EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

Tuesday 1 September 2009

Session 3

£5.00

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

CONTENTS

Tuesday 1 September 2009

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PUBLIC SERVICES REFORM (SCOTLAND) BILL: STAGE 1 2561
SUBORDINATE LEGISLATION 2602
Looked After Children (Scotland) Regulations 2009 (SSI 2009/210) 2602
Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009(SSI 2009/211) 2613
Police Act 1997 (Criminal Records) (Scotland) Amendment (No 2) Regulations 2009 (SSI 2009/216) ... 2636

EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE
21st Meeting 2009, Session 3

CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

COMMITTEE MEMBERS

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

COMMITTEE SUBSTITUTES

Ted Brocklebank (Mid Scotland and Fife) (Con)
Hugh O'Donnell (Central Scotland) (LD)
Cathy Peattie (Falkirk East) (Lab)
Andrew Welsh (Angus) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Tam Baillie (Scotland's Commissioner for Children and Young People)
Val Cox (Scottish Government Children, Young People and Social Care Directorate)
Penny Curtis (Scottish Government Children, Young People and Social Care Directorate)
Geraldine Doherty (Scottish Social Services Council)
Graham Donaldson (HM Inspectorate of Education)
Annie Gunner Logan (Community Care Providers Scotland)
Adam Ingram (Minister for Children and Early Years)
Johanna Irvine (Scottish Government Legal Directorate)
Alexis Jay (Social Work Inspection Agency)
Shane Rankin (Scottish Government Primary and Community Care Directorate)
Adam Rennie (Scottish Government Primary and Community Care Directorate)
Jacquie Roberts (Scottish Commission for the Regulation of Care)
Gillian Russell (Scottish Government Legal Directorate)
Ruth Stark (British Association of Social Workers)
Harry Stevenson (Association of Directors of Social Work)
Laurence Sullivan (Scottish Government Legal Directorate)
Denise Swanson (Scottish Government Children, Young People and Social Care Directorate)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Nick Hawthorne

ASSISTANT CLERK

Emma Berry

LOCATION

Committee Room 1

Scottish Parliament

Education, Lifelong Learning and Culture Committee

Tuesday 1 September 2009

[THE CONVENER *opened the meeting at 14:03*]

Public Services Reform (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good afternoon. I open the Education, Lifelong Learning and Culture Committee's first meeting following the summer recess. I hope that all committee members had an enjoyable summer, even though the weather was not particularly co-operative at points.

We have apologies from Aileen Campbell MSP, who is unable to join us today.

The first item on our agenda is our stage 1 scrutiny, as a secondary committee, of the Public Services Reform (Scotland) Bill. Today, we will focus on the aspects of the bill that relate to social work and joint inspections. I am pleased to welcome from the Scottish Government Val Cox, who is the deputy director of positive futures; Adam Rennie, who is the deputy director of community care; Gillian Russell, who is the divisional solicitor for health and community care; Nicholas Duffy, who is a solicitor in the legal directorate; and Shane Rankin, who is the project director in the scrutiny bodies project team. I understand that Mr Rankin will make an opening statement. We will then move to questions.

Shane Rankin (Scottish Government Primary and Community Care Directorate): Thank you very much.

The new scrutiny and improvement bodies for social care and social work and for health care are a significant part of the Scottish Government's plans to improve the performance of Scotland's public services. The Government believes that the core purpose of external scrutiny is to provide public assurance and improve service quality. Its aim, in introducing the changes, is to create more effective and efficient bodies that can work more effectively together and with the other major bodies, such as Her Majesty's Inspectorate of Education, Her Majesty's inspectorate of constabulary for Scotland and HM prisons inspectorate for Scotland.

The Government's intention is that the creation of the new bodies will lead to reduced administrative burdens on public bodies and other service providers, and to a better focus on the greatest risks. Part 4 of the bill, which will establish the body social care and social work improvement Scotland, provides for those changes. The new body will integrate the Scottish Commission for the Regulation of Care's responsibilities for regulating and inspecting care services, excluding independent health care; the Social Work Inspection Agency's responsibility for inspecting social work services, including criminal justice social work; and HMIE's responsibilities for inspecting child protection and integrated children's services. The legislative provisions that will establish social care and social work improvement Scotland, which are critical to achieving an integrated approach, are in sections 34 to 89 in part 4 of the bill and sections 92 to 97 in part 6 of the bill. The provisions will draw into the new body—which will be a non-departmental public body—the functions, powers and duties of the existing bodies. The care commission will be dissolved and the functions of SWIA, which is a Government agency, will be carried out by social care and social work improvement Scotland.

The provisions will permit simplification of the regulation of care services, will allow for the first time the scrutiny of services along the whole care pathway, from the point of assessed need to the point of service delivery, and will focus on outcomes for individuals. A focus on outcomes as well as on standards will be enabled. Joint inspections by scrutiny bodies will provide a duty on the bodies to co-operate and will require the involvement of users of services in design and delivery of scrutiny.

The primary focus of the new body's responsibilities will be to provide public assurance on the quality of a range of often interdependent services that are provided by public, private and not-for-profit organisations. The new body's capacity to consider the complex interrelationships between services will ensure that inspection and regulation provide effective support for service improvement. The integration of responsibilities from three existing bodies—the care commission, SWIA and HMIE; the capacity to conduct simpler and more proportionate joint inspections with other bodies, such as healthcare improvement Scotland, HMIE, Her Majesty's inspectorate of constabulary for Scotland and HM prisons inspectorate for Scotland; the flexibility on inspection frequency and the greater scope to share information will enable the new body to consider more effectively and efficiently the impact of other services on outcomes. The new powers, duties and flexibilities in social care and social work improvement Scotland will enable better targeting on risks, allow scrutiny to be more proportionate, lead to more efficient use of scrutiny resources, improve public assurance and focus support for improvement where it is most needed.

The Government is determined to improve services and scrutiny as quickly as possible. Work is already in hand on how the functions of the existing scrutiny bodies can be integrated, and on how the new bodies can collaborate to provide improved public assurance and more effective support for improvement.

The Government wants to see the benefits of integration and collaboration as soon as possible. It does not want to diminish public assurance or to delay service improvement in the period to April 2011, when the new bodies will commence their work. Service users may be concerned that, in the run-up to establishing the new scrutiny bodies and in the early months of their operation, services will not be effectively regulated and inspected, and that the providers of poorly run services will not be challenged. However, the scaling back of scrutiny, the focus on risk and the co-ordination of scrutiny of local government services are already enabling more proportionate scrutiny and a high level of assurance, and are focusing attention on improving the poorest services.

The current considered and evolutionary approach to scrutiny improvement will continue as we move towards the start-up date for the new scrutiny bodies. We will work with the existing scrutiny bodies, relevant professionals, service providers and users, and with other key stakeholders to ensure that we shape the operations of the new bodies so that they maintain high levels of assurance and focus effectively on supporting service improvement as soon as they are established.

I hope that my comments have helped to explain the Government's intention in establishing the new bodies. We are happy to answer any questions that the committee may have.

The Convener: Thank you for that. The committee has questions on a number of areas that it wants to pursue with you this afternoon.

The existing bodies all have particular remits and are responsible for scrutiny—HMIE and SWIA are examples. What difference will centralisation of the provision of services make? Do the bodies currently not co-operate?

Shane Rankin: The bodies do co-operate, and it has in recent years been shown well how that collaboration can improve assurance on quality of services, and how it can give a better sense of how services operate and how they might improve.

However, it is also clear that some of the collaborative arrangements are quite complex. The proposed approach should, by bringing together in one body a variety of services, as opposed to their being provided by three separate bodies, allow simplification of the process of collaboration, and should also allow integration of a number of activities. As I said in my opening statement, it will allow the care pathway for individuals—right through from the assessment of need to the social work service—to be scrutinised as a whole, and it will allow the information that is gathered at every stage in that process to be considered and used to develop a sense of what is being achieved for the individuals and the quality of the service.

The Convener: Can you give me a concrete example of the difference between the existing regulation and scrutiny and the regulation and scrutiny that we will have if Parliament agrees to enactment of the bill in its current form? I read some of the responses to the consultation: the Association of Directors of Social Work and Children 1st—they are but two examples—have some concerns. They state that although the current system might be a little complicated, it does deliver. They are not convinced that streamlining will necessarily lead to improvement in the quality of scrutiny—it might lead to a dilution of the service.

Shane Rankin: Some of the comments that were made in evidence question how we will know whether the service has improved—the convener alluded to that in her question. I suppose there are two aspects to the answer. First, the existing bodies, some of which have not held their responsibilities for very long, brought together a number of different services into the organisations in which they currently conduct their work, and they have shown considerable success in simplifying the approach and in providing better assurance and a clearer sense of how services need to be improved. That argument for simplifying the scrutiny arrangements follows through to the proposed amalgamation of a series of functions.

Secondly, the detailed work on developing the approach to integration and simplification is in progress as we proceed with the bill. That work is being done in collaboration with the existing bodies and stakeholders of all kinds, from service providers to umbrella bodies and so on. In doing that work, we are starting to arrive at some of the solutions—some of the integrations and simplifications that might, in due course, be possible. We have not arrived at a conclusion as to how the business model for the new organisation will take shape, but that work is in hand.

The answer is also partly about whether the public will be more assured by reports from the future bodies. As the new organisations take shape and take hold of their responsibilities, we will have a sense that they can describe more effectively the outcomes that are being achieved

through the collaborative work that they are undertaking and the approach that they are adopting.

The fact that the Government has moved towards a much more outcomes-based approach with local government is making scrutiny of many services much more challenging. The enabling of collaboration between scrutiny bodies that have a particular service focus—requiring that they collaborate, and simplifying that process—allows assessment of outcomes to be achieved and the quality of service to be improved.

14:15

The Convener: I realise that you tried very hard to answer my question, but I am just a simple politician and am struggling to grasp what the Government is attempting to do here. Could you give me one concrete example of what will be different in the new streamlined scrutiny body, and tell me how the services that it delivers will be different? I fail at the moment to understand why legislation is necessary.

Shane Rankin: I think I tried to explain how, by bringing together inspection of social work and of care services, for example, one creates the opportunity for the single body to scrutinise the range of interventions for individuals, from provision of care services to social work services and all the bits in between that go towards ensuring that someone who is in need of care is treated properly and effectively and is provided with the services that they need. In bringing those together in one body, you are simplifying the scrutiny of the range of services—

The Convener: For whom are we simplifying it?

Shane Rankin: You are simplifying it for the providers and procurers of the services, and you are providing more assurance for the public.

The Convener: How will the public be more assured? Will it be just by hearing you say that the service is streamlined? How will you demonstrate that?

Shane Rankin: I am not trying to say that streamlining will make the public more assured; rather, I am trying to explain that streamlining scrutiny of the care pathway will ensure that the services that are interconnected are provided to individuals effectively and appropriately and are of good quality.

The Convener: As part of its consideration of the bill, did the Government consider whether improvements to scrutiny could be made without merging the organisations?

Shane Rankin: Yes. The proposals are a response to the Crerar review, which resulted in a series of recommendations to which the Government has responded. A number of those recommendations—many of which are about simplification, streamlining, co-ordination and collaboration—are already being implemented and have begun to yield some benefits in the work that bodies are doing, and have had an impact on the public and service providers.

The Convener: I had an opportunity to meet Professor Crerar when he published his report. I grasp the desire in the public sector to streamline things and make them as simple as possible. Equally, however, Parliament has a duty to ensure that any changes will improve services and scrutiny. Maybe it is just me, but I am struggling to see how the changes are going to make any concrete difference to the system, let alone improve it. I appreciate that the co-operative arrangements at the moment might be complicated, but it strikes me that that complicated co-operation is working. I need to know why the change is viewed as being appropriate.

Shane Rankin: I will make one further attempt to shed some light on the matter. One basic principle of the Crerar review, and the response to the review, was that scrutiny should be made more proportionate for service providers.

We are already seeing the major scrutiny bodies including HMIE, SWIA and the care commission provide some co-ordination in their scrutiny of local government services. That is beginning to lead not to less scrutiny, but to scrutiny that is better targeted at poorer-quality service providers. Taking such an approach to providing more proportionate scrutiny is a key strand in all this; it will allow the new body to provide a proportionate approach to scrutiny of the local authorities. The information from care-service inspections can also be used to inform the overall sense of how services are provided in a locality. Progress on making things more proportionate is already yielding benefits and should yield further benefits in the future.

Val Cox (Scottish Government Children, Young People and Social Care Directorate): You asked for a concrete example, convener. I am not sure that this is such an example, but it is an attempt at one. The new arrangements will pull together in one body the scrutiny of the strategic functions around the provision of a range of social work and social care services—services that rest at present with the local authorities in respect of their social work function—and the individual care pathway, as Shane Rankin said. The latter is the technical and jargonistic term that we use for an individual's use of a care service. The new scrutiny regime will enable us to get a clearer picture of the quality of the service that is provided to service users and the quality of, for example,

the local authority commissioning arrangements that led to the service being put in place and made publicly available.

In essence, the new body will bring together the operational function—which is where a great deal of the activity of the care commission rests at present—and the strategic local authority function. In practice, those operational and strategic responsibilities already come together in the experience of the service user. Under the current arrangements, scrutiny of those two core components is somewhat fractured. I have not helped you, have I?

The Convener: Unfortunately, you have not. I return to Mr Rankin's point: the new body will lead to a more proportionate level of scrutiny. Surely proportionate scrutiny could be delivered by the existing bodies? Why do we need a new agency to do that? Surely this not about having a new agency but about the existing remits and practice. If there was the will for the current inspection agencies to undertake their work in a more proportionate manner, they would do that. If that is the case, what is the driver for the new agency? What makes it different from the existing situation and what makes it better? That is what I am trying to get at.

Shane Rankin: I return to my earlier point: this is about trying to make things as simple as possible in many different ways. We are trying to streamline the process and ensure the simplest possible line of accountability for scrutiny of care and social work, which are interconnected.

The committee has also received evidence that things would be so much simpler if there were only one scrutiny body. Although the argument has merit—indeed, Professor Crerar supported such a move—we can go only so far at any one time. As I tried to suggest earlier, several years ago the current bodies simplified and streamlined things and brought together a raft of functions that had, up until then, been fragmented. That move has led to significant improvements in a number of the areas of scrutiny in which they are involved. The bill is about going a stage further and trying to make things even simpler and more streamlined.

The Convener: I am going to let my colleague Liz Smith have a shot at getting me some clarification on this matter.

Elizabeth Smith (Mid Scotland and Fife) (Con): Can I get some clarification on the fundamental question whether the main driver of the bill is improvement of scrutiny or simplification of and reduction in scrutiny?

Shane Rankin: What I am trying to say is that there are a number of drivers in all this. Given that the Government's response to the Crerar review has been to simplify and improve scrutiny, we are trying, if you like, to improve scrutiny through simplification.

Elizabeth Smith: Some of those who have submitted evidence—I can think of three such submissions—made the very strong point that they are not yet satisfied that improvements in terms of simplification of the process will result in a qualitative improvement. Some have even suggested that the process could result more in amalgamation than in integration. What is your answer to such concerns?

Shane Rankin: As I said a little while ago, we are working through the process of ensuring that the proposed bodies will, when they are established, provide the best integration and simplification. Indeed, we are collaborating with the current bodies to find a way in which to do that. We are not suggesting that we have the perfect business model for these organisations, but we are pursuing them on the basis that we are convinced that simplification, amalgamation and integration provide a platform for improving scrutiny, which, after all, is essential.

Elizabeth Smith: The key point, however, in some of the evidence—if I have read it correctly—is that there is a difference between amalgamation and integration. What the public and the main stakeholders are looking for is the conviction that we will be able to deliver a better service that has a quality value that, in your view, the present system does not have. I am slightly concerned that a lot of evidence that the committee has received suggests that there is confusion about what should be amalgamated or integrated, so it would help the committee, which obviously has to recommend to Parliament how it scrutinises the issue, if you could tell us where this approach will lead with regard to the quality of delivery. The key question is whether functions will be fully integrated or whether there will simply be an amalgamation of two bodies that do different things.

Shane Rankin: We are clear about what amalgamation means—it means the amalgamation of functions that are set out in the bill. What we need to develop and work through with existing bodies and stakeholders is the exact way in which integration will flow from that amalgamation. We are not saying that we have the perfect answer and that it will work in such and such a way; what we are saying is that we do not want to lose or dilute in the process the very effective scrutiny that the existing organisations are carrying out. Instead, we want to develop from that point methodologies that allow integration around the care pathways, as they are described.

Elizabeth Smith: Children 1st was slightly concerned that the process might involve a reduction in consultation of key groups. Do you accept that criticism?

Shane Rankin: Do you mean the process of developing methodologies?

Elizabeth Smith: Yes.

Shane Rankin: I hope that that is not the case. I think that we have got to this point with the legislation as a result of the strong participation of and engagement with stakeholders and that is how we envisage taking the process forward. The knowledge and expertise, the alternative ideas and the best solutions lie with the stakeholders and the service providers.

14:30

Elizabeth Smith: Are you happy that the new body will continue to involve itself in such consultation to a full degree and that some people will not be missed out because of a simplification of the structures?

Shane Rankin: To a degree, the requirement for user focus that is contained in the bill is about emphasising that—it is about saying that that is what the scrutiny bodies need to do. Many of them do it extremely well already. It is a question of ensuring that they do it thoroughly and appropriately for the communities or providers that they scrutinise.

Elizabeth Smith: I have a final question, if that is permissible. Why do we need legislation to do that?

Shane Rankin: Because we need to change the joint inspection provisions and a number of the arrangements for the care commission. Those are the two examples that occur to me.

Gillian Russell (Scottish Government Legal Directorate): To put it at its simplest, we are legislating because we are creating a new body with a new set of functions, and that needs to be delivered through legislation.

If your question is more whether the existing bodies could not just work more effectively together without legislation, the view has been taken that the best way of achieving that is to create a new body with a new set of functions and to put in place an appropriate legislative basis for that body to develop.

Shane Rankin: A loosening up of some of the arrangements under which the care commission operates is critical to the creation of social care and social work improvement Scotland. The intention is not to challenge what the care commission does, but to allow the organisation to be more proportionate in the scrutiny of care services by recognising that there needs to be more flexibility with regard to how that is done and the frequency with which it is done.

Ken Macintosh (Eastwood) (Lab): HMIE and the Social Work Inspection Agency have voiced concerns about losing their agency status. Could the members of the panel say what they believe the pluses and minuses are of losing independence and becoming NDPBs?

Shane Rankin: Do you want us to describe what HMIE and SWIA think the pluses and minuses are?

Ken Macintosh: No. I want to know what the Government's position is on the pluses and minuses of those bodies losing their agency status.

Shane Rankin: I suppose that it is not entirely a matter of the advantages and disadvantages of the loss of agency status. The agency status arrangement works perfectly well and, in the case of HMIE, it is clear that it is being sustained. The bringing together of SWIA and the care commission, and of their functions, responsibilities and staff, into one organisation is about recognising the difference in scale of the two organisations and the practical difficulties of taking the care commission into an agency as opposed to taking SWIA into an NDPB. The fact that that is probably one of the biggest drivers of the proposed change is in no way to say that there is anything at fault with the agency approach. The bill is not about diluting the status of social work inspection by bringing SWIA into an NDPB. In fact, the position is very much the reverse, as the Government's plans to make the chief social work inspector a Government post show. It is a question of ensuring that what we get from an agency that is close to Government and which provides direct policy advice to it is not lost by the arrangements that the bill puts in place.

Ken Macintosh: Do you think that the new body will be able to provide policy advice in the way that SWIA currently does?

Shane Rankin: No. I was saying that the proposal whereby there will be a chief social work adviser within Government replicates one of the roles that SWIA's chief inspector has, which is a role that cannot entirely be delegated to the chief executive of the new NDPB.

Ken Macintosh: There will be a post of chief social work adviser, but it will not be part of the new body. The chief adviser will not have the advantage of being a practitioner as well as an adviser.

Shane Rankin: But they will have an opportunity to work closely with the organisation, use the evidence that it has, sit on a board and so on.

Ken Macintosh: Will the relationship between ministers and these bodies change? In particular,

will there be more ministerial intervention? I believe that the bill will give ministers more powers of direction.

Shane Rankin: I do not think that the relationship will change. I cannot see why it would. My colleagues might want to comment on that.

Adam Rennie (Scottish Government Primary and Community Care Directorate): Ministers have the power to issue directions to the care commission, and the bill simply replicates that power in respect of social care and social work improvement Scotland.

Ken Macintosh: I believe that it is a modest extension of ministerial powers. However, added to the lack of an independent state for the agency, I worry about the relationship that will exist between ministers and the new bodies.

Shane Rankin: Could you clarify what you mean by

"lack of an independent state"?

Ken Macintosh: The bodies are losing their agency status—that is the key issue.

Shane Rankin: One of them is.

Ken Macintosh: One of them is, yes. Further, there are other powers in the bill that could allow ministers to take decisions at a later stage—I suppose that that is a different argument, however. The point is that those bodies have expressed concerns about what the relationship will be. As advisers to the Government, have you weighed those concerns in the balance?

Shane Rankin: Very much so. I think that I have described some of the key drivers in that argument and some of the attempts to ensure that we do not lose the benefits that exist in that close relationship between SWIA and Government.

The Convener: Did the Government have any particular concerns about the evidence that was submitted by SWIA in relation to staffing? SWIA expressed concern that many of its staff would prefer to remain in the Scottish Government's civil service, rather than transferring to the new agency, as that would give them more opportunities for career progression and movement. Has the Government considered that issue?

Shane Rankin: The Government continues to consider it, and discussions are taking place between the Government's human resources director, my team, the SWIA staff management and trade unions about the possibility that, if staff who have transferred to the new social work improvement body decide, within a specified period of time, that they do not wish to stay with the organisation, they can be reappointed to positions in the Government. That flexibility will ensure that the transition is not as unsettling as it might otherwise be. We want to find ways of lessening the challenge for people and providing them with a way to go back into the Government if they would prefer to do that. We are discussing a number of ways of ensuring that staff see the opportunities that are offered by the new organisation and that it does not become unduly difficult for SWIA to carry out its functions in the period leading up to the start-up date of the new organisation.

The Convener: I expect that some of my colleagues will follow up on the issue of the transition later.

Margaret Smith (Edinburgh West) (LD): There is a perception that some of the joint inspections that have been undertaken by HMIE have been helpful and have pinpointed ways in which services—fundamentally, child protection services—can be improved. Of course, members of this committee are trying to find ways in which services can be improved. The bill extends the provision for joint inspections. Can you give us some hard examples of what that extension will mean for service users and of the improvements to the service that there might be?

Val Cox: It is important that the extension of the powers on joint inspection effectively recognises the increasing complexity of the issues that many people who use services face, and the reality that those issues can rarely be met by only one agency or service provider. By extending the joint inspection powers to include adult services, we will be better able to get a clear holistic picture of the range and quality of services that individuals use to meet their range of needs. An example might be someone with mental health problems who also has difficulties to do with their use of substances and who as a result engages in offending behaviour and therefore comes to the attention of a social work department, the police and psychiatric services. The extension of the joint inspection power to include adult services will make it possible to examine the quality of the range of services that that one individual in my hypothetical case uses. That person has a range of problems, including mental health and alcohol difficulties. They might be a parent, so there might be concerns about their parenting capacity. The extension of the power will enable all those issues to be examined and will allow the range of services that the individual receives to be examined.

Margaret Smith: I seek an assurance that there will be no diminution of the powers that are currently available in relation to joint inspections. I am thinking about issues such as powers of entry and powers to require sharing of information.

Val Cox: I do not believe that there will be any reduction, but my lawyer might want to comment.

Gillian Russell: The intention is to maintain the current suite of powers in relation to joint inspections. The detail of that is currently under discussion, but the expectation is that the detail will be in regulations and a statutory code of practice to which anybody carrying out joint inspections will have to have regard.

Christina McKelvie (Central Scotland) (SNP): I will pick up some points from earlier questions. Is it fair to say that the joint inspection provisions that were put in place a few years ago stopped some of the duplication that was going on? A social work department might be inspected by one body, while its older adults unit is inspected by the care commission. Will the new agency put a complete end to that type of duplication?

Shane Rankin: That is an interesting question. Until now, the joint inspection powers have related to children's services. Joint inspection is a way of ensuring that all the agencies that have an interest in children's services are engaged and involved in the scrutiny arrangements. That ensures that, when services are provided from a number of directions, they are all scrutinised. The bill will extend the provisions beyond children's services and child protection. In that sense, it will definitely create a different framework within which services can be inspected. Joint inspection also supports the duty of co-operation and reinforces the outcome-based approach of the concordat and the national performance framework. Therefore, it is one of a number of ways of ensuring that scrutiny looks at what happens to the individual rather than just the service—it is about looking at the outcome. Therefore, the powers should help to avoid duplication and ensure that services are examined in the holistic way that we keep describing.

Christina McKelvie: Anybody with a background in social services will know that we should take a person-centred approach, which means that we should start from the person and work out, rather than start from the services and work in. I welcome that holistic approach.

My next question is also on duplication. How will the situation be improved for a parent who is looking after a young adult with a learning disability who is moving from children's services into adult services and who is suddenly faced with a range of agencies?

14:45

Val Cox: The extension of the powers around joint inspection will enable the new scrutiny body to examine the interface between existing services and to deal with transitions in a better way than has been the case so far. We know that many of the problems that have arisen in the past, and which have led to tragedies in the lives of people using services, have occurred at points of transition.

It is clear that there are numerous points of transition in an individual's life. Christina McKelvie has given a powerful example. Under the existing powers it is entirely possible to examine holistically the range of services that a child or a young person accesses, but it is currently not possible to do the same once that individual becomes an adult in the eyes of the law and begins to access a range of adult-oriented services.

The new arrangements will manage that transition period, by understanding the quality of the transitions and—crucially—helping service providers to improve them. One of the powerful drivers behind the reform programme is the intention to have a strong and overt focus on improvement, and on the capacity of services to improve themselves.

Christina McKelvie: I am sure that Val Cox agrees that to improve services it is necessary to have a highly motivated and qualified workforce. The Scottish Social Services Council has raised concerns about whether the new agency will be able to enforce the code of practice on employers, and whether it will be able to enforce and monitor continuous professional development and minimum qualification development programmes for staff who are working in care services. Will that make a difference? Will those concerns be addressed?

Val Cox: I believe that the SSSC's concerns are being addressed. Officials are certainly considering amendments to the existing regulations on conduct.

Gillian Russell: We are seeking to amend section 53 of the Regulation of Care (Scotland) Act 2001 to make it obligatory for social service workers and their employers to comply with the SSSC code of practice. That has been discussed with the SSSC.

Christina McKelvie: That is a very welcome advance—I know from my background in training social care staff that it would have been welcome a few years ago, but it is good that it is happening now.

The British Medical Association has raised the same concerns about the sharing of information without consent that it raised did a few years ago with regard to the joint inspection of children's services. How will such concerns be addressed? Does the issue need to be revisited in the context of the extension of joint inspection to adult services? Should consent be paramount, or should there be a balance?

Shane Rankin: There are two answers. First, we are not aware that the legislation that provides for joint inspection of children's services has raised any particular problems about information sharing to date. The other aspect is that the arrangements for sharing information will of course be governed by a code of practice, which will be very much open for consultation and development with stakeholders and interested parties. Those are the two protections.

Gillian Russell: Obviously, any issues in this area will raise concerns about compliance with article 8 of the European convention on human rights. The public bodies will need to comply with the requirements of human rights legislation, so whatever they do must be appropriate and in accordance with the law. We are not changing the terms of the Data Protection Act 1998, as it is a reserved piece of legislation, so the bodies will have to ensure that they comply with it.

On the specific point about whether consent should be express or implied, as Shane Rankin said we are still discussing issues to do with consent. We will develop a code of practice that will deal with those issues and which will be fully consulted on.

Christina McKelvie: I have a final question on that point. The BMA has suggested that anonymising information is a way forward and the Scottish Information Commissioner has raised his own concerns. Can you reassure us that those concerns will be taken on board and that the Information Commissioner and the BMA will be listened to?

Gillian Russell: It is fair to say that their comments will be considered. I do not know whether, ultimately, their views will hold sway, because other issues must also be taken into account. There are sufficient safeguards in place for joint inspection, not least that anyone who is dealing with information must treat it as confidential and use it only for specific purposes. There are ways of safeguarding information that might not amount to anonymising it. All those issues are being considered.

Claire Baker (Mid Scotland and Fife) (Lab): In the submissions to the committee, there seem to be two issues to do with transitions, which the convener touched on earlier in relation to SWIA. One is continuity and retaining expertise in the system. I still have concerns about the SWIA option, because the discussion earlier was about what options people might have to move back into the Government. If expertise goes with those people, how will expertise and knowledge be retained in the system? The other concern, which was raised by HMIE, is whether the transitional provisions will be robust enough, particularly in relation to work on child protection. What thought has been given to those two issues and what actions might be planned to deal with those concerns?

Shane Rankin: You ask a number of questions. On the robustness of the transition arrangements, particularly in relation to child protection, HMIE is leading on child protection and a three-year cycle has just kicked off and, obviously, it is planned that the third year of the cycle will be led by social care and social work improvement Scotland. One cause for reassurance is that, at present, leading joint inspections involves leading a team from a number of professional disciplines that contribute to the inspection and those disciplines will still need to participate in the third year. It is the leadership that will transfer across, but the methodology need not change in any significant way.

You are correct that expertise needs to go across to the new organisation from both SWIA and HMIE. The work that we are doing to develop the business models and the sense of how the organisations work is being done openly with stakeholders and the existing bodies and is being driven by the stakeholders. We are trying to ensure not only that we get the best solution but that a sense of ownership of what is emerging develops across as wide a community as possible, so that by 2011 there will be a strong sense of how the organisation should function and people in the existing organisations will be able to see what they are getting involved with, because to some degree they will have had an opportunity to shape the new organisation. That provides a chance to spell out the opportunity and to encourage people to want to go with the new organisation.

Kenneth Gibson (Cunninghame North) (SNP): I will ask a couple of questions about order-making powers. Section 10 enables ministers to bring forward regulations

"which they consider would improve the exercise of public functions, having regard to—

(a) efficiency,

(b) effectiveness, and

(c) economy."

Ministers can add to or remove from the list any body that has public functions. However, organisations such as Children 1st and the Aberlour Child Care Trust and Scotland's Commissioner for Children and Young People have expressed concerns about the issue. Do such order-making powers not diminish the level of scrutiny that is proposed for making changes to public bodies?

Shane Rankin: We are not directly involved in those provisions in the bill. Although they raise

some issues for bodies that are affected by parts 4 and 5, we are not directly involved in those provisions so I am afraid that we are unable to comment. We are happy to take the questions and to provide answers in writing subsequently, but I cannot answer that question at this point.

Kenneth Gibson: Convener, I realise that such a question could be answered by ministers, but I had thought that the bill team would have been able to answer all our questions on the bill today.

The Convener: As long as the questions do not stray into areas of policy, the bill team should be able to answer them. I am not quite sure whether Mr Rankin is suggesting that the issue relates to a policy decision that has been taken by Government ministers.

Shane Rankin: No, it is a question of logistics. As you rightly say, the bill team would be able to answer the question, but the bill team is currently in front of the Finance Committee to answer questions on the bill. We would need to field the bill team to answer that question. I am afraid that the issue is a matter of practicalities.

Kenneth Gibson: We would need to ask for a transfer from the Finance Committee to get our questions answered. Have you just come off the subs bench for our committee meeting because the first team is at the Finance Committee? I am being facetious, but I hope that you will be able to answer my second question.

Section 13 will enable ministers to make regulations to remove or reduce burdens on business, the public and third-sector organisations where those burdens result from any legislation. That could include abolishing or changing the functions of a body. The power will replicate for devolved areas powers under the Legislative and Regulatory Reform Act 2006. What has been the impact of that act? What improvements, if any, are envisaged in rolling out that legislation through the bill?

Shane Rankin: Can I be clear about what the question relates to?

Kenneth Gibson: Again, the question relates to order-making powers. Should we not be asking questions about that part of the bill at this stage?

Shane Rankin: We cannot answer those questions for you. If I were to try, I might lead you into the wrong place.

The Convener: Although this is not Mr Rankin's fault, there is a serious issue about proper and due scrutiny. The committee has a responsibility to take that role seriously, as I think all members of the committee do. We are working to a timetable that has been determined and agreed by the Government. Perhaps it might be helpful if Mr Rankin and his team reported back to the bill team leader the committee's dissatisfaction that you are unable to answer some of our questions that we have a legitimate right to pursue. I am grateful to you for your honesty in not attempting to answer questions for which you do not have the detailed knowledge to be able to answer. Equally, this is the committee's only chance to put questions to the bill team on the order-making powers in the bill. It is quite unhelpful that we are unable to pursue those issues today.

Shane Rankin: I understand that. I can offer to take your questions and to provide full answers in writing if that is helpful. I will report your dissatisfaction to the bill team.

The Convener: That would be helpful. Perhaps, when the *Official Report* of today's meeting is published, the bill team can reflect on Mr Gibson's questions and provide a written response.

Kenneth Gibson: Convener, it is a bit odd that we cannot ask questions on an issue that requires scrutiny. The order-making powers in the bill are a key point that has been raised by the organisations from which we will take evidence later today. I am sure that they will also be concerned that we have been unable to get any answers on the issue this afternoon.

The Convener: I have a question on the financial memorandum. I understand that the Government anticipates that, over a four-year period, the cost of the changes will be £5.56 million and the expected savings will amount to £6.2 million. That is a net saving of £640,000. That does not seem much of a saving, given the scale of the change. Is it really worth it?

I am not being facetious. I am just asking.

15:00

Shane Rankin: That question was asked in a slightly different way earlier by Elizabeth Smith, who asked about the driver for change. The driver for change is improving the quality of scrutiny and public services; it is not saving money, although the intention is that it will cost less to provide the required scrutiny.

The Convener: In that case, does the Government agree with Unison? Unison is not convinced that there will be any savings as a result of the measures. Is it possible that we will go through all the changes and find that the new system costs us the same amount of money or even more?

Shane Rankin: We have put in the financial memorandum our sense of what the costs will be. It is estimated that the system will cost less.

The Convener: But not very much less.

How does the Government view the care commission's concerns about the lack of consultation by the bill team, particularly on the financial memorandum?

Shane Rankin: The care commission will no doubt comment on such issues later. It has been very helpful to the Government, as other bodies have been, in putting together the financial memorandum, and has provided us with a great deal of information and experience, which it has gained from establishing its own organisation. That has helped to guide the figures and the approach that we have taken.

I think that the care commission was concerned about one particular issue: the harmonisation figure. It was concerned about the methodology that was adopted, which it thought could have been more sophisticated and could have gone further at the time. We could not have gone further at the time. I think that the financial memorandum ended up with a harmonisation cost of £780,000. More detailed work has now been undertaken, and an estimate of around £350,000 has been produced. In a sense, the care commission was right. More detailed work could have been done, but it could not have been done in the time that we had. However, it has now been done to help to shed light on the figures.

I do not think that any other matters are in dispute any longer.

Kenneth Gibson: I would like to clarify some figures. I refer to the £5.56 million cost of the changes. Are those one-off changes or will there be subsequent on-going costs? Will there be £6.2 million of savings over a specific period? Are they savings over three or four years?

Shane Rankin: Over three years, I think.

Kenneth Gibson: Does that mean that there will be on-going savings year on year?

Shane Rankin: There should be.

Kenneth Gibson: If there is a saving of £6.2 million over three years, we are looking at year-on-year savings of around £2 million, although there might be a net saving of only £640,000 over the first three to four years. Do you hope to save around £2 million year on year?

Shane Rankin: Yes. The savings need to go on. There are one-off transition costs and some on-going costs, but everything is essentially captured within the three-year period in the financial memorandum.

Kenneth Gibson: You are looking for on-going savings of around £2 million a year after that period.

Shane Rankin: I think that that is the number.

Margaret Smith: I want to pick up on the issue of consultation. Usually, people from bill teams or organisations who come before us have been able to look at formal consultation exercises that have been undertaken, and to see what has happened as a result of that consultation and what kind of input there has been. Obviously, the consultation has been slightly different in this case. How have you consulted on the bill?

Shane Rankin: Much of the consultation concerned the Crerar review, which established the principle that having fewer bodies would improve scrutiny and make it more proportionate. There was a great deal of consultation on all of that.

The Government decided in early December last year that it would create a new social care and social work body and a new health care improvement body and that it wished to legislate in the PSR bill. There had been no draft legislation—no detailed proposals on the shape of the bill—and, from that point, Government officials have engaged directly with the existing scrutiny bodies and a number of the policy interests across the Government to develop the necessary detail of the proposed legislation.

At the same time, officials have engaged directly with key stakeholders from the social work side through the ADSW, as well as from the Convention of Scottish Local Authorities and the Society of Local Authority Chief Executives and Senior Managers. They have also engaged with the 11 trade unions that are affected by the proposals, engaged with a formalised reference group, published bulletins on the progress of the work and developed draft legislation that was tested with as many of those groups as possible as it moved forward. Those structures have been sustained to carry us through into the rest of the work as the bill passes through the Parliament and the development of business models takes shape and progresses.

The Convener: That concludes the committee's questions to you today. I thank you for attending. We look forward to receiving further written evidence on the points that Mr Gibson pursued.

The committee will suspend briefly to allow for the changeover of witnesses.

15:07

Meeting suspended.

15:11

On resuming—

The Convener: We return to our continued consideration of the Public Services Reform (Scotland) Bill.

We are joined by Alexis Jay, who is the chief executive of SWIA; Jacquie Roberts, who is the chief executive of the care commission; Graham Donaldson, who is senior chief inspector with HMIE; Harry Stevenson, who is an ADSW executive committee member; Geraldine Doherty, who is depute and registrar with SSSC; Tam Baillie, who is Scotland's Commissioner for Children and Young People; Ruth Stark, who is a social worker representing the British Association of Social Workers; and Annie Gunner Logan, who is the director of Community Care Providers Scotland. We had understood that John Fair, who is a regional officer with Unison Scotland, would join us this afternoon, but he has not arrived yet. He may show up and join the panel later.

Most of the panel members sat through our evidence from Government officials and so have had the opportunity to guess which questions we are likely to ask, and perhaps to prepare their answers. We will not allow you to make opening statements, which might mean that we would be here all day, so we will move straight to questions. You have submitted written evidence in advance, which committee members have had an opportunity to read.

I am conscious that you will all have wide and varied views on many of the subjects, but I wish to keep the discussion reasonably focused so that you are not here for an overly long time and so that the committee can deal with the other items on today's agenda. It is fine if you want to follow up on a point that someone else has made, but you should do that only if you have something additional to say, rather than simply to echo your agreement, unless you think it is important that you do so.

I begin by asking you about your general views in relation to the merger of your organisations, and whether you think that the change will deliver improvements.

Jacquie Roberts (Scottish Commission for the Regulation of Care): It is helpful to consider the issue from the point of view of members of the public. I will put myself in the position of the grandparent of a child who is living with drug misusing parents. As that grandparent, I would want to know that there was good scrutiny of the multi-agency system, and whether health, education, social work and the police were working well together. I would want that to be checked. I would also want to know that social work services were being delivered and checked. If the child went to a childminder or a family centre, I would want to know that the quality of those services was checked and that good services were being delivered to the parents.

From that point of view, we can see why it would help if the checking of all parts of the system was done by one body. There would be communication and working out where the greater risks were and where more checking was needed. That example might help you to understand why it might be good to put everything together.

15:15

The Convener: Thank you—at least I have an example at last.

Annie Gunner Logan (Community Care Providers Scotland): I will give another example, but from the service provider's point of view. At present, the care commission assesses the quality of a service pretty much in isolation from anything else that happened before the service was provided, whereas a person who uses the service has had their needs assessed, a commissioning and procurement process for the service might have been undergone and a care management process goes on for the individual, with a care plan being put together. At present, separate bodies examine those things. From our point of view, it would be a real change to have one body, which I hope would use the same set of measures and standards, to hold all parts of the system to account for what Mr Rankin earlier called the care pathway. There is the potential for that to happen but, in our submission, we raise questions about whether the bill will achieve that or whether it will be achieved through the business model that the new body employs.

The Convener: That leads me on rather nicely to my next question Do we need legislation to make the various people work collaboratively within one organisation, or can that collaborative working be achieved without legislation? Is the driver for change the right one? Is legislation necessary? I do not mean whether it is necessary in order to create a new body or to abolish other ones, but whether the establishment of a new body is right and the only way in which to deliver co-operation and collaborative work in a way that is much clearer and easier for people to understand.

Alexis Jay (Social Work Inspection Agency): As someone who has been responsible for leading multi-agency inspections of adult services—which are the parallel to joint inspections of children's services but without the underpinning legislation to enable and facilitate them—I can certainly say that the lack of legislation has led to many practical difficulties. Different approaches are taken and different legislation governs access to health records and other types of records. There are different ways of following up action plans and different approaches to checking what is done. I say that as someone whose organisation has led multi-agency inspections of services for older people, people with learning disabilities and

people with addictions, as well as inspections of criminal justice social work services. With so many bodies, it is difficult to rationalise the process when there is no underpinning legislation to compel people to do so. The parallel in the inspection of children's services is pursued more easily because of legislation: with adult services, everything must be done by co-operation, which does not always achieve what is required.

Jacquie Roberts: To return to my example of the grandparent of a child with drug-misusing parents, it would be helpful for the grandparents to know that there was one body that was responsible for overseeing the whole system. A reduction of the number of bodies will make sense to some members of the public.

The Convener: In an answer to me, Mr Rankin said that the new body would lead to a more proportionate level of scrutiny. Are you confident that that will be the case? Are you equally confident that we will get the balance right and that services will be scrutinised properly? Can we say confidently that what could or should be inspected will be inspected?

Alexis Jay: The Social Work Inspection Agency always intended, after completing its first round of performance inspections of councils, to be more proportionate, to reduce the amount of inspections and to target its work at organisations that were most in need. That was the plan, regardless of whether the PSR bill existed. That might well be true of other organisations.

It is true that we are focusing more on improvement, key to which is the competence and ability of providers to evaluate themselves. It is quite right that they should be responsible for improvement. However, in response to your question whether we are targeting the right areas, I think that we need to recognise that organisations are at different stages of being able to self-evaluate accurately. As a result of that, we will continue to require some professional scrutiny. I am sorry to say that some of the worst performers are those who are least good at telling whether they are any good at providing services. That is the fairly general view across scrutiny bodies: providers still have a fair bit to go to be able to self-evaluate accurately, and we will still have to verify or test things to be confident of the appropriate amount of scrutiny to be carried out.

Graham Donaldson (HM Inspectorate of Education): As the question implied, organisational structures alone do not automatically deliver the kind of improvement that we are seeking. If the tests are about ensuring proportionality, coherence and better outcomes for the people who are in receipt of services, I have to say that we are moving to a better position on all those criteria. However, there are undoubted rubbing points and areas where organisational difficulties have made outcomes more difficult to achieve. The process could be facilitated by tidying up the structure, although whether or not we achieve change will be determined by the behaviours that lie behind it.

Harry Stevenson (Association of Directors of Social Work): Organisations work in slightly different ways; for example, some focus on outcomes, some focus on standards and others are still working on outputs. As a result, they are starting from different positions. If the proposals are to have any benefit, it should be the recognition that, as we deliver services in an integrated way in communities and people's homes, it makes sense to integrate the scrutiny of such services. Indeed, that has been a benefit of child protection inspections.

Information sharing was mentioned earlier. In that respect, I have to say that, in the move from the Crerar review to the bill, we are now missing one of the key players: the health service. I think that that might prove to be a lost opportunity.

The Convener: How might the bill be amended to include health boards? How would you envisage any such proposal?

Harry Stevenson: I am no expert on drafting bills, but I feel—given how reports carried out in communities not only provide elected members, councils and the public with the assurance that they seek, but help with improvement—that much of this should actually be about collaboration rather than about requiring people to co-operate. If the bill is to strengthen scrutiny in any way, it must ensure that everyone is held to account. I think that the Crerar review envisaged a more rounded body to take that work forward. In that respect, I am talking about key professionals who support and protect vulnerable children and adults in our communities.

Ken Macintosh: How will SWIA's role change, particularly given that it will lose its agency status?

Alexis Jay: When the question was raised with the previous witnesses, the committee was right to highlight that the relationship between ministers and agencies is different from that between ministers and NDPBs. As chief inspector, I am also, at the moment, chief professional adviser to the Government on social work issues. I feel that a key issue is access to evidence.

As Mr Rankin pointed out, the Government intends to create the post of chief professional adviser when the new body is created. That role will be akin to the role of the chief medical officer or the chief nursing officer, but it is recognised that there will be difficulties in that. There is an important issue around access to the evidence base that backs up the policy advice that is

provided. It will be important to ensure that that continues to be available.

I should say that any suggestion in the Crerar report or anywhere else that the relationship with ministers is anything other than wholly independent and respectful is simply not accurate, in my experience. I have worked with previous Administrations and the current one and I can say that ministers are always entirely proper and do not interfere in the process of independent inspection.

Jacquie Roberts: From my experience of being the chief executive of an NDPB, I can say that it is possible to use evidence from scrutiny to inform policy departments, officials and ministers directly. It is not impossible to have a good and informing relationship, even though the NDPB is an independent body. However, we support the creation of a chief social work adviser on the same level as the chief nursing officer and the chief medical officer.

Ken Macintosh: Will your organisations' relationships with ministers alter as a result of this merger?

Alexis Jay: If you are referring to the relationship that we have in terms of policy advice, I expect that the relationship probably will change. I meet ministers regularly to update them on our findings and to give them my views and advice on key social work issues. I think that that relationship would not be the same for the chief officer of an NDPB.

Harry Stevenson: I support that view. One of the features that has emerged since the inception of SWIA has been the maturity of the relationship with our senior politicians in Scotland. Some difficult and tough conversations have been had about issues that we sometimes cannot control in social work in Scotland. It will be important to retain access to ministers if we are to maintain the current level of confidence in that relationship.

Ken Macintosh: The background to this issue concerns not only the bill's merger of the two organisations that we are discussing, but also the fact that the bill will create ministerial powers to amend or possibly even abolish a lot of other public bodies. We did not quite get into that before the summer recess.

There is an implication that the relationship between public agencies and the Government might be shifting. Is that to be welcomed or to be worried about? Are you concerned about that possibility, or is it simply a practical measure that will be to the advantage of all?

I am sorry if that is a bit of a speculative question.

Tam Baillie (Scotland's Commissioner for Children and Young People): I offered comment on the scope of the powers in part 2 of the bill, particularly those in section 10. Earlier, someone asked whether ministers having such powers would limit parliamentary scrutiny: I say that it would. That is one of the key issues with regard to the changing relationship between Government ministers and bodies. I answered the question in respect of my position as commissioner and am mindful of the fact that the office that I hold was set up directly by the Parliament's Education, Culture and Sport Committee, rather than by the Government. Recently, we went through a protracted in-depth review that was conducted by the Review of SPCB Supported Bodies Committee. That review resulted in a bill, which will go through Parliament in parallel with the Public Services Reform (Scotland) Bill. I have concerns about whether there will be sufficient time for scrutiny of the order-making powers.

15:30

My other concern is that one of the central tenets of my office is that it must be seen to be independent from Government. The international yardstick that is used for that is the Paris principles. In my view, the inclusion of my office under schedule 3, which is part of the reference in section 10, would compromise that. I can understand the Government looking to be nimble and light of foot by not having to go through full parliamentary processes to make changes in our public bodies, and I can understand its desire for expediency, but I am mindful that there needs to be sufficient time for parliamentary scrutiny. A balance must be maintained and, in my view, the balance has moved too far towards expediency at the cost of parliamentary scrutiny. That is the answer to the question that the convener asked earlier.

The Convener: Thanks for pre-empting my question. Mr Gibson has some more questions.

Kenneth Gibson: Do not steal my thunder, Tam. I was going to ask you that question more or less directly because your submission expressed considerable concern about the issue. I asked the bill team the question effectively on your behalf, given that the committee is an appropriate public forum in which to do that.

I will play devil's advocate and look at the issue from the other side. One of the points that the Scottish Government would make—although the officials who were at the committee today did not—is that the committee would be able to debate the issue for up to 90 days, so there would be parliamentary scrutiny, and that changes would be made only if they were

"proportionate to the aim of delivering more efficient, effective and economical public functions".

If a proposal did not meet those criteria, ministers would not be able to make the changes; if the criteria were met, the committee could still debate the issue for up to 90 days and take it into the parliamentary chamber if necessary. Given that no party has a majority on the committee or in the chamber, that is surely a built-in safeguard in respect of scrutiny. How do you feel about that?

Tam Baillie: Safeguards are built into the arrangements in respect of proportionality, any necessary protections being deemed to be affected by the making of the order, consultation that would have to be carried out, and the parliamentary process. However, it is not 90 days; it is 90 minutes.

Kenneth Gibson: Sorry. We could debate a proposal in committee for 90 minutes.

Tam Baillie: We are already just past 90 minutes in today's discussion. That gives you some idea of the limited parliamentary scrutiny of what could be the exercise of very sweeping powers under section 10.

Annie Gunner Logan: I will comment on the same point. I am extemporising slightly because I did not think that we would get into this territory, but when the Regulation of Care (Scotland) Act 2001 went through the Parliament, we had all kinds of arguments about who would be consulted about what and when as different developments took place. It occurred to us when we read this part of the bill that, although parliamentary scrutiny is certainly an issue, as far as I am aware there is no provision for consultation with anybody about anything before proposals come forward. From our point of view, we are always keen that when there is any change to the regulation of services there should be consultation with service providers, groups of service users and so on. That is also missing from the bill, which is a slightly different dimension.

Tam Baillie: There is a requirement for consultation, but there is a lack of specificity about what that would constitute. My understanding is that the recent process of the Review of SPCB Supported Bodies Committee would constitute sufficient consultation with respect to the use of these powers, and that there would be no need for a parliamentary bill; in the case of SPCB-supported bodies, a bill is about to go through in parallel with the Public Services Reform (Scotland) Bill. There are serious concerns about that.

Kenneth Gibson: Are the witnesses of the view, collectively or individually, that there should therefore be greater clarification of exactly what form any consultation should take?

Tam Baillie: Regardless of the consultation, because of the concerns that I have with regard to my own office I would press for the removal of offices such as my own from schedule 3 on two grounds: first, the lack of scrutiny in comparison with the process that established my office and endorsed its independence; and, secondly, the strong desire among parliamentarians for my office to be seen to be independent. The powers would seriously compromise that independence.

Kenneth Gibson: I am keen to hear from one or two others on the issue, convener.

Harry Stevenson: I was involved in the stakeholder reference group. We are at the stage of looking at implementation, the timescale for which—from the change management point of view for the organisations that are directly affected—becomes a driver. The ADSW has made the point about the need for more consultation and the lost opportunity in that respect in terms of the process. There needs to be a fix between the two. Uncertainty is a big distraction. As others said about the scrutiny process, business continuity is required. We need to assure both politicians and the public about the good quality of the services that are being delivered in Scotland every day of the year.

The Convener: I did not notice Ruth Stark indicating earlier that she had something to say. Before we move on to questions on the extension of joint inspections, I will bring you in. I do not want you to think that we had forgotten about you.

Ruth Stark (British Association of Social Workers): The point that I was trying to make earlier for BASW was about the difference that having one body in place of several would make. Practitioners on the ground think that current inspections are complex, repetitive and time consuming. No one in any social services department wants a bad review; everyone works towards getting a good report. Evidence from my members shows that, during review periods—this is a significant point—contact with service users drops from 12 per cent to 6 or 7 per cent. That is a significant loss to people out there in the community. The bill should bring together functions so that more emphasis can be placed on service improvement and not on working towards an inspection in a way that reduces the delivery of day-to-day services.

Geraldine Doherty (Scottish Social Services Council): My focus is on what we will gain. I represent the workforce regulator. I was pleased to hear the committee's questions on the codes of practice. Through the proposal for only one regulator, the bill gives us the opportunity to gain a better interface between the workforce regulator and the service regulator. The SSSC has a good relationship with the care commission and SWIA.

Gillian Russell spoke of moves to introduce a requirement that employers and workers comply with the codes, but that is already in the regulation of care legislation. We want to go further than that.

At the minute, if a registered worker does not adhere to the code of practice for workers—I am talking about a serious situation—the SSSC takes action. However, the same action cannot be taken against an employer. As the committee will know, it is seldom the case that one worker is the source of poor practice. It is more often the case that infrastructure issues are involved, such as the way in which employers recruit their staff and how they safely manage, supervise and support them. We argue strongly that the bill should contain a clear requirement on the new body to take account not only of the codes but to take action where employers do not adhere to their code of practice. If they do not follow the code—for example, in not supporting their workers properly—they endanger service users.

The expectation is that information sharing is done informally. We should make better use of information. When we investigate the conduct of individual workers, we often find information on service quality and management. Equally, when the service regulator looks at service provision, it often pinpoints the poor practice of individual workers. We share information informally, but that should not be done informally. The bill needs to include not only the right but the responsibility to share information. That would ensure good services for vulnerable people.

Ruth Stark: The code of practice for employers needs to be scrutinised and enforced. Ultimately, if we want a confident, competent workforce, employers have to be made to fulfil their side of the bargain by supporting front-line staff.

I was interested to hear in the first evidence session this afternoon an almost risk-averse approach to the scrutiny of what we do. Those who work in social work services continually balance need, risk and rights. It is much better to think of the work as a balancing of those things, rather than thinking of ourselves as watching our backs all the time and being risk averse, because that does not help people to move, change and achieve a better quality of life.

Margaret Smith: I want to pick up the issue of the extension of joint inspections. Your views on that are implicit in quite a lot of what you have already said this afternoon, but I would be interested to hear anything more specific that anybody wants to say about it.

Harry Stevenson: I reinforce the point that I made earlier. We deliver services to people on an integrated basis in their own homes and their local communities. It makes sense that we take a more rounded view of the types of service that we deliver and the parts that we all play in that. In particular, good communication between different disciplines and different agencies and provider organisations is required and has been beneficial.

In my experience, child protection inspections still feel like inspections of social work services, because the case for a reading links in and follows through. Nevertheless, they highlight important issues between agencies and between professionals, and, importantly, the views of the service user and their carers or parents in the process as well. There has been a step forward in how we respond to the complex way in which we need to deliver services.

Graham Donaldson: Thinking back to the questioning from the previous committee when the current legislation was going through, the legitimate concerns that existed at that time were well addressed in the codes of practice. I am clear that the most powerful aspect of inspections is the way in which child protection inspections can work, with a common, rather than individual, view of all the information that is available. An inspection team can bring the information together and share it within the team. That approach allows us to work from the child outwards rather than from the service inwards, because we can look at the totality of the information that is held on any individual child.

Looking back over 32 child protection inspections, the legislation that was passed in 2006 has proved to be a powerful contributor to the success of those inspections.

Christina McKelvie: Good afternoon. I say to Tam Baillie that I think we are into extra time now, because we have gone past the 90 minutes.

I want to pick up a point that Geraldine Doherty made earlier. When I was in a social work training section, I delivered the regulation of care stuff for members of staff who needed that minimum qualification, and we looked at the code of practice quite a lot. I did not accept their evidence for their qualification unless they knew the code of practice for workers back to front. I was quite a hard taskmaster on that.

I think that the feedback that I got earlier was that section 53 would be amended to compel employers, but perhaps I picked that up wrongly. I wonder whether you picked that up as well.

Geraldine Doherty: I want more assurance about that. At present, in relation to the regulation of care, employers are compelled to take account of our codes, and we have the ability to compel registered workers to take account of them. If they do not do so, we will take action. However, there is no duty on the new body to enforce the codes. Enforcement is needed. It is not required for the

majority of employers who take their responsibilities seriously, but the current position is that, if I go to the care commission or SWIA and say that an employer is ignoring the code, is not supervising their staff properly and is not training them properly, those bodies do not have the right or ability to do anything about that.

15:45

We have had good informal liaison, and the care commission does thematic inspections in relation to the code, but that is not the same as employers being absolutely clear about it in the way that registered workers are. As you know, the whole point of having a shared code was that workers and employers should have responsibilities. At the minute, we can enforce the code in relation to workers, but there is no enforcement in relation to employers. It would be an awful lost opportunity if such enforcement were not included in the bill for the very small number of employers for whom it is required. The majority of employers work well with the codes, but we and the new body need to be able to take enforcement action. A duty to co-operate on the regulation of services and the workforce is also important.

Christina McKelvie: Thanks for that.

I spent much of my social work career working in learning disabilities services so I understand what it is like to take young people through transition—I still bear the scars. It was horrific for some of them to move into adult services and then not get the services that they thought they would get. Does anybody have any concrete examples of how the new agency will address transition? Shane Rankin said that the new agency would enable better-quality transition that would allow it to pick up any gaps in the service and sort them out. Are panel members able to expand on that?

Jacquie Roberts: It would be much better to bring together investigation of the young person's file with looking at the care assessment and care management arrangements, the service that has been commissioned, the quality of service provision, and links with the young person's family and with health, education and perhaps higher education or an employer. The new agency would make the system more understandable and coherent for the family of that young person.

Christina McKelvie: In lots of cases, it is the parents or identified carer who develop the care plan when the young person does not have the capacity to understand why things are being done in that way. It is my impression that a single-agency approach would be more helpful to families in that situation.

That leads us to the BMA's concerns about consent. Consent has always been an issue in learning disabilities services and it is also an issue for people with mental health problems and other medical conditions that inhibit their capacity for either a long period or a short period. Can the witnesses shed some light on the BMA's concerns about consent and tell us about their experience of how it works in children's services? Earlier, Shane Rankin said that no problems around consent had been raised in the past couple of years of joint inspections of children's services. How does viewing records without consent work in adult services? Can the witnesses give us any examples of that?

Jacquie Roberts: From the care commission's point of view, only a medically qualified person can access medical records and therefore interpret them. They use the same professional principles that apply to the medical practitioners who help the person.

Alexis Jay: Children and adults cannot necessarily be put in the same category, given that we are talking about adults who, in some instances, intermittently have capacity—for example, people with dementia or mental health problems can be very capable. We must be sensitive to individual rights.

I am not sure that anybody around the table would want their health records to be read indiscriminately by any inspector or scrutiny body. The regulations must be clear that viewing someone's medical records without consent must not be an open-ended blank cheque—I am mixing my metaphors. There will need to be restrictions on viewing records without consent so that it can be done in a way that will give comfort to those who have genuine concerns about the issue. That would include, for example, not sampling medical records of the population in a certain age group—people should do that only if they have a reason to do so.

Harry Stevenson: I return to transitions. If we are to make the progress that we hope to make in relation to the getting it right for every child agenda, there should be an integrated assessment framework for every child. I would like to think—and I am certain that the ADSW agrees—that we are working to remove practice issues such as barriers to moving on from being a child to adult life and moving towards working in a different way. Uncertainty is an issue for families, as is funding for long-term support arrangements. Integrated assessments are the way forward for every child as they move into adulthood. That is the way in which to give them the support that they require.

I think that we all agree on the principle, rightness and importance of information sharing. However, if we look at the major inquiries—even those that were held in the past year or so—we

see concern about the reality of practice on the ground. Challenges remain for all agencies in that regard. We must win the argument on the need for information sharing and then see practice develop on the ground. Professionals will then have confidence in information sharing.

Some good work has been done in Scotland on gold standard information and electronic data sharing. I refer to the single shared assessment. We have made good progress, but more needs to be done.

Christina McKelvie: You will remember as well as I do the case in the Borders and the concerns that were expressed in the inquiry. Central to the issue was the fact that, because the person involved was an adult, information on risk was not shared properly.

Graham Donaldson: Shane Rankin made a point earlier about child protection inspections, which follow a different process to that which applies in care commission inspections. I want to reinforce that point. In the former, a single inspector can look across and make connections between files from various sources, including medical files. Instead of sharing the information by way of reporting what is in a file, one person looks across the board at a child's records. There is no automatic read across to the process for adults, however. Prior to the passage of the Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Act 2006, concerns were raised with our inspectors. Since then, as Shane Rankin said, no issues have been raised with us during the 32 inspections. That is a reflection of the way in which the code of practice was written and how inspectors have observed it.

Christina McKelvie: I have one further question on the need for motivated and qualified staff. For many years, the cry from social work service staff has been, "Oh no, not another change." Change can demotivate people. How do you, as providers, supporters and employers, use change as a positive experience and not one that leads people to say that?

Annie Gunner Logan: That largely depends on how the business process is taken forward once everything is set up. Providers have expressed concerns, including on whether they will have to make another application to register their service. There is a lot of support among staff in the voluntary sector for the grading system that the care commission is operating. We want that to continue.

I return to the original point about the codes of practice. If I may, I will briefly go off on a slight tangent. Geraldine Doherty pointed out the anomaly in the enforcement powers—she said that one code is enforceable, but not the other. We are also concerned about another anomaly, which is whether the care commission's enforcement powers in relation to services will be transferred to the new body so that it can take significant action if it finds poor practice.

Also, will what I might describe as the non-enforcement powers of SWIA also be transferred to the new body? The care commission can issue improvement notices and enforce them. It can ensure by way of making return inspections that change will happen. However, none of that can happen in the bits that SWIA looks at. That is the real anomaly in bringing things together into the new body. That slight imbalance is an issue.

I am sorry for having taken the first question and not answering the second one. I wanted to highlight the issue, which is significant in that it disrupts the idea of having an integrated and cohesive scrutiny system. The proposed system is neither integrated nor cohesive.

Harry Stevenson: In reality, things are going on. Last week, a meeting was held in my area as part of the new approach to SWIA inspection. Every year, we have to deal with 70 care commission inspections, including in the area of child protection, which was looked at a year ago. From talking to colleagues across Scotland, I know that a sense of proportionality and a reduction in the burden of regulation are required, particularly given the data that we have to report to Government in other ways.

There are also the internal systems through which we look at quality, best value and how to become more effective in service delivery and in responding to the needs of the public.

Work is going on and at this point I do not think that the issue has any resonance with our workforce. There is an issue for the ADSW, in that we have rightly moved more towards self-evaluation and skilling up organisations, but there is also clearly a capacity issue in various organisations throughout Scotland. We offered the view that, given that the situation is changing and there is a greater burden on local authorities and others to provide self-evaluation approaches, which are more complicated because of the outcomes approach, there should perhaps be a shift in resources to recognise that.

Ruth Stark: We welcome these moves; we advocated that they should be in the Regulation of Care (Scotland) Act 2001 when it originally came through; we said that there should be only one body. We are excited by the fact that there will not be repetitive inspections and that people will be able to get down to the work that they want to do. The other outcome that we seek is a cultural change so that there will be no corporate move to work towards inspection and we will be able to

work towards improving services on the front line. We hope that the bill will achieve that.

The Convener: I am conscious that Mr Baillie has to leave by 4 o'clock. You explained that you have another appointment. Do you want to say anything before you go?

Tam Baillie: Yes, I have one other comment. This is not a self-imposed consultation guillotine—I really do have another appointment and I apologise, but I thank you for giving me leave to go at 4.

I will comment on user focus, because it is tremendously important. I am pleased that the requirement to involve users is included in the bill. Both SWIA and the care commission have done useful and innovative work. I understand that the bill does not mention specific groups because it covers all groups, but there are considerable challenges in involving users in the scrutiny process. Although I pay tribute to the organisations' efforts to do that, there must be an acknowledgement of the additional resources that are required to have proper user involvement in the scrutiny process. It will be invaluable to us to have that perspective, and to have it recognised within the capacity of the new organisation. I do not think that an adjustment to the bill is required, but such involvement needs to be properly recognised through guidance and there must be acknowledgement of the capacity in the organisation to be able to do it properly, because it will be to all our benefit.

Now that I have said that, can I go?

The Convener: Yes, Mr Baillie. Thank you for your attendance at the committee. We will continue in your absence.

Geraldine Doherty: There will also be a lot of change for the staff of the existing organisations. An interesting point is that we currently register care commission officers, and a requirement of their registration is that they have both a relevant practice qualification and a qualification in regulation and inspection. Tam Baillie made a point about good inspection and the involvement of service users. Inspection is a very skilled activity so we urge that there be clarity about what the inspection and regulation requirements will be for the new body and that consideration be given to how we support the staff who are being merged and will have shared activities.

Jacquie Roberts: To answer the question about the impact on staff, the vast majority of staff in the care commission think that the proposals make sense and they are keen to get going in making our work more integrated with the work of SWIA and HMIE to deliver multi-agency child protection. Indeed, without pre-empting any decisions about the bill, staff are out shadowing people doing the other work. I think that the aim of the proposals makes sense, but we will all have to undertake quite a significant programme of organisational development to achieve that aim, so that there is added value and a truly integrated system rather than a group of bodies put together under the same logo or management. We must work quite hard on that.

16:00

Alexis Jay: I want to follow up on Tam Baillie's point. We believe that we have involved service users and carers in our inspections in a non-tokenistic way, but that has a cost attached to it. We have not only trained people and supported their involvement—we have developed courses for carers, in particular, with the Glasgow College of Nautical Studies—but have paid people who have been involved, to give them proper recognition of the value of their contribution. We have not assumed that they can be involved in their spare time. If the bill and the new body are serious about involving service users and about having a user focus in general, it must be recognised that that does not come cheap.

The Convener: That leads us nicely on to the financial memorandum. It states that the bill will result in net savings, but they are not predicted to be particularly significant. Do you have any concerns that the drive to make savings might come at the expense of the quality of the service that the new inspection authority will have responsibility for?

Jacquie Roberts: That is why I talked about the need for extremely careful planning. A lot more time needs to be devoted to looking at terms and conditions and ensuring that we avoid any equal pay claims. Without presuming that what the bill proposes will definitely be agreed, I believe that a lot of work needs to be done with HR and finance experts. That is why the current bodies—including NHS Quality Improvement Scotland, which is to become healthcare improvement Scotland—must work together closely and share information to ensure that any reduction in activity takes place where there is less risk. That has been the basis of the change in the frequency of our inspections: our ability to provide evidence that there is less risk. We need to carry on that work and link it with the work that is being co-ordinated by Audit Scotland so that we have a shared risk assessment process to determine where more scrutiny is needed and where less can be tolerated. I presume that that would lead to some savings in the overall cost of the scrutiny regime.

The Convener: In response to Mr Gibson, Mr Rankin suggested that the Government anticipated that, after the initial implementation period, £2 million-worth of savings would be made

annually. If that is the case—and bearing in mind that a number of you said that, having done your first round of inspections, you plan to adopt a more targeted approach anyway—are you confident that the Government's target of making £2 million-worth of savings is realistic and can be delivered without jeopardising the quality of the service that we need to ensure that our care and child protection services are properly scrutinised?

Jacquie Roberts: More careful work needs to be done to link a reduction in activity to lower-risk services. I could not give you a guarantee that that work is ready at the moment, but I understand the external climate. It is worth looking at where, collectively, we can make efficiency savings.

Alexis Jay: Yes. We believe that SWIA, which has a very small budget, would be able to deliver the current saving of 5.5 per cent and still maintain the quality of our work. If further savings were sought, some of the extremely important high-quality work on development and the engagement of users and carers could begin to suffer.

Annie Gunner Logan: I want to raise a related issue. The driver is savings and efficiencies. At present, service providers pay fees to the care commission, and it is proposed in the financial memorandum that that system will continue.

The committee would be hard pushed to find a more inefficient use of public money than we have in the current system, particularly in relation to publicly funded services. The independent service providers have to build the fee into the cost of their service and their contract price, only to hand it straight back to another public body. That has always seemed to us to be hugely inefficient, and the creation of a new body presents an opportunity to scrap fees and fund regulation centrally.

There is a tenuous link with the fees in a system in which there is just the care commission, in that service providers pay for the service that the care commission provides. However, providers will be a relatively small part of the new body, so what their fees are used for will become even more opaque than it currently is. I am aware that I have been banging on about the subject for about 12 years, but I will not stop doing so because some of our members are paying up to £300,000 annually for care commission fees, which is public money that they require to get from their purchasers and then pass back. The bill presents a great opportunity to end that system once and for all and to fund the work centrally, which would cut out all the transaction costs along the line. Here endeth the lesson.

Jacquie Roberts: Such an approach would mean that at least £11 million would have to be found from somewhere in central Government. Some 39 to 40 per cent of our income comes from fees.

Annie Gunner Logan: My point is that the money comes from central Government in the first place, through the settlement. By the time that the money has finished its journey through local authorities and providers and come back to the regulator, it has probably lost quite a lot of value.

The Convener: I am sure that we will want to raise the issue with the minister.

Harry Stevenson: If we embed improvement and are sure of the quality of services in organisations, the task of preparing for inspections should take care of itself. Best practice should result in a good inspection. I think that we all agree that we are not trying to get out of having inspection reports.

The issue to do with resources is not about potential financial savings. I was trying to make the point earlier that we are in a world in which we consider outcomes and the difference we make to people's lives. Do people feel safer and more confident? Do they think that we are doing the right things to support them to be independent? We are in a world of self-evaluation. The issue is where the resource will sit, how much will stay in the central scrutiny organisation and how much will be used locally, to build local organisations' capacity to deliver on those outcomes. Tam Baillie made that point well.

As Alexis Jay said, it takes time to involve service users and carers in any process. It is necessary to build confidence, so that people can contribute and feel that we have listened and can respond to them. All that takes more time and effort, so self-evaluation takes more time and effort. The issue for ADSW is where the resource lies rather than the financial savings that can be made in the process.

Margaret Smith: Do the witnesses want to comment on the consultation on the bill and say whether you have been able to put your case to Government?

Jacquie Roberts: I represent one of the bodies on which the bill will have a major impact. Along with the other scrutiny bodies, we have had a lot of opportunity to talk to Government and its officials about the matter. It is important now to convey what is intended to members of the public, providers and organisations such as ADSW. The engagement of stakeholders is important.

Harry Stevenson: As I said, ADSW thinks that we have moved quickly from Crerar to implementation of the bill. Perhaps more time could have been spent on considering the wider implications. The role of some key players in the delivery of services to the public may have been missed.

Margaret Smith: Someone said that the various organisations operate differently in relation to standards and outcomes. Does anyone want to expand on that point?

Jacquie Roberts: It may be a reflection of the different reasons for the setting up of the different bodies. The care commission was set up by the Regulation of Care (Scotland) Act 2001 on the back of the issuing of national care standards. We use the national care standards and have to take them into account. The Social Work Inspection Agency was set up for a different purpose.

There is a task for us in getting together to discuss language, methodology and the fact that, when it comes down to it, the work of the child protection inspections, SWIA and the care commission is all about getting better outcomes and experiences for the adults and children who use the services. It is part of our organisational development work to find more shared language and a shared understanding of what we can do in a similar way.

Annie Gunner Logan: I have highlighted before the difference in enforcement powers between what the new body will be able to do in relation to services and what it will be able to do in relation to anything else—commissioning, care management, assessment and so on.

There are also big differences in the way in which the two bodies currently deal with complaints from the public, which will continue in the new body. The new body will be able to deal with public complaints about care services, but it will not have the power to deal with public complaints about anything in social work services other than its own operating procedures. In terms of the public perception, it will be quite difficult to address that. If we are talking about an integrated scrutiny system for all social work services and the whole system, it will be problematic to tell the public that they can complain to the new body only about a little bit of the system and not about the rest. The committee might want to consider that when it comes to amending the bill at stage 2. As a principle, it is important.

Margaret Smith: Do other members of the panel agree with that?

Alexis Jay: SWIA does not currently deal with complaints. It is not that we deal with them differently; it is not part of our legal responsibilities to deal with them at all. Each council has its own statutory complaints procedure that works in parallel. Crerar was absolutely right to say that it is extremely difficult for the public, when they have a problem, to know how their complaint goes through the system. It is a complicated and bureaucratic process, and I would support anything that simplified it.

Jacquie Roberts: It is important to recognise that members of the public trust an independent body to investigate a complaint when they fear reprisals from a service provider. That is something that the public hold dear, and that is what is being carried forward for care services in the bill.

Ruth Stark: I echo that point not just from the public's point of view but from the perspective of members of front-line staff. When they see their colleagues providing a poor service, they find it difficult to report that. The issue is the culture of how inspection takes place and how accessible the complaints procedure is, not just to the public but to people who work in the industry.

Geraldine Doherty: To state the obvious, we also deal with complaints from the public about staff who work in the services. If the bill could achieve a good complaints procedure, that would be wonderful. The procedure needs to be streamlined and people must know whom to make complaints to. It is important not just that it is worked out in relation to the new body but that the interface with the workforce regulator is understood, not only for efficiency and effectiveness but for the service user. The service user must understand whether they have to complain to one body about the worker, another body about the care service and not to anybody about the infrastructure. The workforce regulator aspect must be dealt with as well.

The Convener: Mr Macintosh has a brief final question.

Ken Macintosh: Having identified the problem with the commissioning of services in local authorities recently, Community Care Providers Scotland has suggested that local authorities should have

"a duty … to take SCSWIS reports into account".

That might help to redress the balance of regulation. Do any of the other witnesses have a view on that suggestion?

Harry Stevenson: I do not think that local authority services would have any difficulty with that. Any scrutiny and transparency of processes is important. I will not stray into discussions that are taking place in other parliamentary committees, but I do not think that there would be any concern about that. We all have the same intention in how services are commissioned and procured in Scotland.

16:15

Annie Gunner Logan: The proposal in our written submission was about how to deal with the issue at the micro level. Local authorities would be asked to have regard to the grading that a

particular service received when it made decisions about it. Something similar could also be done at the macro level, joining those things together. For example, the duty could be tied in with national performance frameworks and single outcome agreements, and local authorities could have a responsibility to increase the proportion of services in their areas that had gradings of a certain level and above. That would take the link between scrutiny and commissioning to the strategic level as well as the level of specific services. There are a number of different ways in which that could be done; it all depends on how the new body sets up its business model when it starts. None of that is a given in the bill.

The Convener: I thank our witnesses for their attendance at the committee today. I will suspend the meeting to allow them to leave and to allow members a brief comfort break. We still have a substantial item on our agenda to consider today. The committee will reconvene at 25 past 4.

16:16

Meeting suspended.

16:25

On resuming—

Subordinate Legislation

Looked After Children (Scotland) Regulations 2009 (SSI 2009/210)

The Convener: Item 2 is consideration of subordinate legislation. We will first consider the Looked After Children (Scotland) Regulations 2009 and then the Children's Hearings (Legal Representation) (Scotland) (Amendment) Rules 2009. The committee will take evidence on the instruments, which are subject to negative procedure, from the Minister for Children and Early Years. Once our questions on the Looked After Children (Scotland) Regulations 2009 have been exhausted, we will move to questions on the Children's Hearings (Legal Representation) (Scotland) (Amendment) Rules 2009. We will then proceed to a separate agenda item to consider the instruments further.

Members will be aware that the Looked After Children (Scotland) (Amendment) Regulations 2009 have now been laid and that we will consider them at a forthcoming meeting. However, members are encouraged to ask questions on the amendment regulations during this evidence session.

I welcome Adam Ingram, the Minister for Children and Early Years. Mr Ingram is joined by Penny Curtis, who is the head of the kinship, fostering and adoption team at the Scottish Government, and by Johanna Irvine, who is the principal legal officer at the Scottish Government. I understand that the minister wishes to make an opening statement.

The Minister for Children and Early Years (Adam Ingram): Thank you for the opportunity to outline why the Scottish Government seeks the committee's support for the regulations.

The Looked After Children (Scotland) Regulations 2009 provide the legislative framework for the planning for and care of children once they have been identified as needing to be looked after. The regulations do not cover what happens before a child is considered as looked after, or the throughcare and aftercare arrangements that are put in place once a child leaves care.

I will take the opportunity to set out some of the rationale behind the regulations.

There are five key themes covering what we want the regulations to achieve. The first is about direction. The Government is clear that all children deserve the chance to fulfil their potential and

there should be no difference between the outcomes of young people in care and the outcomes of their peers.

One of the principles of the early years framework is that we want to work with parents, families and communities to develop their own solutions, using accessible, high-quality public services as required. In an ideal world, no child would have to be looked after by a local authority but, where that is necessary, we want to ensure that the child is better off as a result of being in the care system. As well as the necessary changes around adoption and fostering and kinship care, the new regulations tighten up, modernise and consolidate provisions around assessing the needs of children who are looked after at home, planning to meet those needs and monitoring success.

The regulations recognise specifically, for the first time, the role of the wider family who care for looked-after children, by defining them formally as kinship carers. We have set out in legislation the arrangements for local authorities providing allowances to kinship carers of looked-after children. However, our view is that where a child is cared for by the wider family, that family should be supported to provide as normal a home as possible for the child. We believe that the benefits system should be supporting kinship carers through the usual child-related benefits—child benefit and child tax credit. Local authorities would then need only to supplement those benefits to meet any additional costs of bringing the child into the household. As members will be aware, we are actively pursuing that matter with United Kingdom ministers.

We have embedded in the regulations some of the principles identified by the reference group that was set up to consider aspects of kinship and foster care. Once the legislation is in place, I intend to consider with our partners what else needs to be done to improve outcomes for children in foster and kinship care.

16:30

The second theme that the committee will want to note is that the commencement of the regulations will remove the bar on same-sex couples fostering children. That was a recommendation of the adoption policy review group and it mirrors the changes that Parliament made to enable same-sex couples to be assessed as adopters in the Adoption and Children (Scotland) Act 2007. The existing bar not only prevents same-sex couples from being assessed as foster carers, but can in turn act as a barrier to their adopting as, under the existing legislation, agencies often approve adopters as foster carers before the child is freed for adoption.

Thirdly, we have aimed to embed in the regulations the crucial role of the corporate parent and the responsibilities that local authorities have, working together with community planning partners, for achieving positive outcomes for all looked-after children, regardless of whether the child is looked after at home or looked after and accommodated by the council. The regulations make it clear that care planning and reviews need to happen for all looked-after children.

Fourthly, one of the key principles behind the new regulations is the importance of ensuring effective and timely decision making for looked-after children. What can seem like a short time in an adult's life can be a very long time indeed in a child's life.

Fifthly, looked-after children tell us how important it is that they are listened to. The regulations strengthen the legislation so that children's views have to be taken into account. That does not mean that the decision taken will always be the one that the child wants—that is not the role of a good parent, corporate or otherwise—but it means that those involved in planning for looked-after children's lives have to listen to children's views and take them seriously.

As members know, legislation in itself will not deliver wholesale changes to the outcomes for looked-after children. As we have developed the regulations, we have been clear that they are not a detailed or restrictive set of instructions. They are intended to provide professionals working with looked-after children with a framework within which they have to exercise their judgment to meet the needs of each individual child. We have commissioned guidance, which will provide more detail and good practice to support practitioners working with the new legislation.

We know that young people leaving the care system do not always get the support that they need. In response to a number of comments made during the consultation on the regulations, I have committed to look at how throughcare and aftercare arrangements are operating and how they can be strengthened.

I have written to the committee while we have been developing the regulations to update you on progress and timescales. It has taken us longer than we originally anticipated to draft the regulations as partners identified significant issues in both consultations reflecting evolving policy and practice that we wanted to ensure were reflected in regulations.

A small number of issues about the regulations have been raised by the British Association of Adoption and Fostering and the Fostering Network, which have been developing the guidance on the new legislation. As a result, we

have laid amendments to the regulations. I wrote to the committee in August to explain the purpose of the amendments. The two main changes are the inclusion of civil partnership status in schedule 3 and the extent to which local authorities can delegate their functions with respect to looked-after children and fostering to registered fostering providers.

The regulations and the amendment regulations are set to come into force on 28 September.

The Convener: Thank you for that clarification. There is now an opportunity for members to ask questions.

I want you to clarify a couple of points for me first. The first is on looked-after and accommodated children and your commitment to carry out a review of throughcare and aftercare. I know that we share a true commitment to improving services for looked-after and accommodated children. As part of that review, will you also consider the pressure that, informally or otherwise, is sometimes placed on children turning 16 to leave care? I know—as I am sure you do, minister—that not all local authorities behave in that way; unfortunately, a small number of local authorities are still leading children to believe that it is all right for them to leave care at 16.

Adam Ingram: You have put your finger on a very real issue that we want to address: the particular problem of youngsters who, by leaving care before school-leaving age, are disallowed aftercare services. Of course, some children are only too keen to leave the care system, and we need to persuade them that it is in their best interests to stay in it until they are more mature and can cope with tenancies and the like. I completely agree with the thrust of your comments, and our review of throughcare and aftercare arrangements will certainly focus on the issues that you have identified.

The Convener: Do you intend to keep the committee informed of that work?

Adam Ingram: I certainly undertake to do so.

The Convener: That would be very helpful.

I will move on to schedule 5, which relates to kinship carer arrangements. I want first to say that I welcome the fact that, under these regulations, kinship carers will be treated the same as foster carers. However, I am concerned that there is a lack of clarity, particularly about the definition of kinship care. If we do not get this right, are not clear about what constitutes a kinship carer and are therefore not working to the same definition, there is a risk that, when the regulations are implemented, we might simply continue with the current system in Scotland in which some local authorities engage in good practice by recognising the role of and paying kinship carers while others do not. Do you have a view on that? Is there a specific reason why you chose not to define kinship care?

Adam Ingram: I did not have notice of your question, convener, so I am trying to turn quickly to schedule 5. Do you feel that the schedule is missing anything in particular or are you raising a general point about kinship carers of looked-after children or kinship carers who do not have that status? Is that the essence of your question?

The Convener: I am slightly concerned that if there is no clear definition of kinship care some local authorities will extend rights to kinship carers and others will not. Getting off on the right foot is fundamental, because if that does not happen we will be storing up problems for the future. I simply think that we have missed an opportunity here.

Adam Ingram: We have to differentiate between kinship carers of looked-after children and other kinship carers. We have focused on looked-after children because they have particular needs and, given that they are in the care system, we are under an obligation to ensure that those needs are met. That is why the kinship care strategy document “Getting it right for every child in kinship and foster care” focused on the provision of allowances to kinship carers of looked-after children.

That does not mean to say that local authorities cannot exercise their powers to provide for other children who do not fall under that specification but whose families are in need. I know that local authorities throughout the country provide discretionary payments to kinship carers in that situation.

As I indicated, ideally we want a system whereby a child who comes into a family is properly supported, ideally through the benefits system, so that local authorities are there to meet any additional need that is identified. Until we get that sorted out, this problem will remain. In fact, we are probably subsidising the benefits system through the payment of a kinship care allowance as a result of the child’s looked-after status. As I indicated, we are heavily engaged with our UK counterparts to try to fix the problem. Unfortunately, we have not made much, if any, progress to date. I want to come back to the issue and will probably come back to the committee on it.

The Convener: I do not necessarily disagree with you, minister, particularly in relation to the payment of benefits—that is possibly one matter on which we might agree. My slight concern is that by giving local authorities discretion we will always have a postcode lottery for kinship care, and I do not think that that is helpful.

Adam Ingram: I take that view on board, but we have a commitment in the concordat, which no doubt other members will question me on, whereby every authority has signed up to providing an allowance to kinship carers of looked-after children at an equivalent rate to that of foster carers. I am confident that we will be able to deliver on that. Most, if not all, local authorities are now paying a kinship carers allowance, although I concede that not all those payments are as yet at the level of the foster carers allowance. We will need to see how that pans out over the next couple of years, at which point we will be in a position to judge where we are with this particular policy.

Margaret Smith: I will shock the minister on our first day back by welcoming some of the provisions that are included in the regulations. I note that there has been a delay along the way, but it is more important to get the regulations as right as we possibly can, rather than worrying too much about the fact that the timetable has slipped by a few months. I greatly appreciate the fact that you have taken on board the comments and concerns that some of us have raised with you along the way.

I will pick up first on the kinship carers allowance. I ask these questions on the basis that, as the convener indicated, there may be a great deal of support on the committee for the suggestion that the matter be addressed within the benefits system—that would make a lot of sense. Nevertheless, we are where we are. A national minimum level of payment would deal with the considerable discrepancies that exist around the country and it would allow local authorities to retain some discretion. Did you consider the possibility of having a national minimum level of payment?

Adam Ingram: I will answer that question in two parts. The minimum level that we have stipulated is the Fostering Network rate, which is the recommended rate, as it were, for foster carers. We want kinship carers to be treated in an equivalent fashion.

Your second point refers to the fact that a number of local authorities are paying only so much at the moment and are moving towards the fostering rate. We will not be in a position to assess whether we have achieved our objective until the end of the period.

16:45

As you probably know—I think that this is in the public domain—there was a phased release in the financial settlement. There was a certain amount allocated to this policy in the first year. That was doubled in the second year and trebled into the third year. There was a phased introduction, so you would perhaps expect that some local authorities are phasing their payments to kinship carers and will get to the level that we are looking for. That maybe explains the variation in practice. I congratulate the local authorities that moved immediately to the fostering rate.

Margaret Smith: There are issues around changes in timescales. I understand that there are changes in that foster carers will no longer be automatically reviewed every year. I think that there is a review in the first year and then after three years or where necessary. What safeguards and risk assessments will be put in place, given that we would potentially be leaving a child in a situation for a further three years, which is a significant period in a child's life?

Adam Ingram: I refer you to my colleague Penny Curtis.

Penny Curtis (Scottish Government Children, Young People and Social Care Directorate): The change that we have made, which was in response to comments in the consultation, relates to the approval of the foster carer. The foster carer will get a review after the end of their first year and then on a three-yearly basis, although that can be brought forward by the local authority or the fostering agency if they choose. That is separate from reviews of the child's case; it is to do with the status of the foster carer. It would not be the case that a child would just be left for three years without any intervention from social work services.

Margaret Smith: That is helpful. Thank you.

Elizabeth Smith: You quite rightly raised the issue of essential discussions with the UK Government about the benefits system. Are you expecting those discussions to be difficult in respect of time? Are you expecting to make progress soon, or are there substantial policy differences that will cause difficulty?

Adam Ingram: I have been disappointed by the lack of progress that we have made so far. I understand that the Cabinet Secretary for Education and Lifelong Learning is meeting Yvette Cooper—I cannot remember her designation—to discuss this specific issue. We have suggested a change to the regulations and have provided appropriate wording to our counterparts in the Treasury, who have so far not been able to accept that position. It would be helpful if we could make cross-party representations—the more we can do that, the better.

There are differences between the system in Scotland and the system in England; for example, we are falling foul of definitional differences in respect of what we mean by kinship and foster care, and the different categories that people come into. We need to iron out that problem.

Christina McKelvie: I want to focus your attention on care planning and assessment. One of the really welcome things in the regulations is the fact that local authorities and corporate parents are compelled to assess specific criteria. I have seen lots of absolutely fantastic practice in this area, but in one or two cases things such as contact arrangements, health and education were not included in the overall care plan and in other cases the care plan was quite flimsy. How will the regulations improve that? Will they run in tandem with co-ordinated support plans? What will be the impact on the regulations that we have just passed via the Education (Additional Support for Learning) (Scotland) Act 2009?

Adam Ingram: Regulations 4 and 5 are on assessment and the child's plan. We have put into the regulations a lot more detail, or instructions, on assessment of the child's immediate and long-term needs.

In my opening remarks, I emphasised that a large number of children are looked after at home. I am concerned that the outcomes for that group of looked-after children are probably the worst of all. The regulations will help with assessment and with putting together plans for children in that group in order to monitor things more effectively. However, I accept that we need to do a lot more work on children who are looked after at home, so we have in place a programme to get that work under way as a priority.

Christina McKelvie: Do you see the regulations as creating an almost standardised procedure throughout Scotland? At the moment, things are a bit patchy with respect to the evidence that children's workers in units or social workers provide in relation to children who are looked after at home, for example. Do you envisage a more standardised procedure that will remove the problem of what happens when a child moves from one local authority area to another? The new local authority may have a different approach.

Adam Ingram: Absolutely. We are trying to drive up standards across the piece. That is part of the reason for the regulations.

There is another thing to say about the child's plan: we will ensure that a new consultee list will be drawn up that will include the child, parents and people who have parental responsibilities, which will meet our obligations under the United Nations Convention on the Rights of the Child. I hope that we will see advances in practice, and that we will see systems being developed.

Ken Macintosh: I have a couple of points for clarification. First, I want to follow up on a question that was asked earlier. What financial or other support will be available to looked-after children after the age of 16? What support will local authorities be able, or obliged, to give them?

Adam Ingram: As I said, the regulations are not to do with children leaving care, in particular. I said that we will produce revisions to throughcare and aftercare arrangements. Obviously, there will be financial implications for the fostering or kinship caring of children over 16. I am not sure where you are coming from.

Ken Macintosh: My point is about families and foster carers receiving an allowance until children reach a certain age and that allowance then being lost. It is about local authorities not being under an obligation. I simply want to clarify what obligations local authorities are under and what is at their discretion.

Adam Ingram: I will need to clarify that. Local authorities are normally under an obligation to provide support for children up to the age of 16, but I think that they have a power to provide support for people up to the age of 18. I ask my officials whether that is correct.

Penny Curtis: It is.

Adam Ingram: That is normal practice. You may recall that we discussed that issue when we discussed transitions in considering legislation on additional support needs.

Ken Macintosh: Could the matter have been addressed in the regulations?

Adam Ingram: No, I do not think so. Perhaps I should write to you about that.

Ken Macintosh: Possibly. Many members are aware of the issues; in fact, the previous children's commissioner highlighted some of them, particularly the difficulty that there can be at a certain age. After all, most families continue to support their children for many years, as I am sure the minister knows.

Adam Ingram: Yes—to my cost.

Ken Macintosh: Exactly. The question is whether that difficulty should be addressed at national level in regulations, or whether there is a specific policy intention to leave it entirely to the discretion of local authorities and therefore to make provision rather hit-and-miss throughout Scotland.

Adam Ingram: I do not know whether the issue was raised in the consultation. Was it?

Penny Curtis: People are always very concerned about the age of leaving care. We did not address it in the regulations because we felt that it would not be appropriate to do so in regulations that are concerned with the system. However, it is clearly a current issue, so we could write to the committee with information about how the system operates, if that would be helpful.

Ken Macintosh: Yes. Perhaps you could also tell us about the Government's intentions with regard to addressing the issue.

On a similar note, the regulations do not impose a national scheme of fostering allowances but instead leave that to local authorities' discretion. I wonder whether the minister can cast his mind back to the previous parliamentary session when he was a member of the Education Committee. When that committee considered this very issue, its recommendation—which I believe was unanimous—was that the Government should introduce a national minimum allowance. In other words, even though such a scheme might be at the discretion of local authorities, it should be underpinned by a national minimum. Has the minister changed his mind?

Adam Ingram: The minister's mind has been influenced by other developments such as the concordat agreements, which mention, for example, the fostering network rate. I think we can agree that that represents the minimum that we would expect every local authority to pay for fostering. However, you will be aware of other developments in the foster care market—if I can call it that. In order to recruit and retain foster carers, local authorities have often had to offer better terms. I do not think that there is a problem of local authorities paying foster carers too little; if they do, the carers simply get snapped up by independent agencies. The context has changed a bit.

Ken Macintosh: Perhaps I can ask the minister to cast his mind back again three and a half years or so to another issue that was raised with the previous session's Education Committee: the idea of a nationally set maximum on the number of children that a foster carer can look after. I have to say that I quite like the individual approach, but did you consider setting a national maximum, as has been set in England? Are you going to issue regulations or guidelines on how many children each foster carer should be allowed to foster?

Adam Ingram: The Fostering Network and others continue to lobby for a maximum of three children per foster carer. To date, we have resisted such a move because, as you have already pointed out, we prefer to allow individual foster carers to be assessed for the number of children they would be comfortable looking after or, indeed, would be able to look after. I want to stick with that approach because it is a bit more flexible; for example, it allows a largish family to stay together under one roof. On those grounds, I would prefer to stay where we are, but we need to review that constantly. We will undertake work on foster carer recruitment and retention. The matter will come within the scope of that work, about which we will keep the committee informed.

17:00

Ken Macintosh: That would be useful. You are right that it is okay to foster large numbers if it suits the needs of the children because there are siblings or for other reasons. However, large numbers have sometimes been imposed on a fosterer purely because they were the only one available.

Adam Ingram: Yes—we have heard tales of that.

Ken Macintosh: I return to kinship care. The last paragraph of the Executive note that accompanies the regulations concerns

"The financial effect of introducing the kinship care allowance"

It says that

"sufficient resources were included"

and agreed with local authorities

"based on estimates at a national level".

What were those estimates?

Adam Ingram: I cannot give you the figure off the top of my head, but I undertake to pass it on to the committee. The estimates have been published.

Ken Macintosh: Is that money in the local government settlement at the moment?

Adam Ingram: Yes.

Ken Macintosh: I have heard some local authorities suggest that although it may be in the settlement at some point in the future, it is not yet. You do not accept that.

Adam Ingram: No, I do not.

Ken Macintosh: I will be happy if you are able to give the committee figures for how much has been put into the settlement.

I echo the convener's point about the lack of a definition introducing the potential for another element of inequity throughout Scotland. We have seen figures that suggest that some local authorities have a generous interpretation of kinship care and others have a stringent definition. That introduces another element of unfairness for families and children, depending on where they are located.

The Convener: That concludes our questions to the minister on the Looked After Children (Scotland) Regulations 2009. I thank him for his statement and for answering our questions.

The committee will suspend briefly to allow the minister's officials to leave and other officials to take over.

17:02

Meeting suspended.

17:04

On resuming—

Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009 (SSI 2009/211)

The Convener: We return to the second item on our agenda, which is consideration of Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009 (SSI 2009/211). We will consider how the legislation relates to proposed changes to the children's hearings system. The minister, Adam Ingram, has been joined by Denise Swanson, who is the head of the children's hearings team, and Laurence Sullivan, who is a senior principal legal officer in the Scottish Government.

I ask the minister to make an opening statement.

Adam Ingram: Thank you. I welcome the opportunity to discuss the new arrangements for making available, by way of a Scottish statutory instrument that was made in June, state-funded legal representation for relevant persons in children's hearings.

The amendment rules make provision to ensure that relevant persons may, if necessary, be provided with free legal representation to assist them in a children's hearing. The changes were made because the Scottish Government accepted that the absence of any statutory provision to make available state-funded legal representation for relevant persons who had difficulty participating effectively in a children's hearing risked incompatibility with articles 6, 8, and 14 of the European convention on human rights. The Scottish Government made that acceptance in the context of a particular legal challenge, in which an individual argued that the absence of any provision for state-funded legal representation breached their rights under the ECHR. The judgement in that case has not yet been issued by the Court of Session, so the committee will understand my not going into details about it. The Scottish Government has made a concession in the case, that the absence of any provision whereby the appellant could apply for state-funded legal representation before a children's hearing if the appellant was unable, without such representation, to participate effectively at the hearing, was incompatible with articles, 6, 8 and 14 of the convention.

That case applies only to the particular individual involved, but the underlying rationale could have further application to other relevant persons who would, without legal representation, be unable to participate effectively at children's hearings. Therefore, the Government decided to act quickly—even before the case was concluded—to ensure that relevant persons in similar circumstances to the appellant in the case could have legal representation, if their individual circumstances merited it. It was therefore agreed that we would make provision for access to state-funded legal representation for relevant persons in the future, and that we would put in place arrangements to provide that access without delay.

That is why the Government took the unusual but legitimate—and, I argue, justifiable—step of breaching the 21-day rule by bringing the amendment rules that are before the committee today into force the day after they were laid in Parliament in June. The SSI provides an interim route through which such provision can be made.

A permanent scheme will be put forward in the children's hearings bill that I plan to introduce early in the new year. The SSI has been constructed to ensure that availability is open to those who are most in need, while it strives to maintain the more informal proceedings that are at the heart of the children's hearings system.

The SSI sets out clear criteria that should guide the decision on whether or not to make such provision available. That decision will be made by panel members, who will notify the relevant local authority to appoint a legal representative from a panel of such experts that it maintains. That service is entirely state funded, and local authorities reclaim the cost of it directly from the Scottish Government.

The new arrangements, by the very nature of their link to issues around upholding human rights, and in the context of the on-going litigation, had to be made very quickly, which meant that we were unable to engage with stakeholders before the regulations came into force. However, we held a statutory consultation as required by the Tribunals, Courts and Enforcement Act 2007 with the Administrative Justice and Tribunals Council and its Scottish committee. We also gave the Scottish Children's Reporter Administration prior sight of the draft rules. Since introduction, guidance has been provided by children's hearings training units, and officials are liaising with local authority staff to provide what support they can as we establish the likely demand for assistance.

As I have already mentioned, the provision of legal representation under the rules is wholly state funded and demand driven. Early signs are that the cost of the additional provision is unlikely to exceed the budget that is already available for legal representation in the system. However, we

will monitor that continually as the scheme beds in.

The Convener: Thank you for those comments and that clarification. Again, there is an opportunity for members to ask questions. I will start, but before I ask my question, I have to say that, in my 10 years of being an MSP—I have been here since day 1—Parliament has considered many subjects, some controversial and some in which there was a great deal of consensus, but I have never received on any subject the amount of correspondence that I have received about the regulations that we are debating. That includes the most controversial subjects that we have considered, such as section 2A and the smoking ban. That tells me that, although people understand the Government's need to recognise ECHR challenges, they believe that the hearings system, which is often described as the jewel in the crown, is at risk.

I felt that it was important to preface my questions with those comments. I have not spoken to any of my committee colleagues about that, but they have probably received similar correspondence. I would be surprised if the minister had not heard some of those concerns while he was out and about during the summer consultations. I expect that people will have taken the opportunity to raise specific concerns about the regulations.

Was I right to pick up that there has been only one challenge to the right to legal representation and state-funded legal aid?

Adam Ingram: There is one live case before the Court of Session. As I indicated, the Lord Advocate and the Government have acknowledged or conceded the essence of the case that human rights would be breached under articles 6, 8 and 14 of the ECHR.

The Convener: Okay. The Government has conceded that and has taken steps to address the circumstances surrounding that individual case. Is that correct?

Adam Ingram: The decision has not yet been provided by the Court of Session, but we obviously stand ready to do that.

The Convener: Is it possible that you can address those concerns without implementing the regulations?

Adam Ingram: No, I do not think so. I refer the question to my legal colleague, who can put the matter in the appropriate context.

Laurence Sullivan (Scottish Government Legal Directorate): The minister is correct. It would not be possible to address the issue that has arisen in the case without changing the legal representation rules. There is only one challenge outstanding. The convener might be aware that when, in 2002, children in certain circumstances were given legal representation in children's hearings, that was the result of the S v Miller case, which went to the Court of Session. The then Scottish Executive lost that case and brought in the 2002 rules, which we now seek to amend to address the situation of children in children's hearings. The new challenge was about legal representation for a relevant person—a parent of a child.

The case is on-going, and the Government has conceded on the main point of the appellant's rights in terms of articles 6, 8 and 14 of ECHR. However, the Court of Session is considering the scope of the concession, and it will issue its judgment shortly. The only way to address the issue for the individual concerned, and for other individuals who may be in similar circumstances to the appellant in this case, was to change the 2002 legal representation rules to extend legal representation in certain specified circumstances to parents as well as to children. There would have been no way of doing that without changing the 2002 legal representation rules.

17:15

The Convener: Could it have been done without changing the rules in the way that the Government wants to do? Could you have considered alternatives that would have addressed the concerns?

Laurence Sullivan: This is the only way that we could see of doing it by secondary legislation. On other possible solutions, you will be aware that legal representation at children's hearings is not operated through the legal aid system and the Scottish Legal Aid Board; it is done by the hearings assessing whether the child—and, now, the relevant person—needs legal representation to participate effectively in the hearing. The solicitor for the child or relevant person is appointed from a panel that is kept by councils. It has therefore nothing to do with the normal civil legal aid system that SLAB runs. One option would be to move that process to SLAB, but it would not be possible to achieve that without primary legislation. Within the existing enabling powers in sections 42 and 103 of the Children (Scotland) Act 1995, the secondary legislation route is the only way, as far as we can see, that would remedy the situation that has arisen in the Court of Session case.

The Convener: Are we not going to have primary legislation in relation to children's hearings some time in the new year? The minister commented earlier that he intended to introduce a permanent scheme as part of that. Would it therefore not be more appropriate, as the children's panels chairmen's group and children's

panel members have made clear to the committee and to MSPs the length and breadth of the country, to deal with the situation through the forthcoming bill rather than address it in a piecemeal way without full and proper consultation?

Adam Ingram: Certainly, it would be much more preferable if we were in a position to consult fully on the matter. However, given the situation that we face, whereby individuals' rights are being breached, we think that it was best practice to move as soon as the matter was brought to our attention. We certainly do not want the appellant in the Court of Session case or any other person in similar circumstances to face a situation in which their human rights are being breached. We need to move, as a matter of moral responsibility, as quickly as we humanly can to correct such breaches. That is why we have laid the SSI. Once we have conceded the case—I assume that the Court of Session will provide its ruling on it—we are really duty bound to follow through on it with the new legislation.

The Convener: I do not think anyone here would want to ignore the human rights of any individual in Scotland. Equally, however, we must ensure that any secondary legislation that the Parliament approves does not ignore the basic human rights of children, which the children's hearing system was set up to look after and represent. It strikes me that the rules that are before us give the reporter the responsibility to consider arranging a business meeting on the appointment of a legal representative, which surely raises its own ECHR issues. Why should the reporter be the decision maker in that way? I do not believe that that sits particularly comfortably with the reporter's role, which is primarily to promote the welfare of the child.

There is potential for real conflict, as the same reporters who deal with the question whether a parent requires legal representation are also required to deal with an appeal following the hearing. I think that that is a real ECHR challenge. If we push the rules through today, we might open the gate to many more ECHR challenges than we have currently.

Adam Ingram: I am sorry to disagree with the convener, but that is not my understanding of the process. I ask my legal colleague to provide the detail.

Laurence Sullivan: Decisions on appointing legal representation for a child or for a relevant person are made not by the principal reporter but by the children's hearings. Rule 5 in the amendment rules, which inserts new rule 3A into the 2002 rules, says that the business meeting is arranged by the principal reporter, who sets the date and sends out the papers, but the decision whether a particular child or parent before the hearing should have state-funded representation is made by the panel—the three lay people who form the tribunal. The reporter has no role whatever in that decision.

The Convener: Will the reporter not have much of a role at the hearing in future? If the rules are approved, from 14 September, the child, their parents and their carer—if they have a carer—will have the right to legal representation. There will be safeguarders there. All those people will have the right to legal representation, but the panel members, who are volunteers who give up their time to serve their community, will have no legal representation. We will have solicitors arguing points of law in a way that we have never seen before in a hearing. We will be moving away from the real concern and thrust of the children's hearings system, which was always to put children at the heart of the process. The process will become very legalistic and there will be a real move away from the current system.

Adam Ingram: I think that the convener is reading too much into this measure. We are talking about a specific issue with regard to legal representation for relevant persons in tightly defined situations. The criteria are set out clearly. I totally agree that we do not want to see every player in the children's hearings system being represented by a lawyer or solicitor. That is very far from what we are aiming to do.

Perhaps there is some confusion between what is in the rules and other proposed measures that might appear in the children's hearings bill further down the line. This specific issue had to be addressed here and now; we had to act urgently. We are asking for the committee's approval for what we have done, which we were duty bound to do. As my colleague Laurence Sullivan indicated, the issue of legal representation of children arose during the term of the previous Executive in 2001, which had to concede a case. What we are doing is very much in the same vein as that decision. It is not a precursor to a takeover of the hearings system by lawyers—God forbid.

The Convener: I do not want there to be any kind of takeover of the children's hearings system. I am sure that you would not want that either. However, unfortunately, some of the rules could lead to that, although that was not their original intention. You suggested in response to my previous question that I am confused and do not understand, because I am getting mixed up between the rules and what might or might not come in a future bill. My clear understanding—perhaps you will confirm whether this is the case—was that you wrote to all children's panel chairs on 25 June advising them of the changes to practice guidance in relation to the operation of children's

hearings. In that letter, you clearly stated that, during a hearing, the reporter will no longer act as a legal adviser. Did you or did you not write that letter? Have I misunderstood those clear words?

Adam Ingram: The context of that was the reporter as a legal adviser to the panel. We must divide, if you like, the responsibilities of the reporter as somebody who brings a case to the panel and at the same time advises the panel on legal matters. We have been advised, and the Scottish Children's Reporter Administration has been advised, that potentially that situation is not compliant with the ECHR. The SCRA has independently moved to address that issue. However, that is a separate issue from the one that we are considering today.

The Convener: I agree that it is separate but, unfortunately, all the issues must be taken as a whole. That is one reason why the chairs of the children's panels in Scotland wrote to members urging us not to support the changes lightly, because the consequences cannot be seen in isolation. Although the chairs are not saying that access to legal representation for parents is not necessary, they argue that the issue should be considered as part of a wider bill, so there can be full consultation and scrutiny and so we do not risk introducing a short-term fix that in the longer term might lead to the dismantling of the children's hearings system and the introduction of a criminal justice system that is similar to the system in England and Wales.

Elizabeth Smith: Minister, will you confirm that, if we approve the SSI, there will be considerable implications for the conduct of children's hearings?

Adam Ingram: Clearly, the instrument will have a significant impact in that a parent in the circumstances defined by the criteria will have legal representation, which they do not have at present.

Elizabeth Smith: Do you acknowledge that there is considerable concern among stakeholders about the forthcoming children's hearings bill?

Adam Ingram: I acknowledge that we have not yet come to a conclusion in our engagement with stakeholders on that bill. However, I caution the member on that—let us not get arguments about the bill mixed up with the discussion of the present measure, because it is a specific provision that is designed to sort a specific problem with regard to a small group of parents whose human rights are being breached because they cannot participate in the hearings system unless they have legal representation.

Elizabeth Smith: I understand that in the context of the particular issue, but the measure has other implications, certainly for the conduct of children's hearings. I agree with the convener. I have had a tremendous number of substantial and interesting letters on the issue. There is genuine concern about the implications of the changes. I am uncomfortable that we might be putting the cart before the horse, which could have ramifications that could be instrumental in changing the ethos that lies behind the children's hearings system.

Adam Ingram: I assure the member that the rules that we are discussing will not have that impact. I cannot stress more that the rules deal with a particular narrowly defined situation—they do not have ramifications for the whole system. Perhaps—

Elizabeth Smith: Sorry to interrupt, minister, but do they not have ramifications in relation to legal representation?

Adam Ingram: The notion of legal representation was conceded several years ago, as a result of the Miller case, which was referred to earlier. In certain circumstances, children are entitled to legal representation in the hearings system. A situation is now arising in which other relevant persons also require legal representation.

I will pass over to my legal colleague to explain that particular development.

17:30

Laurence Sullivan: The new rules that the committee is considering can be seen as an extension of the 2002 rules. Lawyers have been involved in children's hearings since 2002. Indeed, if a child or parent was able to get their own lawyer to represent them at the hearing, either for a fee or pro bono, they could do so. Therefore, there have always been lawyers in children's hearings. Since 2002, there have been state-funded lawyers for some children in some circumstances. Research since 2002 has not shown that to have had a deleterious effect on the ethos of the children's hearings system.

With the changes that are introduced in the new rules, more lawyers will be involved in more hearings because there will now be a small category of parents who, because they essentially lack the capacity to participate effectively in a hearing that might affect their rights under article 8 of the ECHR and might interfere with their important relationship with their child and with their child's relationship with them, will have a lawyer to represent them in order to assist the hearing so that their full views can be heard. Generally, most parents are capable of participating effectively in children's hearings without legal representation. That will remain the case. As has been said, the composition of the hearing and its procedures are designed to secure the active participation of all those involved. Allowing parents who cannot

represent themselves effectively to have a lawyer to represent them should be of benefit to the hearing in arriving at a decision that is in the best interests of the child because the views of the parent will have been represented to the hearing properly, whereas parents who are incapable of representing their own views would otherwise not be able to present their case to the panel appropriately.

Elizabeth Smith: I fully understand and accept that, but there is more to the issue than just the legal process. My argument is that the bill presents very considerable possibilities of change in the system. By definition, that has an implication for the legal aspects, perhaps not for the procedures of how the hearing operates under law—obviously, that is done by statute—but for how the matter is referred.

Laurence Sullivan: The new rules that the committee is considering are entirely separate from the children's hearings bill. We would need to make the rules even if no bill was proposed. The rules are completely separate. We would need to introduce these changes irrespective of whether there was an intention to introduce primary legislation on the children's hearings system.

The new rules have been driven by the particular circumstances of a court case—the judgment has not yet been issued, but it will be issued shortly—in which the Government has already conceded that an individual parent's rights were breached because the parent was unable to represent themselves before the children's hearing. The Scottish Government has conceded that the parent needed a lawyer to represent them. The vast majority of parents before children's hearings do not need a lawyer to represent them. There has always been provision—in rule 11 of the Children's Hearings (Scotland) Rules 1996—for a child or parent to make use of a representative, who might be a lay person, a friend or a relative, or a lawyer if the child or parent employed the services of a lawyer. All that the new rules will do is allow a certain number—probably a very small number—of parents who, as a result of issues to do with their own capacity and abilities, are unable to represent themselves even within the informality of a children's hearing, to be represented effectively so that they can participate in the hearing, which might make an extremely important decision that will have an effect on them and their child.

Margaret Smith: It is an unfortunate set of circumstances that minister brings before us. Committees will always feel uncomfortable about being bounced into decisions—the minister no doubt felt just as uncomfortable in being bounced into making his decision—and we do not like to read paperwork that makes it clear that the Government has breached our rules. The explanation that the minister has given us today did not come out in the paperwork that he laid before us. Further explanation in advance might have been helpful.

I share colleagues' concerns about the ethos. Mr Sullivan has just talked about the informality of the children's hearings system. Those of us who have been present at children's hearings have appreciated the hard work that goes in to keeping that sense of informality and ensuring that the child feels as comfortable as they can—that is important. It is worth preserving the child focus of the operation, but that that ethos is being taken away by stealth.

Minister, although you have indicated that we will consider the issue more widely when we consider the forthcoming bill, you have also said that it is not something that we can revisit—rightly or wrongly, you have conceded that point. If we agree to the SSI, we cannot come back to the issue afresh when we consider the bill. Perhaps you can tell me whether I have got that wrong.

If I understand you correctly, we may have left ourselves open to the possibility of retrospective challenges by parents and others for the period 2002 to 2009. If the fact that there has been a breach is conceded once, presumably the case could be made by other individuals. It opens us up to the possibility of retrospective challenge.

Do you think that there is a need to consider other hearings or tribunals to see whether they have similar problems and whether such problems are inherent in the way in which other tribunals and hearings are set up? Over the past few months, the committee has spent a lot of time talking about the fact that every one of us wanted to take away the creeping legalisation, for example in additional support for learning tribunals. Although some of us felt slightly uncomfortable about it, we all agreed that parents were always up against councils and lawyers and so on—that in a sense the arms available were unequal. Despite that concern, we made a judgment call that it was worth trying to preserve the ethos of what an ASL tribunal aims to do. What we are saying to you today, minister, is that what we believe to be the ethos of the children's hearings system is worth preserving and fighting for, in any way we can. I would welcome it if you were able to address some of those questions.

Adam Ingram: I can assure Margaret Smith and the other committee members that I want to engage with you, and indeed with colleagues throughout the Parliament, to shape the legislation on the children's hearings system. If nothing else, what we have seen over the summer is the passion for the system throughout the country. There is nothing party political in trying to arrive at

the best possible system that we can, and in building on the Kilbrandon ethos of a welfare-based system for looking after children in need of care. I want to engage as widely as possible with colleagues.

Ultimately, as a minister I am not in a position to force a piece of legislation through the Parliament. It has to be scrutinised properly. I would much prefer that that process was based on consensus instead of on a battle over every line and section in the bill, so I am looking for ways of trying to engage with the committee, with the convener, and with individual MSPs who, I know, have been lobbied by children's panel chairs and children's reporters from up and down the country. I want to make improving the system a collective effort.

On your question about retrospective challenges, they are an argument for closing the loophole as soon as we can—immediately if possible. The breach was not obvious before the challenge was made, and I cannot guarantee that there will not be future challenges to which we will also have to respond. We have had to concede on this particular challenge on all legal advice, including that of the Lord Advocate, so I argue that I was not in any other position than to introduce this particular statutory instrument. The situation is not unique; it happened under the previous Administration when we faced a challenge over legal representation for a child.

Margaret Smith: Could you pick up on the other question that I asked, which was about other tribunals and inquiries? Does the regulation give us any cause for concern there?

Laurence Sullivan: You mentioned the additional support needs tribunal. Although that obviously makes important decisions for the children and families concerned, the children's hearing is in a different league in terms of ECHR rights. For all that there is an informality about it, the children's hearings system can make an authorisation to place a child in a secure unit, which means that that child is deprived of their liberty. Very few other tribunals—in fact, I do not think that there are any—have the ability to make such a decision, important though the decisions of the ASNT are for children with additional support needs. Even short of the biggest authorisation that a children's hearing can make, lesser decisions, such as putting a child into a children's home, infringe on the article 8 rights of the parent and child.

The Strasbourg jurisprudence is extremely clear about the absolute importance of the parent-child relationship from the perspective of both the parent and the child, and that any state interference in that relationship should happen only if it is absolutely necessary. In that sense, the children's hearings system is unique. For all its trying to be informal and use an inclusive process that is not threatening to children, when it comes down to it, it can make really big decisions about the lives of a child and its parents. If a child or parent needs legal representation to present their case before the children's hearing makes such a decision, the ECHR states that it is appropriate for them to get it.

The Convener: A number of members want to ask questions but, on that point, why has this Government chosen to go down the road as proposed in the statutory instrument and not just said that any legal representative who is at a children's hearing would be eligible for legal aid? Surely that would address the problem without having to introduce a new system of legal representatives.

Laurence Sullivan: That would have been an option, but it would have required amendments to the Legal Profession and Legal Aid (Scotland) Act 2007, which would have required primary legislation—a bill would have had to go through Parliament, which would have meant it took longer to fix the problem.

When we looked at the enabling powers, the secondary legislation power was in the Children (Scotland) Act 1995. After the Scottish Executive lost the S v Miller case in 2001, the fix was to use sections 42 and 103 of the 1995 act, which is what we are using now. The fix of legal aid was an option, but it would have required primary legislation as the Legal Profession and Legal Aid (Scotland) Act 2007 does not have the secondary legislation powers to achieve what we want in the way that can be achieved under the powers in the Children (Scotland) Act 1995.

The Convener: It strikes me that we might be doing something through secondary legislation that we should be doing through primary legislation, and that going down that route risks other things.

17:45

Adam Ingram: We will introduce a bill to reform the children's hearings system, which will provide a permanent solution to the issue. However, as we are not yet in a position to introduce primary legislation, we need to find a solution here and now to the case that we are considering and other cases involving people who are in the same circumstances. That is why the issue is important and why we have breached the 21-day rule. It is not without precedent that that has been done.

The Convener: No, but if we do not get things right, we might not have a children's hearings system to reform.

Kenneth Gibson: First, I commend the minister for accepting the Lord Advocate's advice and acting so swiftly.

I want to put the issue in perspective. I have not been contacted by anyone about the proposed regulations, although I have received two or three communications about the children's hearings bill. Last Friday, we had a session with members of the panel system and children's reporters, who advised us that 50,800 cases were brought before them last year, not all of which were referred to the panel. In any given year, how many of those 50,800 cases are likely to be covered by the regulations?

Adam Ingram: I do not know that we can make that estimate, but I imagine that we are not talking about more than a handful of cases.

Kenneth Gibson: Are we talking about half a dozen, a dozen or twenty cases?

Adam Ingram: It is only a guess on my part, but that is the scale that we are talking about.

Kenneth Gibson: So in that case, there is no threat whatever to the hearings system. Am I right to say that?

Adam Ingram: I do not believe that there is any such threat.

Kenneth Gibson: So the ethos whereby the best interests of the child are considered first will remain the Government's priority. There is a general understanding that that is the case because, as the committee knows, no motion to annul the regulations has been laid as yet.

Can you confirm that you believe that there was no other action that you could have taken in this case?

Adam Ingram: Absolutely not. I asked that question, as you might imagine. I also asked why it was necessary for us to breach the 21-day rule, and I was assured that it was best practice to ensure that people in the case that we are talking about and other similar cases are not exposed to breaches of their human rights for one day longer than is necessary.

Ken Macintosh: Like many members, I want to express my concern. I can tell from what the minister has said that he has no wish to change the nature or the ethos of the children's panel system, but my concern is that, regardless of the minister's intentions, the proposed regulations will do exactly that. The minister's inability to say exactly how many people they would affect does not reassure me. The Executive note says:

"A full regulatory impact assessment has not been produced … Additional costs … are anticipated, as yet undetermined."

Basically, we do not know. That is the problem. If we had primary legislation that Parliament was able to scrutinise with the full participation of stakeholders, that would offer some reassurance that what is proposed is the only way to address a clear problem.

I note that the minister said that consultation was extremely limited. What did the few people whom he consulted say? Were they supportive? Were they worried?

Adam Ingram: No. They recognised the need for the proposed action.

Ken Macintosh: The SCRA had prior sight of the regulations. Did it just see them or did it comment on them?

Denise Swanson (Scottish Government Children, Young People and Social Care Directorate): It commented on them.

Ken Macintosh: Did it approve of the regulations?

Denise Swanson: It had concerns about the capacity of the legal representatives in the system to respond to additional needs. Since that point was raised, I have gauged its importance with local authorities, and so far it does not seem to be an issue.

Laurence Sullivan: Unusually, there was an obligation for a statutory consultation, which only covered the Administrative Justice and Tribunals Council, which was formerly called the Council on Tribunals. That consultation was carried out, and the council was content with the rules. We were not under a statutory obligation to consult anyone else. We consulted the SCRA, but the statutory consultation covered just the AJTC.

Ken Macintosh: It does not sound as if even the SCRA's endorsement was ringing.

Adam Ingram: The SCRA was concerned about whether there was the capacity of legal representation to call on; it was not concerned about the principle of the matter.

Ken Macintosh: I am concerned about the principle of the matter. Having heard from constituents and others who are concerned about the matter—as the convener has—I think that there is a real worry about changing the nature of the hearings.

Earlier, Mr Sullivan suggested that the principle of legal representation had already been conceded in 2001, but that is not quite the case. That was the principle of legal representation for children at children's panels; now, we are talking about the principle of legal representation for adults—for parents, in fact. Some parents might be relevant persons—in cases of abuse or neglect, they might be the perpetrator. It is a strange step to take to—

Adam Ingram: You should be careful about how you interpret the limited circumstances that we are talking about. We are talking about parents who might have even more limited capacity than children.

Ken Macintosh: That brings me to a further point. The Court of Session judgment—we have not even seen the ruling yet—seems to be about the capacity of the adult in question. Why do we not approach the matter from a different angle altogether? Why not approach it from the adults with incapacity angle, or from any number of angles other than the children's hearings one? Why are we reforming the whole of the children's hearings system so as potentially—I admit that it is just potentially—to overlegalise it and make it more adversarial? We could do it a different way. We could approach the issue by using the Adults with Incapacity (Scotland) Act 2000 to provide an incapable adult with support at a hearing.

The minister mentioned earlier that there is a system for providing representation to children that does not involve the Scottish Legal Aid Board. I am not saying that this is definitely the way we should go, but another approach would be to make reforms to the current legal representation facilities within the children's hearings system. To my mind—despite not knowing much about the subject until relatively recently—a number of alternative options could have been explored. I have great reservations about rushing into using the proposed route, which could change the nature of hearings.

Adam Ingram: We are dealing with an emergency situation with a limited on-going impact on the system. We have already heard about the changes that have been made to legal representation in the system down the years. Those changes have not undermined the ethos of the system, and the proposed change will not do so either, because it refers to a very small number of people.

We are all duty bound to ensure that the legislation that comes through and is the responsibility of this place is ECHR compliant. Therefore, the Government is duty bound to bring the situation to the Parliament's attention in the form of an appropriate Scottish statutory instrument to correct the situation. That is what we have done.

I recognise that there has been a breach of the 21-day rule. As the member will know, that occasionally happens, and it is nobody's fault. I give members my categorical assurance that the rules are not a Trojan horse to undermine the ethos of the children's hearings system; they are a fix for a particular problem. We can return to the issue of legal representation or any other form of representation in the children's hearings system when we introduce the proposed primary legislation early next year, and I want you all to be engaged in putting that primary legislation together, so that there are no surprises.

Ken Macintosh: I began my remarks by saying that I did not doubt the genuineness of the minister's approach. Clearly, he does not wish to undermine the ethos of the children's hearings system, but we are left with a doubt about whether that is happening. The minister has not been able to assure us with figures or facts about the impact of the proposals.

The minister talked about the situation being an emergency. Why should we not wait until we have had the Court of Session's ruling? I cannot for the life of me understand why we are rushing into the matter this week when we could wait for the Court of Session's ruling and take a more reasoned approach once we have heard it. There are Court of Session rulings all the time. As Margaret Smith said earlier, there were a number of Court of Session rulings that led to our reforming the Education (Additional Support for Learning) (Scotland) Act 2004, but we did not amend the act before we heard those rulings. We took the judgments on board, lived with the legislation for more than a year and then acted, as a Parliament, to amend the act. I believe that there are Court of Session rulings at the moment about placing requests—there are Court of Session rulings all the time, so I do not see why this one represents an emergency.

How long did the Executive take to act in 2001? I think that the minister suggested that the Court of Session made a ruling in 2001 but the Executive acted in 2002. I do not remember an emergency SSI going through to amend the children's hearings legislation, although I might be wrong. I would welcome the minister's thoughts on what makes this situation an emergency and why we cannot take a little more time to get ensure that we get it right.

Adam Ingram: We have identified that people's human rights are being breached and we are under an obligation to move as fast as we possibly can to ensure that that does not continue or affect any other individual. That answers your question.

Ken Macintosh: That does not answer my question. Court of Session rulings happen all the time and you do not always take the action that you are proposing today.

Adam Ingram: Court of Session rulings on human rights do not happen regularly. We have to deal with this specific case here and now, and it is in our power to do so.

Ken Macintosh: If I may say so, there has not even been a ruling.

Adam Ingram: Okay, we have identified—

Ken Macintosh: That there might be a ruling.

Adam Ingram: No. We have identified and accepted that a breach of human rights has happened in these circumstances, so we are duty bound to correct that here and now—as quickly as we possibly can.

Ken Macintosh: I must express my concern. I understand the minister's approach, but I think that, in addressing one set of rights, we might be breaching another set of rights.

Christina McKelvie: We have heard a lot of filibuster this afternoon about the changed nature of the panel system. Can you confirm that it has always been the case that parents who could afford a lawyer could take a lawyer to the panel?

Adam Ingram: My colleague has acknowledged that that is the case.

Christina McKelvie: So that has always been the case. Therefore, we are talking about a handful of people who need support to get through the panel system, especially when an important decision is being taken about the liberty of their child.

Adam Ingram: That is correct. We are talking about people who cannot participate in the hearings other than through a legal representative, which is a specific and not large group of parents.

Christina McKelvie: In all the children's hearings that I have attended over the years, I have seen only one or two cases in which a parent has been in the position that we are discussing. Each time, however, it was heartbreaking to see, because decisions were taken out of their hands, and they did not have the proper support to deal with those decisions or help them through the system. I welcome the immediate action that you have taken. If immediate action had been taken on slopping out, for instance, we would not be paying out huge compensation claims to people whose human rights were breached. I commend you for addressing the issue as quickly as possible.

I have had letters from children's reporters and members of children's panels who have concerns about the bill, but I can see both sides of the issue, and, as I said, I have seen situations in which parents needed the kind of support that we are discussing but could not afford it and situations in which parents who could afford that support were able to make a very good case. It is unacceptable that, in a democratic country in which we are supposed to support vulnerable people to engage with our systems of government, we should not provide them with that service.

18:00

Adam Ingram: I thank the member for her comments.

The Convener: I do not think that there was a question in there, but the member is entitled to express her views on the matter.

Margaret Smith: I want to tease out with you the issue of the numbers. I take Ken Macintosh's point that, although we might well hazard a guess that a handful of people are involved, we cannot really know the exact number. However, as far as I can see, there is nothing in the regulations that would allow us to pinpoint the kind of individual we are talking about. Ken Macintosh has alluded to the Adults with Incapacity (Scotland) Act 2000, with which I was involved many years ago. Why is there nothing in the regulations that limits or, at least, gives guidance to people on the types of situation that are likely to be covered?

Earlier, I mentioned the covering letter to the SSI. I point out to the minister that we have received a letter from the children's panel chairmen's group, asking us not to approve this SSI because its

"provisions, if implemented, may have a profound effect on the way Children's Hearings are conducted".

Opposition members of the committee are not just making this up. At no point in your covering letter, which indicates some of the thinking behind these regulations in relation to human rights legislation, do you say that the matter is subject to an on-going challenge. We as parliamentarians are consultees on legislation and SSIs as much as the Scottish committee of the Administrative Justice and Tribunals Council or anyone else, but our rights to proper scrutiny are being breached by what you have done. I accept that you feel that you had to do it, but I find it difficult to accept why a covering letter from a Government department should not give us the full facts behind the course of action that has been taken.

We are talking about people whose service to our country is held in the highest possible regard by every single person around this table, and I am simply concerned that you have not involved the committee enough in all of this. I appreciate that we have been in recess, but there are ways of handling these matters. You have not really given us the full facts and I am concerned that we have missed the opportunity to tighten up the regulations and to ensure that they are much more specific about the types of situation involved. Surely that might have given us some comfort on issues such as the numbers and the guidance.

Is there any chance, minister, that you might be happy to go away and think again about the contents of the regulations and perhaps take what we have suggested on board? No one around this

table is trying to obstruct you in your attempts to deal with a particular issue, but we are all trying to do the right thing.

Adam Ingram: As far as the covering letter is concerned, I am constrained in the detail that I can include about on-going cases. Perhaps Laurence Sullivan could respond on that matter.

Laurence Sullivan: I believe that the member is referring to the letter that accompanied the instrument, explaining why we had breached the 21-day rule.

Margaret Smith: The letter is dated 3 June.

Laurence Sullivan: Yes. At that point, the case in question was at an earlier stage. Although the letter makes it clear that in presenting the amended rules we were breaching the 21-day rule—which, as long as we provide an explanation, is allowed for under statutory instrument procedures and, indeed, the Parliament's procedures—it points out that by not doing so we were risking incompatibility with articles 6, 8 and 14. Because, as I have said, the case was at an earlier stage at that time, we were constrained in what we could say publicly in what was essentially a public letter to the committee. Today, however, we have been able to say more about it.

Margaret Smith: And perhaps the Scottish Government has not paid its phone bill in the past two months, which is why there was no phone call to the convener or committee members telling us what was likely to be on our desks when we came back after recess.

Adam Ingram: Well—

Margaret Smith: I am simply talking about courtesy, minister, and about trying to find the right solution. We are not playing games; we just want to know the full facts.

Adam Ingram: I point out to members that communication is a two-way exercise.

There was another issue that you wanted to pick up.

Margaret Smith: It was about detailing the individual.

Adam Ingram: No, it was something else.

Margaret Smith: I asked whether there was some way in which the regulations could be more tightly drawn either through guidance or by indicating some of the circumstances that we might be talking about. Such a move might give people more of a sense that the regulations will affect literally the handful of people that you have told us about today.

Adam Ingram: I do not think that there is any way of amending these regulations in that respect. I also point out that the letter that you say was sent to committee members by the children's panel chairmen's group was not passed to me.

The Convener: I have to disagree with you, minister. The letter was passed to you today in the same e-mail that I and the rest of the committee received. If your officials did not flag it up to you, that is to be regretted.

In any case, during the summer recess, I wrote to you in great detail on this subject—not, I must stress, as the committee convener, because the committee had not formally considered the matter, but as an individual MSP—to reflect panel members' concerns. To date, I have received no response. As a result, it should have come as no great surprise to you and your officials that this matter was raised today.

Adam Ingram: I am sure that your letter is in the system. If, as you said, you have written to me as an individual MSP, you will have to accept the normal timetable for responses to letters. If the committee had written to me, seeking information for this meeting, I would have obliged members with it.

The Convener: I had no ability to write to you on behalf of the committee. After all, this is the first day that the committee has had the opportunity to consider the issue.

That concludes the committee's questions. I thank the minister and his officials for attending.

18:07

Meeting suspended.

18:10

On resuming—

The Convener: The final item on our agenda is further consideration of the subordinate legislation that was discussed with the minister in evidence taking. I will take each instrument in turn and ask members to comment on them.

No motion to annul the Looked After Children (Scotland) Regulations 2009 has been lodged and the Subordinate Legislation Committee has determined that it does not need to report on them to the Parliament. If members have no comments, do they agree to make no recommendation on the regulations?

Members *indicated agreement*.

The Convener: Does any member want to comment on the Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009?

Ken Macintosh: Yes. Notwithstanding the minister's argument today and the fact that he began to reassure me that the policy intent is not to open up the hearings system to an army of lawyers or make it overly adversarial, I am left with the worry that that is exactly what the rules will do. The explanatory note to the rules says:

"In addition rule 5 specifies a non exhaustive list of factors which may affect a person's ability to effectively participate in the hearing."

Therefore, even the list, which includes the complexity of the law, is reason for impairing somebody's ability to participate in a hearing—sorry, I am having difficulty participating in this hearing; it is 10 past 6.

I have a number of outstanding worries, so I ask permission to move a motion without notice.

The Convener: You have permission to move it. It is up to me whether I take it after you have moved it.

Ken Macintosh: In that case, I would like to move a motion to annul the rules.

The Convener: Does anyone wish to comment?

Kenneth Gibson: I find it astonishing that we spent an hour and a half discussing the matter when the minister repeatedly made it clear that he had no option other than to take the current course of action following advice from the Lord Advocate that human rights were being breached.

Common sense should prevail. Although we did not get specific numbers, it is clear that we are talking about significantly less than 0.1 per cent of cases that are brought before children's panels. Alarmist comments that the hearings system is somehow at risk are clearly nonsensical, as the previous Administration used the same sections of the Children (Scotland) Act 1995 to introduce statutory instruments on the same emergency basis in 2001.

It is astonishing that we are discussing the matter at this late stage. I will not support any motion to annul, given the clear comments that the minister repeatedly made.

The Convener: There will be no opportunity to support or oppose the motion to annul today. If, as convener, I choose to accept the motion, the committee will have to consider it at a later meeting and the minister will have the opportunity to speak to us again.

Given the minister's evidence, the level of concern that many members of the committee have expressed and the concerns expressed directly to the committee by members and chairs of children's panels from throughout Scotland, I am minded to accept the motion to annul, which means that the committee will have to consider the matter further. Normally, we would do so at our next meeting. Unfortunately, because of the timescale, we will need to meet again briefly on Tuesday morning to consider the motion. I hope that members will be able to attend the meeting.

18:15

Kenneth Gibson: I am sorry, but I have other arrangements for next Tuesday. To call a committee meeting on such an issue at such short notice, without any consultation whatever, is an absolute outrage. If we have to go through this rigmarole again, we should at least have a discussion about when the meeting will be held. Not all committee members are present, and we should at least discuss the matter with them. If we are going to meet next Wednesday anyway, the obvious solution would be to meet earlier on Wednesday—we will all have to be here from 10.00 am on that day—rather than have us come in specifically to discuss the issue. Some of us have other arrangements in our constituencies that cannot be broken.

The Convener: I appreciate that, Mr Gibson. My preference is to meet on Wednesday morning, but that is not possible. The time constraints that are placed on our consideration of the rules require that it be completed by Tuesday. Those are not my time constraints; they are the time constraints of the Government, which chose to breach its own rules when it laid the instrument.

The options are that we meet on Monday or on Tuesday. I thought that members would prefer to meet on Tuesday morning, but some might be minded to meet on Monday or on Tuesday afternoon. Maybe you could tell me what your preferences are. Sorry—I am advised that Tuesday afternoon would be too late for the Parliamentary Bureau. It would have to be Monday or Tuesday morning. Tuesday morning would appear to be the best time.

Christina McKelvie: I am sorry, convener, but Tuesday morning does not suit me. I am really annoyed that more courtesy is not being shown to members. I was involved with an inquiry by the Standards, Procedures and Public Appointments Committee last year, and we were courteous to everybody in ensuring that, when we held additional meetings—two or three in one week—we co-ordinated them with each member of the committee. You are saying that we will meet on Tuesday morning just because that suits your diary or other members' diaries, but it does not suit my diary. I am sorry, but it would need to be Monday afternoon for me.

Kenneth Gibson: Why not Thursday or Friday?

The Convener: Christina McKelvie fails to understand that this is not about suiting my diary.

It is not about suiting anybody's diary. It is about the time constraints that are placed on the committee in complying with the standing orders of the Parliament. None of us could have known that we would have to consider a motion to annul because none of us came here today wanting to force the minister into this position. We came wanting to hear him give evidence to us, to reassure us and address the concerns of many people in Scotland.

Kenneth Gibson: He did.

The Convener: Mr Gibson may, from a sedentary position, suggest that he did.

Kenneth Gibson: We are all sedentary.

The Convener: However, the minister clearly did not address everyone's concerns. It is entirely up to the convener of the committee to decide whether it is appropriate to consider the motion to annul. I think that that is appropriate, given the concerns that have been expressed by several members. That means that we must consider it no later than Tuesday lunch time. I suggest that Tuesday morning will be slightly more convenient for the majority of members. I assure you that it is not convenient for me—I will have to cancel appointments. Most members will have to cancel appointments. However, that is the obligation that is placed on us and we all have a duty to fulfil our parliamentary obligations. I am not going to discuss the matter further.

Kenneth Gibson: Why can it not be Thursday? Why do we have to meet on Monday or Tuesday? Is it possible to meet on Thursday or Friday?

The Convener: Committees of the Parliament cannot meet when the Parliament is in plenary session. That rules out Thursday. Is Friday an option?

Kenneth Gibson: We could meet at 6 o'clock on Wednesday or Thursday, or at lunch time on Thursday.

Margaret Smith: Can we leave it with you, convener, to try to find some options in terms of members' diaries that will also allow the minister a fair amount of time to consider people's concerns? My concern about pulling the meeting back to Thursday, for example, is that, given that it is already Tuesday, we would not give the minister much time to do that.

Kenneth Gibson: We have already heard the minister's decision.

Margaret Smith: Mr Gibson can keep barracking me—

Kenneth Gibson: I am not barracking you.

The Convener: Mr Gibson, one speaker at a time.

Margaret Smith: I am attempting to find a way for us to find a time that suits as many members as possible. Rather than try to do that around the table, could we leave it to you, convener, to try to find a suitable time through discussion with colleagues via e-mail or whatever? It could be any time up to Tuesday morning but no later than Tuesday lunch time, on the basis of what we have been told.

Ken Macintosh: That is a very good idea. I point out that there is still another item on our agenda.

The Convener: Yes. We will come to that very shortly, I hope.

I will do my best to identify an alternative time, given the constraints that the Parliament's standing orders place on the committee's consideration of the rules. I appreciate the fact that a meeting on Tuesday morning may cause members great inconvenience and concern—that inconvenience will probably be felt by all of us. Nevertheless, we have an obligation to consider fully all the matters that are laid before the committee. The clerks and I will correspond with committee members by e-mail, suggesting as many alternatives as we can identify. I hope that we will reach a limited, if not universal, consensus on the matter.

Police Act 1997 (Criminal Records) (Scotland) Amendment (No 2) Regulations 2009 (SSI 2009/216)

The Convener: No motion to annul the regulations has been lodged and the Subordinate Legislation Committee has determined that it does not need to report on the regulations to the Parliament. Do we agree to make no recommendation on the regulations?

Members *indicated agreement*.

Meeting closed at 18:22.

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