EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

Tuesday 8 September 2009

Session 3

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EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE
22nd 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:

Adam Ingram (Minister for Children and Early Years)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Nick Hawthorne

ASSISTANT CLERK

Emma Berry

LOCATION

Committee Room 6

Scottish Parliament

Education, Lifelong Learning and Culture Committee

Tuesday 8 September 2009

[THE CONVENER *opened the meeting at 10:05*]

Subordinate Legislation

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

The Convener (Karen Whitefield): I open the 22nd meeting in 2009 of the Education, Lifelong Learning and Culture Committee.

We have received apologies from Kenny Gibson, who is unable to join us; he has been replaced by Andrew Welsh, whom I welcome as his substitute. I understand that Liz Smith will join us in the next 10 to 15 minutes. Unfortunately, she has another engagement that she has found it difficult to get out of, although she intends to be here before proceedings close.

There is only one item on our agenda. The committee will again consider SSI 2009/211. Members will be aware that Ken Macintosh has lodged motion S3M-4758 to annul the instrument; it states:

"That the Education, Lifelong Learning and Culture Committee recommends that nothing further be done under the Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009 (SSI 2009/211)."

The committee has up to 90 minutes to debate the motion, after which it will be required to decide whether to support it.

Members will remember that we had an opportunity to question extensively the Minister for Children and Early Years, Adam Ingram MSP, and his officials at last week's meeting. Members can pose questions in their contributions in this meeting, but the minister will not be able to answer them directly. However, he will participate in the debate and may refer to questions in summing up.

I am pleased that the committee has been joined by the minister. He is joined by Shirley Laing, who is deputy director for workforce and capacity issues in the Scottish Government, and Laurence Sullivan, who is a senior principal legal officer in the Scottish Government. Laurence Sullivan has returned following last week's meeting.

I ask Mr Macintosh to speak in support of his motion and to move it.

Ken Macintosh (Eastwood) (Lab): It is unfortunate that we find ourselves in this position. I think that all of us around the table—committee members, the minister and his team—are supportive and, perhaps, even proud of Scotland's hearings system, but it is because we are proud of it and wish to protect the principles that underpin children's panels that we have taken the highly unusual step of moving to annul the statutory instrument.

My overriding concern is that, in addressing one perceived problem with the hearings system—the legal representation that is afforded to adults—the minister will potentially create a range of new problems and could fundamentally alter the principles on which panels operate. Will the minister address that central concern and explain to the committee why there is a rush? What is so urgent about the instrument when primary legislation is waiting in the wings? Why has the Government not consulted more widely? It is clear that the volunteers who sit on children's panels throughout the country are alarmed by what is planned. Finally, can he reassure the committee about who will be affected by the changes? How many cases are involved? I do not think that I am the only committee member who was not particularly convinced by the comments that were made last week about merely "a handful of cases" being involved.

I will expand briefly on those points. I support the children's hearings system, but it was clear from our discussion last week that various shortcomings need to be addressed. I will not argue against the principle that adults also occasionally require assistance to allow them to make known their views at hearings. I think we all accept that there is a need for everyone to be able to participate fairly at a children's hearing. It is particularly important that parents and other relevant adults, who have such an important relationship with the child, can do so.

However, children's hearings focus on the needs and rights of the child, so we must proceed very cautiously before moving the focus away from those rights to the needs and the rights of parents or other adults. The children's panel is not supposed to be an adversarial forum, but panel members fear that that is exactly what it might become if the SSI is implemented. They are anxious that the process might become overly legalistic, and that we might lose sight of a lay-administered system of justice that focuses on the needs of the child.

Despite the minister's evidence last week, I remain to be convinced of the need for urgency. Governments lose court cases on a fairly regular basis, and it is right that law and public policy are tested in that manner. However, the Scottish

Government has not yet lost the case. We have not even heard a judicial decision—if, indeed, we ever will. The minister implied last week that we can always revisit the matter when the proposed children's hearings (Scotland) bill—which will be the primary legislation—comes before Parliament, but that makes the SSI seem even more like a temporary solution and a quick fix.

Important issues are at stake, and the onus is on Parliament to get it right rather than to act quickly. As I am sure the minister knows from meeting people who chair children's panels who visited the Parliament last Wednesday, there is a great deal of unease and concern among panel members about what is proposed under the SSI.

Interestingly, since our last meeting, I have been contacted by a solicitor who often represents adults at children's hearings. I believe that she is representing the family that is the subject of the case that is currently before the Court of Session. She pointed out that the supposed solution—if I may call it that—that the minister proposes will allow only a solicitor who is approved and appointed by the children's panel to represent parents at a hearing. That will usually involve the appointment of a lawyer who has no previous relationship with the family—it would exclude that solicitor, for example, from support in representing her own clients. It appears that lawyers and panel members are unhappy at the proposed direction of the SSI.

I suggest to the minister that we have, at the very least, a duty to consult further each of the stakeholders before we proceed. One of the most glaring faults with the SSI is the lack of certainty around whom, and how many cases, it will affect. On the financial effects, the executive note states:

"additional costs for Scottish Government are anticipated, as yet undetermined".

That sums up the fact that we do not know who will be affected, how much it will cost or how many cases there will be.

I have made inquiries in a couple of areas after hearing the minister's suggestion last week that there could be only "a handful of cases", and I have discovered that even in the three months since June, adults in dozens of cases throughout Scotland have had legal representation appointed for them. That does not strike me as being "a handful of cases". The wording of the SSI struck me last week as being extremely broad, and it does not appear that its effects would be limited.

Those are just some of the anxieties that panel members and others have reported to the committee and to me. Can the minister offer the committee any reassurance on those points, or would it perhaps be more appropriate to withdraw the statutory instrument at this stage? I believe that the children's hearing (Scotland) bill has been postponed specifically in order to get it right. Should we not do the same with the SSI?

I move,

That the Education, Lifelong Learning and Culture Committee recommends that nothing further be done under the Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009 (SSI 2009/211).

The Convener: I thank Mr Macintosh for moving the motion to annul, and I invite the minister to contribute to the debate.

The Minister for Children and Early Years (Adam Ingram): I am conscious that we had a lengthy discussion about the statutory instrument last week, and I hope that we will not spend too much time going back over that.

First and foremost, I must make clear the Government's commitment to the principles and ethos of the children's hearings system. The system is all about the best interests of the child, and the SSI will help to ensure that that remains the case.

10:15

I know that the committee has had representations from panel chairs, and I now have a copy of the letter to which members referred last week. However, I understand that the views of panel chairs and, indeed, of panel members as a whole, are not as clear cut as the letter suggests. That was certainly what I heard at the reception that many members attended with panel chairs last Wednesday evening. I draw the committee's attention to the words at that reception of Gerard McEneany, the chair of the children's panel chairmen's group, who was explicit that the business of children's hearings was children, not politics. I am sure that everyone here agrees with that sentiment.

Unlike the Scottish Parliament, the children's hearings system does not go into recess in the summer months. Hearings take place every working day. Each decision that a panel makes must be made on the basis of the fullest information being provided by all who are in attendance. Only if the panel members have that information can they use their judgment to determine what action is in the best interests of the child. It therefore follows that securing the effective participation of all parties who are involved helps us to protect the ethos of the children's hearings system as much as the informal setting does. Although the child's voice is primary and panels must do everything they can do to support a child to speak and be heard, we cannot ignore the fact that relevant persons also play a key role in hearings. For example, they have an obligation to attend, they must with the

child accept the grounds of referral along, and their views are sought by panel members.

The need for the effective participation of a relevant person seems vital if panel members are to gather the information that they need to make a decision on what, if any, compulsory measures of supervision might be required. Quite often, contact with a relevant person is an element of the terms of a supervision order. In the case that has resulted in our introducing the statutory instrument, the relevant person has been assessed as having the language ability of a child of six and a half, the literacy skills of an eight-year-old and the numeracy skills of a six-year-old. How can we honestly expect that person to have their say and to put their perspective across without help and support? We have a moral duty to support them.

I accept that, when such instruments are introduced, consultation of interested parties is appropriate, but in this case it was not the priority. Every day we delay putting in place this vital provision, we put vulnerable people who are already at risk at an even greater disadvantage. Life-changing decisions are being made for them and about them, without their having the fullest opportunity to participate effectively, and without support for their basic human rights. We had a statutory duty to consult the Administrative Justice and Tribunals Council in advance of laying the SSI—we did so. It commented that the breach of the European convention on human rights in the circumstances was fairly obvious.

By acting quickly, we are protecting vulnerable people and reducing the risk of other ECHR breaches occurring on similar grounds. If the instrument is annulled, we will be in breach of the ECHR and, perhaps more important, so will panel members. As public bodies, under Scots law panels must comply with the ECHR. Parliament will place them in an extremely vulnerable position if we do not allow them to do so, which is why we introduced the instrument in advance of the Court of Session judgment on the case, and why we took the unusual, but highly justifiable, step of breaching the 21-day laying rule. I am sure that members are aware that the Subordinate Legislation Committee examined the SSI on 16 June 2009. That committee approved the instrument and made no comment on the content or on the breach of the 21-day rule, neither did it comment on the Government's consultation. It is therefore clear to me that, procedurally, the SSI is fine, so I trust that we do not need to re-examine those issues today.

Last week, we also spoke about whether allowing lawyers into a hearing could potentially erode the ethos of the children's hearings system. Lawyers are already involved in children's hearings, and have been since their inception. All relevant persons and children have been able to have the support of a lawyer—but only if they were willing and able to pay for one. The Government is committed to helping the disadvantaged. I for one am not prepared to say to the relevant person in this case, or to anyone who is in a similar position, "You can't pay, so you can't have help."

In 2002, the Government of the time put in place a scheme making provision for access to state-funded legal representation for children in certain circumstances. State-funded lawyers have been a feature of the children's hearings system since 2002, without damage to the ethos.

As for the numbers—Mr Macintosh pressed me on this—it is impossible at this stage to say precisely how many relevant persons will require support. Based on a recent informal survey of local authorities, officials estimate a maximum of 250 cases per year, which is about 0.5 per cent of cases that come before a hearing.

I recognise the concerns of panel members and others about the proposals in the draft children's hearings bill, which is why we have decided to take more time to listen to those concerns and to take them into account in preparing the bill for introduction. That bill is not, however, what we are discussing today—I look forward to that in the new year. Our discussions on that bill will allow us to reconsider legal representation for relevant persons in the light of experience so far. Let us be clear: nothing in the statutory instrument that is before us ties the Parliament's hands in relation to the draft children's hearings bill.

I ask you not to lose sight of the vulnerable people who will be affected by the decision that is made today. They are most likely to be adults who have the mental capacity of a child. They are not guilty of wilful neglect, but need support in caring for the children whom they love. Unless they are supported, those adults are unable to contribute to the discussion and to decisions about their children. It is the rights and best interests of those children that we have a duty to protect. Fair process demands that relevant persons are supported, too—let us not forget that, for most children, that means their parents—and that their Government ensures that their human rights are observed. As Gerard McEneany rightly pointed out, this is about children, not politics.

Margaret Smith (Edinburgh West) (LD): Those of us who were at the meeting with children's panel chairs and members last week heard the then chairmen's group chair—I believe that he has subsequently resigned—make that point. It would be nothing short of offensive to suggest that anybody around this table will be viewing the issue as being one of party politics instead of what is in the best interests of Scotland's children.

We heard at that meeting—it was also presented to us in a letter in advance of our meeting last week—the clear concerns of the chairs of children's panels. They did not beat about the bush: they basically said "Do not pass this SSI. Annul it." It could not have been clearer. It was in writing, in a letter under the name of the aforementioned gentleman.

The conversations that we had last week—certainly, the ones that I had with panel chairs—impressed upon me that there is a difference of opinion, but the one that was expressed in that letter is the one that is held by every individual to whom I spoke at the event, with the exception of one.

The minister will recall that he told us last week that "a handful" of people would be affected. "Handful" is a subjective word. To one person, it means five or six, but to another it means 250. When I heard the word "handful", I did not imagine that it meant 250. I assumed that it meant perhaps 30 or 40 people, including the obvious people to whom the minister alluded, such as people with learning difficulties or mental health difficulties. Last week, I and Mr Macintosh mentioned the types of people who might be covered by legislation on adults with incapacity and on mental health. I do not think that anybody would debate whether such individuals should have some form of representation to assist them at a children's panel.

What concerns me the most is the feedback that we received from children's panel members when we talked to them about the likely numbers and about the breadth of the drafting of the SSI. I asked them specifically about those things during last week's committee meeting. In Glasgow, 36 people were covered in the first four weeks. Across Fife, across Lanarkshire and across the country, reasonable numbers of people have already been covered. Children's panel members told us that they have not had the relevant training to enable them to work out whether an individual requires assistance to understand what is going on and to articulate their point of view. In that vacuum, or that gap, children's panel members have been erring on the side of giving people legal representation.

In their letter, the chairs highlight the ethos of the children's panels and their statutory responsibility to act in the best interests of the child. Nobody on the committee would debate or dispute that in any way. However, what we have in the SSI is an opening up that goes beyond the Children's Hearings (Legal Representation) (Scotland) Rules 2002, which cover just children, to cover parents and others. If we look at the wording of the 2002 rules, it is clear that the 2009 amendment rules represent a widening that takes the rules beyond questions of residency in children's homes and into other issues that affect the relevant person's parental rights. Those rights do not necessarily work in the best interests of the child—for example, if the child is being subjected to abuse. The paramount issue for children's panel members is obviously what is in the best interests of the child.

Given the numbers involved, some practical difficulties might arise with the availability of legal representation. If such representation is not available because the numbers are substantially higher than has been anticipated, delays might occur before decisions are made at children's panels. That will not necessarily be in the best interests of children, either.

My understanding of what happened in 2002 is that the previous Administration lost a case in the Court of Session and, as a result, went to a full consultation on the best way in which to implement legal representation in the best interests of the child—which is, I repeat, the fundamental statutory ethos behind the children's panel system. What we have now, in 2009, is a situation in which the Government has not lost a case. The minister mentions in the third paragraph of his letter to the committee

"The clear view of the courts",

to the effect that there is a breach of the European convention on human rights. However, we do not yet have, as far as I am aware, a "clear view" from the courts. What we have is a clear view of the Government. That is not the same thing.

Why have we not waited for the judgment of the courts but instead decided on a course of action without opening it up to full consultation of the chairs of the children's panels and others? There has been only a limited consultation, in which we asked the Scottish committee of the Administrative Justice and Tribunals Council what it thinks. We have not consulted the people who are involved in running the system day to day and week to week. Children's panel members have expressed to us concern that they have not had training to allow them to make the required judgments.

I am always concerned when any Government breaches parliamentary rules. There have been occasions on which that has happened in the past. I do not think that any parliamentarian should take the matter lightly, and I am sure that the minister has not taken it lightly on this occasion; nonetheless, alarm bells have been set ringing. Given the fact that primary legislation will come along in a matter of months, it would be better to have full and proper consultation not only on that primary legislation, but on this particular issue, so that we can ensure that we get it right.

10:30

We have also had made available to us the Government's useful research document. I confess that, because I was off sick yesterday—I should probably be off sick today instead of spreading my germs—I have not read all 102 pages of the document, only the executive summary. Nevertheless, the research that the Government has undertaken for its review of the children's legal representation grants scheme is useful because it shows a mixed picture and flags up ways in which the system might be improved in terms of how it has worked for children. It is highly unlikely that rushing ahead with the SSI that we have in front of us, which will make the system broader and will open it up to legal representation for relevant persons, will enable the lessons that have been learned from the research to be taken on board.

Given the Government's research, the proposal for a full consultation and the willingness of all sides to come up with a solution that gets the balance right and protects the interests of children and of parents—whom natural justice demands have the right to have a voice and their views heard—it is worth our taking the time to get it right. I do not think that anybody around the table would argue that there are not occasions on which individuals would benefit greatly from what is proposed, or that the hearings system as a whole would not benefit from it. However, there is deep concern that it has the potential to change the ethos of the children's hearings system. The numbers involved are a matter of sticking a finger in the air and, at the moment, we have no idea what the costs are going to be. Given the concerns that the chairs of the children's panels still have—of which I learned during conversations that I had with them following last week's committee meeting—I am now more inclined to think that we are doing the right thing in voting to annul the instrument than I was prior to last week's meeting.

Christina McKelvie (Central Scotland) (SNP): It has been my experience, over many years of observing children's panels, that the best practice is always to include everybody. That has also been my experience in life and in politics. One of the issues that have been playing on my mind since questions were raised at last week's meeting is that it is the wrong approach to legislate only after something has happened, when a case has been lost that may involve something as fundamental as somebody's human rights. The approach that we should take is to pre-empt some of this and legislate to protect people before a case is tested in court. That is the course of action that should be taken in a serious human rights-based system. From my experience, I think that that would provide better outcomes for everybody who is involved in the children's hearings system.

When I was a training officer and accompanied trainee social care workers and social workers to children's hearings, I was able to observe everybody's behaviour at a children's hearing. In cases where it was obvious that a parent or relevant person was not engaging or did not understand and where something as serious as a child's liberty or a tagging order was being discussed or where a parental right was being taken away, I always thought that it was a travesty that that person could not participate. As we have heard, it has always been the case that people could have legal representation, but now we can give the most vulnerable in society state-funded representation.

One of the things that has bothered me since the inception of the Children's Hearings (Legal Representation) (Scotland) Rules 2002 is that a parent can always have legal representation, whether they are there for an offence reason, a wellbeing reason or a neglect reason, as long as they can afford to pay for it—a number of parents have such representation. The Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009 will give power and protection to panel members. It will give them the power to decide whether someone needs a legal representative. I am delighted to hear from Margaret Smith that panel members have been erring on the side of caution since the 2002 rules were brought in. That is the best approach and it should be taken in this case. The 2009 rules will also give panel members protection, because, as we have heard, the current system leaves us all open to question about our commitment to human rights, which is a serious issue—panel members might be exposed to allegations that they are not upholding someone's human rights. The 2009 rules will protect panel members in such cases.

The other issue that has concerned me is the conflation of the SSI and the draft children's hearings bill, which is either naive or deliberate. Two things have been meshed together to create confusion and I am disappointed that people have gone down that road. The SSI is completely different; it is brought about by a different issue. The minister has given us assurances that, when we look at the draft bill, we can reconsider this issue. The cautious approach is the best one to take.

At last week's panel chair meeting, there were a fair number of people who were not happy about the SSI. When I spoke to a lot of them, I found that that was because they did not understand why it was there—the two issues had been conflated. A number of panel chairs welcomed the SSI and one of them told me that it was not only necessary but

a good thing. I have no doubt about where panel chairs will go with this SSI, because I think that the people to whom I spoke last week understand why it is necessary. They want to look at the draft bill, and we are giving them that opportunity, but some of them think that the provisions of the SSI are absolutely necessary and should be introduced now.

Another issue is briefing and consultation. Questions have to be asked about why when this committee was offered consultation with and briefings from the minister and his team on, I believe, three occasions over the summer, not only were those offers knocked back but the other committee members were not informed of them. There are serious questions about why that happened.

I caution members that, in annulling the SSI, we would send out the message that we do not value our citizens' human rights. As I have said before, a human rights-based system is the best system for any country. I also believe that one human rights abuse, whether involving a handful of cases or not—we have lots of issues that involve handfuls of cases and I think that trying to calculate numbers is a moot point—is one too many. I do not care whether we are talking about 10, 12, a handful or 250, as one is enough for me.

There is also a serious danger that we will move from a system that supports everyone to one where people can get support if they deserve it or can afford it, which worries me. Our compassionate legal system is based on the right of an individual to be represented. Whether we agree that they should be represented or not, for whatever reason, they should still have the right to be represented. That is what our legal system is founded on. If we annul the SSI today, we will create a situation in which the most vulnerable in our society are not given that support. If we do that, it will be a travesty. It will leave us all open to questions about our commitment to extending human rights to all. I urge Ken Macintosh to withdraw his motion.

The Convener: Although it is not appropriate for me to respond to any of the points made by the member, she made the serious allegation that the committee had been offered briefings on three occasions and that those offers had been rejected. That is simply not the case. The Government ministers, in accordance with procedures that have existed for the past nine summers since the creation of the Parliament, have always offered advice and briefings in relation to forthcoming legislation to allow a committee to prepare for its away day. That offer was made, but there was no offer of a specific briefing on this SSI. It is unwise of members to raise such matters before having clarified the facts with either the convener or the clerks. That does a disservice to the administration of the committee and the Parliament.

Elizabeth Smith (Mid Scotland and Fife) (Con): I apologise to the committee for my slightly late arrival, which was unavoidable, and to Ken Macintosh, whose comments I missed in their entirety.

Minister, over the course of the six days during which we have been able to consider this matter in detail, I have had a genuine concern about the facts. I stress that my concern has been about facts, rather than political posturing or how the politics of the matter might play. As you rightly say, the interests of the children are what is important.

I have gone into the matter in great detail and have sought independent advice from a lawyer who has experience at this level, and I have to say that I remain in doubt about the legal advice that committee members have been given by the Government and others. Quite frankly, I do not think that that advice ties up with the point that Margaret Smith raised. I find it difficult to come to a judgment on that. I listened carefully to what you said last week about the need to separate this matter out from the children's hearings bill, and I take that point. However, I have not received definitive legal advice that gives me the impression that what we have been told is, in fact, the case in the long run, and I worry about our taking a decision before the Court of Session has given a ruling.

For the time being, I am not convinced of either side of the argument. I share a lot of the concerns that Ken Macintosh and Margaret Smith have raised, but I have listened carefully to the opposing view as well. As I say, I find it difficult to come to what I consider to be a factual and accurate legal judgment.

Aileen Campbell (South of Scotland) (SNP): I was surprised to hear what had happened at last week's committee meeting, which I did not attend. In the light of the information that the committee has been given, it seems that the Government has moved to protect the rights of some of the most vulnerable individuals—the people whom, as the minister noted earlier, we have a moral duty to protect.

In the *Official Report* of last week's meeting, I saw that members expressed concern about the ethos of the hearings system being damaged in some way, which Margaret Smith mentioned again today. In my view, the Government is doing what it can to protect the rights of the child and other individuals. A vital element of the children's hearings system is the effective participation of everyone involved, which ensures that a decision can be made that is in the best interests of that

child. I believe that the SSI that is before us respects that.

Ken Macintosh said that he accepts the need for everyone to participate fairly, but he suggests that the SSI would remove the focus from the child. However, that is not the case. Parents who can afford a lawyer can already take one to a panel, which means that, if we annul the SSI, the committee will be saying that we want to disadvantage those who are least able to represent themselves at a hearing.

The Government has indicated that other ways of sorting out the situation are not suitable. It finds itself having to be fleet of foot so that it does not breach the ECHR, which it will if it does not take action. The minister made it clear that that potential breach can be guarded against by not annulling the SSI.

I would be gravely disappointed if the committee took it upon itself to annul the SSI. With the SSI in place, there is no breach of the ECHR. If the committee were to annul the SSI, we would find ourselves in a bizarre situation in which a parliamentary committee had moved to breach internationally recognised rules.

Claire Baker (Mid Scotland and Fife) (Lab): I have concerns over the way in which the SSI has been handled, and I agree with what has been said about consultation. We are concerned about the breach of the 21-day rule. The approaches that the children's panel members made to us last week made it clear that that is an issue.

Margaret Smith referred to the number of applications that there have been so far and the direction in which the trend is going, which challenges the ethos of the children's hearings panels. Members are erring on the side of caution with regard to the numbers, but we are seeing higher numbers than expected, which is concerning.

I also had concerns at last week's meeting about how we define clearly who is eligible for legal support. Christina McKelvie said earlier that that is obvious, which it is for some parents. However, committee members have found it difficult to match those numbers with the suggested maximum number of 250 and to be convinced that support is being given to parents who are most in need. I therefore share many of the concerns that other committee members have raised.

10:45

Andrew Welsh (Angus) (SNP): As somebody entirely new to this, I approach it with trepidation. However, I can see right away that the problems are in fact in the unknowns, especially legal unknowns. The highways and byways of legal advice and, indeed, legal speculation are always a tortuous and difficult territory to be in. I take it as read that everybody rightly expresses a concern for the children and the children's panel system, but at the heart of the immediate issue is the possibility of creating rather than solving legal difficulties.

One problem is that the motion to annul the SSI is a motion to annul an existing right. I believe that annulling the SSI would be a de facto removal of a right that has existed since 2002. At the heart of this is the fact that the Government cannot be in breach of the ECHR, so the SSI must be laid. Is it legally sensible or right to force the Government to remain in breach of ECHR? Surely one solution must be compliance with European law. Forcing the Government to be in breach of it would only attract lawyers and more legal speculation, and court action might even be involved.

Margaret Smith said that we must reconsider the SSI, but if there is an acceptable alternative to it, I would like to hear that solution. To stop the process immediately and annul the SSI would simply cause greater problems. I appeal to the committee to look for another suggestion. I have not heard one, but if members have an idea or an alternative suggestion that would address the problems, it should be made as quickly as possible to enable us to get past what I see as an impasse. The Government cannot be in breach of European law—that is what is at the heart of this matter. The committee might be forcing a situation that would create even further problems.

The Convener: Before allowing the minister to respond to the debate and Mr Macintosh to wind up, I will give my views on the subject. I very much welcomed the minister's explicit commitment this morning to protect the central ethos of the children's hearings system. Although we can all have political disagreements about how that can best be achieved, I am sure that every one of us is committed to ensuring that the children's hearings system remains, and that we all believe in the system passionately and want to see it succeed and work. Equally, I do not believe that anyone who has suggested that the SSI be annulled today is doing so lightly or wants to deny any parent or carer the right to legal representation, if appropriate. More important, I think that we want to ensure that such individuals can engage effectively and appropriately, and understand what is going on at a hearing. In fact, I think that every member of a hearing would want to ensure that that was the case. For many of us, the central concern is that the statutory instrument, as it is drafted, is flawed, and there are many uncertainties that remain to be answered.

At last week's meeting, the minister was asked a wide range of questions. Unfortunately, he failed

to adequately answer many of them. I am not at all convinced that his further comments today have clarified some of those outstanding issues. As a result of his inability to quantify how many cases would be affected by the SSI, the minister failed to reassure many members of the committee that it would not lead to increasing legalisation of the children's hearings system. In response to a question from Kenneth Gibson at last week's meeting, the minister suggested that the number of cases that would be affected would be in the region of half a dozen to 20 a year, but this morning we have heard that the figure is 250.

Over the past few days, I have spent a considerable amount of time speaking to reporters and panel members to find out their views on the operation of the system since the SSI came into force. Although their views are anecdotal, their experience suggests that about 70 legal reps have already been appointed across Scotland. That is before the measure has properly bedded in and everyone has been properly trained. If that is the case, I have some doubts as to whether the figure of 250 that the minister has quoted is particularly accurate. It is clear that people in the "handful of cases" to which the minister referred at last week's meeting deserve to have legal representation, but is the SSI the right way of ensuring that that is the case?

It is extremely worrying that the minister and his civil servants have so badly misjudged the SSI's impact. How can we have any confidence that it will not lead to further legalisation of the system when we do not know how many people it will affect? Equally, how can we have any confidence that the Government can afford the measure or that there will not be consequences for panel members and local authorities?

In addition, I am not convinced that the minister has properly examined the possibility of using other methods to achieve the aim of ECHR compliance. In particular, I feel that the option of granting legal aid to a parent who brings a legal representative with them to a hearing would be far more appropriate and would avoid the needless bureaucracy that the SSI creates for reporters and panel members. It would also mean that we would not have a two-tier system, in which a parent who has a family solicitor to deal with some aspects of their child's care and welfare will also have a legal representative appointed to deal with matters at a children's hearing.

Although I acknowledge the Government's desire to address ECHR issues, it is inappropriate for it to rush to do so in haste, without thinking through the consequences. It is vital that we recognise that the Government is not currently in breach of any ECHR ruling.

Adam Ingram: We will be.

The Convener: You may well be in the future, minister, but you are not in breach of any ECHR ruling at the moment because no decision or ruling has been made by the Court of Session. You have an opportunity to reconsider the rules and to get them right so that you address the genuine concerns that exist and make any changes work appropriately. The Government is very keen on independence. Perhaps, in this case, a little independent thought would have gone a long way.

I do not believe that, in the rush to implement the SSI, proper account has been taken of the real and serious concerns that have been expressed by the children's panel chairs who wrote to the committee. I also do not believe that account has been taken of the views of the many reporters who work daily in the hearings system. If the scale of the impact of the SSI has, as it appears, been seriously underestimated, it is perfectly reasonable to conclude that the children's hearings system will become more legalistic and adversarial. That is a central concern of panel members up and down the country who give up their time freely to help vulnerable children. They are worried that the SSI, along with other changes to the role of the reporter, will result in a much less child-centred system. They rightly point out that protecting the rights of parents—some of whom will have placed a child in a position of neglect or harm—should not impact negatively on the right of the child to be protected from harm. I agree with that. That is why I firmly believe that we must get the legislation right and that changes to legal representation should be considered in the context of primary legislation. I do not believe that ECHR compliance should supersede that.

The minister quoted Gerard McEneany, who said that the rights of the child are central to the children's hearings system and that we should not play politics. I could not agree more with him. It is wrong of the Government to suggest that those who express concerns because we do not agree with the Government are making cheap political points. We are very concerned that the SSI will potentially prioritise the rights of the parent over the rights of the child, which is a serious situation. All of us want parents and carers to have rights, but protecting those rights should not put at risk the rights of a child or the child-centred approach of which Scotland is so proud in its children's hearings system.

The minister now has an opportunity to respond to the debate.

Adam Ingram: The SSI demonstrates the Scottish Government's support for the principles of the children's hearings system. We are ensuring that we continue to protect the rights of the child as well as the human rights of others—and the SSI does just that. Annulment would affect the

most vulnerable members of our society. It would further disadvantage the most disadvantaged people in Scotland by denying them access to free legal representation, and it would take away people's rights.

To Liz Smith, I say that I have received definitive legal advice from the Scottish Government's legal directorate—advice that came right from the top of the directorate to the bottom of it. There is no doubt about the Court of Session judgment, which is why we have conceded the point and the Lord Advocate has written to that effect.

We value our children's panel members greatly. The responsibility on them in hearings is huge. Annulment of the SSI would place them in a vulnerable position, putting them at risk of breaching the ECHR if there is no option of state-funded legal representation for relevant persons when that is deemed necessary. It would also put the whole system at risk, as the decisions of hearings at which a relevant person was unable to participate effectively could easily be challenged.

The Subordinate Legislation Committee approved the SSI without comment. That committee can refer to a wide range of issues, from significant matters such as unjustified breach of the 21-day rule to less significant matters such as drafting practice, but it chose not to report anything to this committee on any grounds. It is clear that the Subordinate Legislation Committee did not think that there was anything amiss with a breach of the 21-day rule in these circumstances.

11:00

Such a breach, given that it occurs rarely, would have ensured that the Subordinate Legislation Committee dealt with the issue as a matter of priority, but I assure you that no concerns were raised with us. I am surprised that a policy committee such as the ELLC committee sees fit to scrutinise the work of and the decisions made by the Subordinate Legislation Committee.

I repeat that we had a statutory obligation to act quickly to ensure that there was no breach of the human rights legislation. With regard to waiting for the Court of Session's decision, it was hoped that the court would be satisfied with our action rather than seek to draw a wider remit for state-funded legal representation. That hope would, of course, be placed under threat and negated by annulment of the SSI.

Margaret Smith made a point about the capacity of children's hearings panel members to deal with assessment issues. The panels have assessed the capacity of children since 2002 and are now doing the same for parents. Since the introduction of the SSI, 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.

I have clarified that demand today: it is around 250 cases, which ties in with the type of feedback that members on the committee are getting. I suggest that 250 cases out of the 50,000 cases that come before children's hearings panels—which, by my calculation, amounts to 0.5 per cent of cases—is not a significant amount. It does not mean that the children's hearing system will be invaded by lawyers.

The committee has mentioned a lack of consultation. Why, in that case, has my offer to brief committee members on the children's hearings (Scotland) bill and on wider related issues—which could have included this particular SSI—never been taken up? My officials offered the committee a constructive engagement with the Scottish Government on the children's hearings (Scotland) bill and related matters on 13 July; in the week beginning on 10 August; and most recently on 26 August. I would like to hear your justification for knocking us back.

If the committee moves to annul the SSI, it will mark a new low for any committee of the Parliament. No one, during my 10 years in this place, has ever proposed to deny the most vulnerable members of our society the means through legal representation to participate in life-changing decisions that affect their families, while knowing full well that those who have private means can, and do, purchase such representation on a daily basis.

I urge Mr Macintosh, in the strongest possible terms, not to press the motion.

The Convener: Mr Macintosh, you now have an opportunity to respond to the debate and to confirm whether you wish to withdraw or press the motion.

Ken Macintosh: I thank the minister and members for their comments. After hearing the minister's opening and closing remarks, I am unsure whether to embrace the points that we have in common or to take umbrage at his more insulting comments, which include his final remarks. I will begin with the more insulting comments and try to end on a more positive note.

Some of the minister's arguments are unworthy of him and the Government. For example, he suggested for some reason that, if the committee resisted the will of the Scottish Government, we would somehow be putting politics above the interests of children. That is not only a cheap argument; it appears to be designed to insult committee members rather than persuade them. The behaviour of members of education committees over several years has demonstrated

that most although not all of us take our scrutiny duties very seriously, and that some of us are capable of independent thought. I suggest to the minister that he take the beam out of his own eye before he accuses others who are not in his party of partisan behaviour.

I am equally unimpressed by the minister's attempt to hide behind the needs of vulnerable people. Do I need to point out that the Scottish Government and the minister contested the case in question until 3 June this year? Am I supposed to believe that the minister was not motivated by looking after the needs of vulnerable people until his Damascene conversion on 3 June? If the Government is motivated by addressing the needs of vulnerable people, particularly vulnerable adults, why is it that the solicitor who is representing such adults in the case before the Court of Session believes that the minister's measure does not do that? The solicitor believes that the measure will not help vulnerable adults because it will not give them access to the solicitors who currently represent them. If there are questions about whether the measure will do what the minister claims it will do, I do not see any reason why the committee should agree to it and not ask the minister to think again.

The minister put forward a number of other arguments that are more worthy of debate and consideration by the committee, including on the vexed issue of whether anybody might be at risk of breaching the ECHR. I think that he suggested that panel members and possibly the committee might be at risk of doing so, but I do not accept that argument at all. In summing up, he stated:

"There is no doubt about the Court of Session judgment".

However, there has been no judgment or decision, so the idea that there is no doubt about such a judgment is totally false logic. The statement again strays into the realms of scaremongering—of trying to scare panel members or committee members into somehow believing that they or we are breaking the law. It is false logic to claim that, because the Government may be in breach of the ECHR, panel members or committee members are therefore also in breach. Panel members cannot be in breach of the convention for performing their duties and carrying out the functions for which they have been appointed; only the Government can be in breach of the convention. The minister's argument is false, and I do not accept it whatsoever.

The minister made great play of the importance and role of the Subordinate Legislation Committee and of why the Education, Lifelong Learning and Culture Committee should take more account of its deliberations. The minister and I served on the Subordinate Legislation Committee for many years, so both of us are aware of its work, as I am sure other members are. That committee does not consider the policy content of instruments in its deliberations; it is the duty of this committee to do so. Members of the Subordinate Legislation Committee would have looked to us—[*Interruption.*]

The Convener: I remind you, minister, that you have had your opportunity to speak. I suggest that you remain silent for the duration of the meeting.

Ken Macintosh: Thank you, convener.

If we asked members of the Subordinate Legislation Committee who should take lead responsibility for scrutinising the instrument, they would say that they would expect us to fulfil that function. We should not read anything that is not there into that committee's comments. Nothing in its report to us suggested that it does not think that we should take the matter as seriously as we are doing.

On numbers, I will not get into the argument about whether 250 cases is or is not a handful. However, I find the number of 250 to be reassuring. It is good to have a number this week, because we did not have a number or any certainty last week, and we were left worrying about the impact of the measure and how far-reaching it would be.

My only problem now is that I suspect that the number 250 has been plucked from thin air—Margaret Smith said that it was like sticking a finger in the air. As Karen Whitefield pointed out, panel members up and down the country are worried about the number of cases in which legal representation is now being appointed. From the figures that I have heard, 250 does not strike me as an accurate estimate. The minister should be given a chance to provide us with the workings behind his figures. We should then discuss and bottom out the argument in greater detail with the stakeholders. That sort of consultation process would give the committee—and the panel members, reporters and solicitors involved—more confidence about what is envisaged and about the impact of the SSI.

Andrew Welsh helpfully raised a number of issues. Let me first just correct his suggestion that the right to legal representation has been in place since 2002; that is the case only for children, not for adults and relevant persons. On the interesting issue of legal aid that Andrew Welsh raised, the SSI is designed to provide state-funded legal representation for adults—a principle on which there seems to be consensus around the table, which should not escape our notice—but is it right that such state-funded legal support should be provided, as is suggested under the SSI, through a panel-approved decision? Perhaps legal aid

would be the more appropriate mechanism. Again, that is an issue that needs to be bottomed out.

Andrew Welsh ended by saying that he had not heard any alternatives or proposed solutions, but in my opening speech I suggested a solution: the children's hearings bill, which is waiting to be redrafted. The bill will, I hope, be subject to full consultation and will be fully scrutinised by the Parliament. That would allow all the issues to be dealt with in depth.

The minister restated this morning that we should accept this temporary measure because we will be able in due course to revisit the issue in primary legislation to ensure that we have got it right. I would put the argument the other way around. The minister has not demonstrated the need for urgency—he has certainly not convinced me, although he may have convinced others—in rushing to change the system fundamentally, as could happen under the SSI.

If we wait a matter of months and consult fully and properly with all those who are involved in the children's hearings system, we will be more likely to address and allay their concerns and, I hope, arrive at a mutually agreeable, long-term solution that addresses the needs of adults who appear before children's hearings while keeping intact the fundamental principle of children's hearings, which is that they address the needs of children, including the most vulnerable children in our society.

On that basis, I will press my motion to a vote.

The Convener: The question is, that motion S3M-4758, in the name of Kenneth Macintosh, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Baker, Claire (Mid Scotland and Fife) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Smith, Margaret (Edinburgh West) (LD)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST

Campbell, Aileen (South of Scotland) (SNP)
McKelvie, Christina (Central Scotland) (SNP)
Welsh, Andrew (Angus) (SNP)

ABSTENTIONS

Smith, Elizabeth (Mid Scotland and Fife) (Con)

The Convener: The result of the division is: For 4, Against 3, Abstentions 1.

Motion agreed to,

That the Education, Lifelong Learning and Culture Committee recommends that nothing further be done under the Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009 (SSI 2009/211).

The Convener: The committee will report accordingly to the Parliament. That brings today's meeting—

Christina McKelvie: Convener, I just want to ensure that my dissent to the decision is seriously noted and is on the public record. The decision that we have just made is grave for the Parliament and for the committee. Given your earlier comments, your impartiality in the committee is called into question.

The Convener: Ms McKelvie, I remind you that you had an opportunity to speak during the debate, so I am sure that people will reflect on your views. I regret deeply that the committee had to consider the matter again today, and I regret deeply some of the minister's comments. There was a failing on his part in that he was unable to convince members of the committee. Given the false accusations about Government offers to provide briefings to the committee on the SSI—the comments were not accurate—perhaps the minister could provide those details in writing so that the committee might reflect on them further.

That brings the meeting to a close. I remind members that we meet again tomorrow morning.

Meeting closed at 11:15.

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