensive engagement with the SLC was on the appointment of members to the GTCS. Our position is that the order abolishes ministers' existing powers on the nominating function under the Teaching Council (Scotland) Act 1965 and creates instead a new appointment function for the GTCS that gives it the ability to co-opt its own members. Our view is that there is a significant distinction between transferring ministers' power of appointment to a third party, which the PSR act would not permit, and granting a body the power to co-opt its own members, which we believe the order does and which the PSR act would allow.

The new appointment power granted to the GTCS is substantially different from the old ministerial nomination power. The power cannot be said to be being transferred, because the character of the power is changing so substantially and completely. We do not think that ministers' power to nominate members of the GTCS was a necessary protection—the idea of necessary protection is an important element of the limitations and restrictions within the PSR act. However, we are also of the view that the substance of the provision delivers a similar protection in an alternative manner, which is also a characteristic that is referred to in the PSR act. The substance is that rather than ministers appointing members to the GTCS—to retain that would be contrary to the entire policy drive of making the GTCS an autonomous, profession-led body—it will co-opt its own members and will be under an obligation to do so from as wide a spectrum of civic life as possible.

Those are the parameters of the two issues that we understand the SLC remains concerned about.

The Convener: Thank you for that, Mr Sullivan. Do members wish to ask further questions?

Elizabeth Smith: I declare an interest in that I am a member of the GTCS.

I support the GTCS to the hilt in the good work that has been done to improve the teaching profession. I also support the measures that the cabinet secretary has taken in recent times to enhance that professional attitude.

I fully understand the principles behind this order and why it would be appropriate to have an independent and autonomous body. Notwithstanding that, having listened carefully to what the SLC's legal team said to us, I remain concerned that there is considerable dispute about the definition of legislative function. Mr Sullivan said that the principle of power would change so substantially that it would mitigate any concern in that regard. Nonetheless, power is power and how it is defined matters. I am not a lawyer, but I think that a principle is involved regarding who can discharge that function. My gut instinct is to support the order, but I would be more comfortable if I felt that the legal advice that we were receiving was very clear, because I think that it could have ramifications that may derail other aspects. I am not entirely comfortable with things as they stand.

12:15

Michael Russell: The matter boils down to there being two sets of advice. I entirely accept that that is where we are. I would hope that the

policy prescription, for which Liz Smith has given strong support, is what we are trying to achieve. There is no point in elaborating further on this. The fact is that there is a difference of opinion between two sets of lawyers. The test for that, if it came, would have to come in the courts, because neither the committee nor I are courts of final resort.

The alternative—not having the order—would create such chaos at the end of a long period as to be very much the worst possible option. I must accept, in light of where you are now, that there is, of course, a risk: there could be a challenge to the legislation. I think that the courts would want to deal with that challenge speedily, but I do not think that to derail the legislation at this stage would be anything other than pretty disastrous for the whole function of what we are trying to achieve, particularly in relation to the constant improvement of teaching standards.

The Donaldson review suggests that there are roles that it wants the GTCS to take on pretty quickly, but that is dependent on the new functions being in place.

There is also the issue of the responsibility for teacher training courses, which we are trying to build and develop, which would remain with ministers—it would be entirely inappropriate for that to happen, and contrary to what Donaldson is recommending.

There is a web built up here. The greater good demands that the order goes through. We are certainly of the opinion that if there was a challenge, the Government would firmly defend the position that we have taken, because we believe that our interpretation is correct.

I commend the work that has been done between the Subordinate Legislation Committee and our lawyers. There has been a long process of negotiation. The fact that it now boils down to two issues is quite an achievement on both sides.

Ken Macintosh: I certainly do not disagree with the minister that there are two conflicting legal views. However, I disagree fundamentally with his statement that it is somehow up to the courts to decide whether the order is legally competent. That is fundamentally our job, not the job of the courts. The courts might test that, but the idea that this Parliament should pass legislation when it is not satisfied that it is legally sound and just leave it up to the courts to decide is entirely unsatisfactory and, in fact, untrue.

Michael Russell: Convener, I suggest that in this debate we should try not to accuse each other of telling untruths. I am trying to put a point of view. Mr Macintosh clearly disagrees with that point of view, but I am not peddling untruths.

Ken Macintosh: I am suggesting that the point of view that you put is not factually correct. It is not for the courts to decide.

Michael Russell: In your opinion, Mr Macintosh.

Ken Macintosh: That is absolutely my opinion, just as it is your opinion that it is up to the courts to decide whether what we pass is legally sound.

The suggestion that we should somehow treat the GTCS as a bowling club or a tennis club is quite unsettling.

If this situation results in chaos—I do not think that it will, although it is certainly a very unhappy situation—that will be fundamentally because the Government has failed to put the order through in a manner that, so far, has convinced the Parliament.

This situation could have been entirely avoided if the order had been a piece of primary legislation. Why is it not primary legislation? Why on earth are we dealing with this order with two weeks until the end of the session, with no ability to amend it or address the fundamental concerns?

Michael Russell: The Parliament gave ministers the power, under the Public Services Reform (Scotland) Act 2010, to undertake this action. It is entirely appropriate that we should do so. You were an opponent of that move. I understand that politically, but I am trying not to follow you into a political debate about this. I am trying to make entirely clear that that power was appropriately given and is being appropriately exercised. There is now a difference of opinion between two sets of lawyers.

I repeat that the committee is, of course, entitled to take its view of this, but the committee is not a court—that is a fact. The final determinant would be a court. It is less good not to carry on than to carry on.

Mr Sullivan is reminding me—very usefully—that the GTCS process was specifically mentioned during the passage of the 2010 act, so it could hardly come as a surprise that we are taking this route.

Mr Macintosh disagrees that this route should be taken. I am afraid that we will have to agree to disagree on that. We are where we are today. We are, some two and a half weeks before the dissolution of the Parliament, considering a very important piece of secondary legislation, which has been under discussion since 2008 and has been before the Parliament since last September. To see it derailed today would be very disadvantageous. I understand that there is a dispute about legal advice, but if we were to go into the realms of Mr Macintosh's political objections, that would be even more difficult.

Ken Macintosh: The measure has, as far as I can tell, almost unanimous support. There is a huge amount of support for it and consensus on it among the education community, and it has entire cross-party agreement in the Parliament; yet, the minister and the Executive have brought a statutory instrument before the committee, with two weeks to go before dissolution, about whose competence we have serious questions.

I would like an answer to my original question. Why did the minister decide to introduce the measure through a piece of subordinate legislation rather than through primary legislation? It is an important measure for the future of the teaching profession and education in Scotland, and it deserves the full scrutiny of the Parliament. I do not understand, even now, why the Parliament was not offered that opportunity through the Executive lodging primary legislation.

The Convener: Before I invite the cabinet secretary to respond, I remind members that the session in which we are engaged just now involves questions and answers to the cabinet secretary. There will be an opportunity for members to make their debating points under the next agenda item. At the moment, it would be helpful if we could just have questions from members and responses from the minister. There will be ample opportunity for all members to put forward their various debating points.

Michael Russell: I point out that the instrument was lodged in draft form in September. Therefore, it has not arrived at the last minute. What has arrived at the last minute is this difficulty, which we need to overcome. The Public Services Reform (Scotland) Bill anticipated—even on this subject—that subordinate legislation would be used in this way and the Parliament passed that bill. There is no surprise about this, and Mr Macintosh could have raised these issues and problems at any stage. We must now decide whether we can proceed with the instrument—which is much needed and on which a great deal of work has been done—or whether, for other reasons, it will be derailed. That is the simple choice that we face.

Ken Macintosh: I have another question for the minister. One of the new powers that the GTCS will be given is the power to introduce a reaccreditation scheme. What is the difference between that scheme and the relicensing scheme that is being discussed in England and Wales?

Michael Russell: The reaccreditation scheme will be more supportive and more bound up with continuing professional development. It will also be more consultative and, provided that the instrument is passed, will be based within the General Teaching Council, whereas the general teaching council south of the border has been abolished. We will have it within our supportive activity for teaching and the regulation of the teaching profession. I would say that it is a very positive scheme, but it is needed—and it is needed now.

Ken Macintosh: What concerns, other than those over reaccreditation, were raised during the consultation?

Michael Russell: A range of concerns were expressed, which were taken into account when the instrument was drafted. I refer Mr Macintosh to the published consultation materials.

Ken Macintosh: What were they? Has the subordinate legislation been amended to take account of the responses to that consultation?

Michael Russell: The subordinate legislation was drafted on the basis of a process of wide consultation. I should point out that it was supported across the Parliament. However, if there are specific objections even at this very late stage, Mr Macintosh, I would be interested in hearing them.

Ken Macintosh: I asked specifically what the main objections that were raised in the consultation were and in what way the subordinate legislation was amended to take account of them.

Michael Russell: As I said earlier, the order was amended as a result of discussions with the Subordinate Legislation Committee and other considerations were taken into account. I am happy to provide a full, blow-by-blow account of that process in writing to Mr Macintosh should he wish it. However, I think that a more urgent issue is that we resolve the difference of opinion on the two legal issues. That is where we are now.

The Convener: Did I see Margaret Smith's hand raised?

Margaret Smith (Edinburgh West) (LD): Yes, unfortunately.

It is unfortunate that the minister has decided to go down the route of trying to turn this into a partisan issue. Committee members are signed up to the policy changes that are involved in the approach to the GTCS that the minister has pursued over the past year. I am sure that the GTCS would confirm that, based on the meetings that it has had probably with us all. It is, therefore, with a great deal of concern and not a small amount of disappointment that we have received the concerns of the Subordinate Legislation Committee, which we must now deal with.

I have had the privilege of being a member of this Parliament for 12 years and I am not in the habit of giving away my responsibility to take seriously any part that I may have to play in the passing of legislation.

The lawyers behind the Subordinate Legislation Committee have brought a range of issues to us, and they give us great cause for concern. I accept that this order could end up at court—as could any law passed by the Parliament—and it is our responsibility to ask the minister questions and to see whether the answers will allow us to break the deadlock between two different legal opinions.

At the heart of the issue is the difference between what is legislative and what is administrative. I agree with the point made by Ken Macintosh: I really do not care who becomes a member of a bowling club, but I care greatly about who is teaching my children. Without going down the route of discussing the membership of a bowling club or a tennis club, will the minister tell me the difference between something that is described as administrative and something that is described as legislative? That seems to lie at the heart of the difference of opinion between your lawyers and the Parliament's lawyers.

Michael Russell: I am happy to offer what help I can. Mr Sullivan's analogy involving a bowling club and a tennis club was a fair one, and I am sorry that Margaret Smith did not like it. If I had the *Official Report* with me, I would read it out; I think that the evidence will show that I am trying to be as helpful as possible. I would only go into political matters if I felt that they were being raised with me, so let me be very positive about this. I am not a lawyer, so I will have to be careful in explaining this, but I think that the issue is the difference between rules and schemes, as described by Mr Sullivan, and legislation. The GTCS can set rules and schemes—but there is a difference between the force of rules and schemes and the force of legislation. The Public Services Reform Bill indicated that. Clearly, the focus for and function of legislating lies with the Parliament; that is what we do. However, other bodies can set for their members rules and schemes that do not have the force of legislation. One such body is the GTCS.

Margaret Smith may not like the analogy using clubs, but we could use other organisations such as professional bodies. The Law Society of Scotland is one that might occur to lawyers. Bodies can have rules and schemes that do not have the force of legislation. The opinion that I am following says that this statutory instrument indicates that difference. The advisers to the Subordinate Legislation Committee have a different opinion, but Mr Sullivan described the difference very well. I could go on describing the difference, perhaps using examples other than bowling clubs and tennis clubs—the Law Society for example.

Laurence Sullivan: May I—

Michael Russell: Mr Sullivan wants to add something—and I presume that it will not be about tennis clubs or bowling clubs, but about serious bodies.

Laurence Sullivan: My apologies if my comparison did not find favour with the committee.

We are arguing that some of the functions of legislating that were contained in the Teaching Council (Scotland) Act 1965 are, in fact, being removed. The rules that the GTCS will have the power to make in this context do not have the nature of legislation. The GTCS internal rules will be applied by a particular body to a particular group, and we think that the true characteristics of legislation will not be present. The rules will be of limited application across the population; they will apply to teachers but not to the generality of the population of Scotland. The rules will not be contained in a Scottish statutory instrument, made by ministers and approved by this Parliament; they will not be considered and approved by the legislature.

We consider that a better view of the GTCS rules is that they are more akin to a contractual agreement and are therefore non-legislative in nature. That is linked to the consent-based relationship between the GTCS and its members. The GTCS is a consent-based body for the registration of teachers. When this Parliament enacts legislation to apply generally across the entire country, the population must follow that rule or law. In that sense, once the law is passed, it is not consent based.

On the generality of the issue and our genuine disagreement with the opinion of the SLC's lawyers on the two outstanding matters, the Government's unambiguous legal position is that the order before the committee today is intra vires and we are confident that, if at any future point the order was challenged in a court of law, the court would find the order to be lawful and intra vires with regard to the Public Services Reform (Scotland) Act 2010.

12:30

Margaret Smith: Ultimately, the concern that we all have is not that we will pass a piece of legislation that could be subject to a decision in court—that may happen to any legislation that we pass—but that from day 1 there could be a query. We can envisage a number of people—for example, someone who had been deregistered or who had previously been appointed but was no longer appointed—who would have an interest in going to court early in the process. You are saying that you are as sure as you could ever be, on the legal advice that you have been given, that anyone who took a case to court would find that the order was competent and they would not win

the case on the concerns raised by the Parliament's lawyers.

Michael Russell: That is our view—that is what it boils down to. There is always a risk of challenge to any piece of legislation.

There are three positions that we can take. One is that the order is ultra vires and would be subject to a successful challenge. Another is that it is intra vires and that there would not be a successful challenge. A third position is that we need to go away and do the work again. In actual fact, the third option does not exist. The order has been on the table since September. There have been extensive debates among lawyers—quite properly, as that happens all the time—and we have reached this final stage. We strongly believe that a challenge would fail, and we have indicated why it would fail.

I appreciate that Margaret Smith is raising the issue with genuine concern, but this is the point at which we are. There are two points on which there is a difference of legal opinion. We are confident. Indeed, I do not want to hide behind my lawyer: I must say that I am confident that we would win any case, because the order is intra vires. We have worked hard to get an important policy to this stage.

Margaret Smith: I will pick up on your point that there are three ways of looking at the issue. One option is, in effect, to go away and look at the order. Although there is cross-party support for the policies behind the order, and any concerns are simply about its legal standing, there is always a possibility that you will not win the day in Parliament. You are saying that the third option to go away and start again does not exist, but I question how you can say that when there is always a possibility that you will not win a vote in Parliament. We are all signed up to the bigger prize—if we can look at it that way—of reaccreditation, the independence of the GTCS and so on, and we all see that as something that is worth striving for. Ultimately, therefore, I presume that the third option would have to be taken forward by a Government—whichever Government that might be.

Michael Russell: I am afraid that all the process has been done. The arrangements are in place, this is the conclusion of the process, and we have a difference of opinion at this conclusion. Everything else has been ironed out, apart from two differences of legal opinion. If we do not pass the order, certain important powers that we need to take forward will not exist. The GTCS is ready to operate them, and the new organisation has prepared itself for this moment. I do not think that there is the luxury of stepping back from this conclusion in the hope that something will happen in the future.

There is a difference of opinion. I am being honest with the committee about where we are. I believe strongly that our legal advice is correct, but it goes against the advice that the committee has received from the Subordinate Legislation Committee. That is a decision that the committee has to make.

I also suggest—although Mr Macintosh thinks that I am wrong about this—that the committee is not a court and, in essence, the decision on the two legal points might have to be tested no matter what happens. There are no conceivable alternatives. It is inconceivable that we could have a body such as the GTCS that could not set its own rules and schemes, therefore the order is an important part of the whole. We have a set of arrangements that have been on the table since September. The time has come to conclude the matter. We are where we are.

Margaret Smith: I accept the minister's point that we are not a court, but we are also not a rubber stamp.

Michael Russell: I agree.

Margaret Smith: It is up to us to ensure that we are content with what we put forward. We either send out the message that we accept the order or we say that we still have concerns, in which case we put that to the Parliament as a whole to make a decision. I am happy to accept that we are not a court but, equally, we cannot accept that, because we are running out of time, as the minister sees it, we should be forced into doing something that is against our better judgment as members of the committee and Parliament.

Michael Russell: Of course. With respect, there weighs in that balance the issue of the policy objectives, which we all agree we wish to achieve.

Margaret Smith: The policy is not in any doubt.

Michael Russell: But the implementation of the policy would be in doubt, and that is an issue.

The Convener: The Government will have considered several options in reaching the conclusion that the order is the appropriate vehicle to make the changes. Margaret Smith suggested that there might be a third option, but you disagree, which is fine. Based on the advice that you got from the lawyers, is it the case that we would end up in the same situation even if the committee chose not to endorse the order, because it is the only way to go? There might be a legal dispute about whether the order is appropriate, but is it the case that the only way in which we will definitively test the issue is in court? If so, the committee can never reach a definitive answer on the issue. It would be helpful to us in reaching a conclusion if we knew that that was the case. I am genuinely trying to be helpful.

Michael Russell: That is helpful. That is my position. The GTCS needs to undertake certain functions, such as the rules and schemes function that I mentioned. I cannot imagine how we could establish a body to do the job without the ability to set its own rules and schemes. Therefore, although one should never say never, it is difficult to conceive of another way in which to proceed that would secure the independence of the GTCS and enhance its functions.

We have a piece of subordinate legislation that does the job that it needs to do. It has been consulted on extensively and has been through a long process, as was anticipated in the Public Services Reform (Scotland) Act 2010, with a draft having been introduced in September. Given all those circumstances, we have the best possible piece of legislation. I regret that we have a difference of opinion. My colleagues know that I have worked with them to try to avoid that over a long period. However, we have been unable to avoid that difference, because we have boiled it down to its irreducible essence. That is where we are.

Kenneth Gibson: My question follows on from the convener's questions. I was going to ask a question along similar lines. To be honest, I am interested in the practicalities and not so much in which side's lawyers are correct, so I would like a bit more information on what will happen if we do not recommend approval of the order today. First, what would be the impact on the GTCS's ability to carry out the functions that we all want it to carry out? Secondly, what would be the timescale for getting us back to the situation that we are in now? Before we vote one way or the other, we need to know clearly what the impact would be on the ground.

Michael Russell: My officials tell me that if we had to reintroduce the order, it could not be done until September. Given the length of time that orders take, we might be back here in a year's time, which would be a very long time.

There are a number of implications to consider, Mr Gibson. The GTCS has been preparing for the change since 2008. Its focus has been so great that it will deeply regret the difficulty caused, if it comes to that. Its credibility and that of the teaching profession would be damaged. We need a strong and independent GTCS to maintain and drive up standards in Scottish teaching, and we will not have that if the order is not passed. Not a single one of the new functions would be available to the GTCS, including reaccreditation and an issue that I feel strongly about, which is the increased powers to deal with those few teachers who are not succeeding. Those enhanced functions would simply not be available.

The impact on implementing the Donaldson review would be considerable because— [*Interruption*.] I am sorry; I got so excited that I threw a pen at myself. It was not self-flagellation, I assure you.

The Donaldson review was, to a great extent, predicated upon having the new GTCS in position. There would be many difficulties if the order was not passed, and there would be no quick fix.

The Convener: Are there any further questions or points of clarification?

Christina McKelvie (Central Scotland) (SNP): I want to ask the cabinet secretary about risk and informed risk. One of the things that the committee has talked about throughout the past four years is moving away from the risk-averse attitude that we have developed.

Every piece of legislation that the Parliament passes comes with a risk. I feel that the information that we have received from the cabinet secretary's lawyers is much clearer than that which I got from the Subordinate Legislation Committee's lawyers, who used words like "seems" and "appears to", which did not make the position clear to me and did not give me the information that I need to make a decision based on informed risk. We might decide not to recommend the order for approval this morning because we think that a risk is attached, but if the Parliament had operated in that way we would have done nothing for 12 years.

Michael Russell: I would not go to that extreme. You cannot tempt me into taking extreme positions. I will not go there. However, you are right about risk. In a sense, legislative scrutiny is about identifying risk. No action in life of any description is risk free. On this occasion, the risks are clear in two areas. We also know that there exists that worst of all things: two conflicting sets of legal advice. That is where we find ourselves. Yes, there is a risk, but we have boiled the position down to its irreducible essence, as I have said, and we know what the risk is. The proper place for any challenge to the legislation is the courts, if there is to be any challenge.

I would not in any way criticise the legal advice that I get as a minister, but there have been occasions in the past when I have had legal advice to which I have had to say that I am going in the opposite direction. That does happen.

Elizabeth Smith: Convener, I seek clarification, because this is not a situation that I have come across before. If we do not agree today, because the dispute is a legal one, is there any way in which the order can go before the full Parliament for further discussion?

The Convener: My understanding is that if the committee is not in agreement today, we will have to vote on the motion. The Government will then have two options: to withdraw the order or to contact the Parliamentary Bureau to seek parliamentary time to allow further consideration of the matter. However, I remind everyone that that might not be as easy as one would think, given that we already have some pretty late sittings coming up. In fact, time is running very short at the moment, because Parliament will convene at 1.15 pm and this meeting will have to be closed, because we cannot continue to meet as a committee while a plenary session is happening.

12:45

The option exists to go to the full chamber, but there is absolutely no guarantee that that would happen. As I have said, we would need to have the Parliamentary Bureau's agreement, and parliamentary time would have to be available for such a debate. There is a heavy responsibility on all of us, as we all genuinely want to do the right thing and weigh up all the arguments that have been made. Ultimately, though, in weighing up those arguments, we need to focus our minds on reaching a conclusion, no matter whether that happens in committee or even in plenary session. Indeed, perhaps a court of law is the only place where a conclusion can effectively be reached.

Elizabeth Smith: Any delay would be unfortunate. I fully understand where the Government is coming from, but I must return to my point that there is doubt and confusion about a matter that has without question been on the table for some time. What concerns me is that this is a legal dispute rather than anything else. Margaret Smith made a very valid point about our responsibilities, and it might be helpful if, with a little extra time, we were able to consider the legal points and clear things up.

The Convener: I am going to allow the cabinet secretary to come in at this point, because it is important that we get some clarity on this issue. I will then move to the debate. This was supposed to be a question-and-answer session, but we have deviated from that at points.

Michael Russell: Although I accept Elizabeth Smith's point, I still think that this is the point of decision. I am not sure that there is any further clarity to be had on the matter. The committee has heard from the Subordinate Legislation Committee's lawyers, and from Mr Sullivan, who is my adviser on this matter. I do not think that there is a third position—this is it. The convener put it well. I do not want to be sceptical about lawyers, but if the committee sought further advice from a third lawyer, they might well give a third set of advice.

I cleave to my position that, regrettably, some issues are uncertain when legislation is passed and have to be clarified by the courts—or not, as the case may be. After all, sometimes people do not take the matter that far. I hope that that does not happen, but if it does the Government will, having studied the matter closely and having been willing to negotiate on a whole range of other issues with the Subordinate Legislation Committee, stand very firmly behind its interpretation.

Laurence Sullivan: My final point is that if we as lawyers and as a Government had thought that the order was ultra vires and that the power was not in the Public Services Reform (Scotland) Act 2010, we would not have introduced it to Parliament in this form.

Michael Russell: We would have been very much on a hiding to nothing had we done so.

The order is the product of lengthy negotiation. I accept that there is a dilemma, but I do not think that it can be resolved in any other place. We are down to the key issue, and making the information more widely available to everyone might just increase confusion.

Elizabeth Smith: But it is not something that has happened deliberately. It is a genuine legal concern. You did not envisage it happening at the start of the process, and I am sure that the GTCS did not, either; it is simply a result of different interpretations. Is that not correct?

Michael Russell: Yes, and I suspect that that might have been inevitable, given that the Public Services Reform (Scotland) Bill was hard fought. There are different interpretations in this area, but I must go back to my point about irreducible essence. There are some things that, because of its very nature, the GTCS will have to do, and I see no other way in which it could do them. We are confident that we have observed the legislation and we will defend our position vigorously.

The Convener: That concludes item 2 on our agenda.

The next item is the committee's formal consideration of the Public Services Reform (General Teaching Council for Scotland) Order 2011. As members will know, technically we have up to 90 minutes to debate the motion. However, we do not have that time, so I ask members to concentrate their minds and keep their comments short.

I invite the cabinet secretary to speak to and move motion S3M-7861.

Michael Russell: I think that I have said all that I have to say on this order. I do not think that there is any dubiety in the room about where the

difference of opinion lies. I would like the motion to be agreed to, because the order is important for Scottish teaching and Scottish education, and it is important that we as a Parliament show that we agree with the overall policy prescription. I accept that there is a difference of opinion, but we have to get on and do this.

I move,

That the Education, Lifelong Learning and Culture Committee recommends that the Public Services Reform (General Teaching Council for Scotland) Order 2011 be approved.

Alasdair Allan (Western Isles) (SNP): From what the convener has said and from what we have heard from the cabinet secretary, it is pretty clear that, unless we reach a reasonable conclusion in the next few minutes, it is likely that the order will not see the light of day until September. I have listened carefully to what has been said, but nothing has convinced me that the risks associated with approving the order are such that throwing it out, in effect for the foreseeable future, would be a proportionate response.

That is all that I have to say. I commend my brevity to others.

Ken Macintosh: I make it clear that I, too, intend to support the order, which is important for several reasons. I do not support it because we have to or because there is a deadline to meet and it is the only option that is open to us; I do not agree with any of those arguments. I think that many options are open to us. If we did not pass the order, the GTCS would continue to function and operate in the way that it has done. It has served Scotland in a tremendous fashion for a number of years, and it will continue to do so. There would be no crisis or chaos—I have no doubt whatsoever about that. However, the situation would be unhappy, and I suggest to the minister that it would be his and the Government's credibility that would be shattered, not that of the GTCS.

Margaret Smith made the point that it is not the committee's or the Parliament's job to rubber-stamp the actions of the Executive, and it is certainly not our role not to take a view on the legality or competence of measures that we are discussing. Indeed, that is at the core of our role.

I am extremely disappointed that we have had quite a long discussion about the competence of the measure, but we have not had a chance to discuss—or even to celebrate, dare I say—the GTCS's achievements and what it might go on to achieve as an independent body. I cannot pretend that the cabinet secretary really answered my questions about reaccreditation. I would have liked to ask him whether the GTCS will have a role in accrediting teachers in further and higher education, but we have not discussed any such issues or any of the policies on which the Parliament, parties and we as individuals have come to unite. I regret not having had the opportunity to do that. Our job is to scrutinise policy as much as anything else.

I am not convinced by the argument that has been put before the Subordinate Legislation Committee. It is simply an argument. It is a question whether the order could be challengeable because it passes the function of legislating on to the GTCS. The Subordinate Legislation Committee decides on such things week in and week out and it quite often has to take a view on the opinions of its lawyers, who quite often raise issues of this nature. I will not pretend that we are talking about a question that is other than at the more worrying end of the spectrum of questions raised by the lawyers, but it is simply that: a question, an argument that has been put.

I side with Laurence Sullivan's view—not with what he said about a tennis or bowling club—that we are talking about schemes, rules and administrative decisions, not legislative functions. For that reason and because of those arguments, we should agree to the motion, but we should certainly not do so because we have to, because there is a deadline or because it is the only option that we have. It certainly is not. We should be pleased about the steps that we are taking unanimously to support the GTCS becoming an independent body, and we should all agree to the measure.

Margaret Smith: I am very unhappy about the situation in which we find ourselves. Essentially, we have come to an impasse between two legal opinions. I am not particularly persuaded that we would gain any more clarity if we carried things on for another week and the issue was considered by the Parliament as a whole. Nor am I particularly convinced that we would get any more clarity if we asked another 20 lawyers what they thought. That is part of my concern. The order has probably shown some of the issues that may arise in future under the Public Services Reform (Scotland) Act 2010. I hope that the Government and its lawyers will look clearly at the matter, if and when other instruments under the 2010 act are laid before the Parliament, because we should not in any way rejoice in the situation that we have got ourselves into.

No member of the Parliament—certainly no member of the committee—does not want changes to be made to the GTCS. I have spoken on many occasions about the fact that I have big concerns about teachers who should not be in our classrooms. There is a real need for clarity on what is legislative and what is administrative. We are dealing with administrative issues in a unique

club, in which—unlike a sports club—administrative decisions about who is or is not a member feed into other legislation that allows members to teach in our schools. That makes the club's membership particularly important for us all.

To be honest, even at this point I have not decided how I will vote. I am unhappy about the fact that we are being expected to vote through the measure at this stage. I hope that the Government will take on board the concerns that have been raised today, quite genuinely, to try to ensure that we do not find ourselves in this situation again in relation to any other instruments under the 2010 act.

Christina McKelvie: Much has been said in debate and questions this morning about the purpose of the committee. The point has been made clearly that we are not a court, but sometimes we need to make judgments. Those judgments must be based firmly on informed discussion. The informed discussion that I got this morning was much clearer from the Government than from the Subordinate Legislation Committee.

Every piece of legislation that the Parliament passes comes with a risk, but that risk is not insurmountable. The Parliament has been a trailblazer in passing legislation that would be deemed risky in other places. It has taken us to the cutting edge of many pieces of policy and policy development, not just in Scotland but in the United Kingdom and the wider world. We should not be averse to risk; in fact, we should be bolder. I hope that our successor committee after the election will be a bit bolder on these matters. For that reason, based on informed risk and the fact that the committee and I, as a member of it, must make a judgment, I will support the SSI.

The Convener: Everyone here has tried to exercise their function as a member of the committee to the best of their abilities. One reason that we discussed the issue at such length is that every one of us takes our responsibilities seriously. It weighs heavily on any politician's mind if there is a possibility that what we are about to do is ultra vires. The committee has heard evidence that makes a legal case for that, but we have also heard the counter-argument that what the Government proposes to do is in no way ultra vires—that it is intra vires and perfectly acceptable.

Such legal opinions will always be there. No matter what the walk of life or the decision, lawyers will always argue with one another and give opposing views. The important issue is whether, in reaching the end of the process, the Government could have done anything differently or considered an alternative course of action. Given Mr Russell's evidence to the committee, it seems to me that no matter which cabinet secretary for education or Government we had, we would end up in the same position of needing a legal debate on the issue. It is not for the committee to have such a debate, so I think that it is appropriate that we support the order. I wanted to put that personal view on the record.

13:00

The question is, that motion S3M-7861 be agreed to.

Motion agreed to,

That the Education, Lifelong Learning and Culture Committee recommends that the Public Services Reform (General Teaching Council for Scotland) Order 2011 be approved.

The Convener: The committee is required to report to the Parliament on the order. It might be somewhat easier just to refer the Parliament to the *Official Report*. More seriously, do members agree to delegate to me the authority to agree the text of the report with the clerks?

Members *indicated agreement.*

The Convener: That concludes consideration of agenda item 3. There are another six items on the agenda, but I will close the meeting in the hope that the cabinet secretary will be able to come to next week's meeting. I hope that we will deal more speedily with the remaining subordinate legislation then, because that day's meeting of the Parliament is scheduled to begin at 1.15 and I know that Mr Gibson has a members' business debate for the meeting, so he is getting very anxious.

Michael Russell: I will certainly wish to alter whatever arrangements I have to ensure that we conclude the items that we must conclude.

The Convener: Thank you, cabinet secretary.

Meeting closed at 13:02.

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