



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

HEALTH AND SPORT COMMITTEE

Tuesday 5 November 2013

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CONTENTS

	Col.
VICTIMS AND WITNESSES (SCOTLAND) BILL: STAGE 2	4527
National Confidential Forum	4527

HEALTH AND SPORT COMMITTEE

31st Meeting 2013, Session 4

CONVENER

*Duncan McNeil (Greenock and Inverclyde) (Lab)

DEPUTY CONVENER

*Bob Doris (Glasgow) (SNP)

COMMITTEE MEMBERS

*Rhoda Grant (Highlands and Islands) (Lab)

*Richard Lyle (Central Scotland) (SNP)

*Mark McDonald (Aberdeen Donside) (SNP)

*Aileen McLeod (South Scotland) (SNP)

*Nanette Milne (North East Scotland) (Con)

*Gil Paterson (Clydebank and Milngavie) (SNP)

Dr Richard Simpson (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab) (Committee Substitute)

Michael Matheson (Minister for Public Health)

CLERK TO THE COMMITTEE

Eugene Windsor

LOCATION

Committee Room 2

Scottish Parliament

Health and Sport Committee

Tuesday 5 November 2013

[The Convener *opened the meeting at 10:00*]

Victims and Witnesses (Scotland) Bill: Stage 2

National Confidential Forum

The Convener (Duncan McNeil): Good morning and welcome to the 31st meeting in 2013 of the Health and Sport Committee. As usual, I remind those present to switch off mobile phones, BlackBerrys and other wireless devices, as they can interfere with the sound system.

Members of the public may have noticed that some members and officials are using iPads and other tablet devices instead of hard copies of the papers.

We have received apologies from Richard Simpson and I welcome Malcolm Chisholm, who is with us again as the Labour Party substitute.

The first item on the agenda is stage 2 of the Victims and Witnesses (Scotland) Bill. Members will recall that, although the Justice Committee is the lead committee on the bill, at stage 1 this committee took evidence on and reported to the Justice Committee on the national confidential forum aspect of the bill. The Parliamentary Bureau has agreed that this committee should also lead on that aspect of the bill at stage 2.

Members should have a copy of the bill, the marshalled list of amendments and the groupings.

I welcome Michael Matheson, the Minister for Public Health; Sue Moody, from the bill team, adult care support; and Rosemary Lindsay, from the Scottish Government legal directorate.

Our task is to consider sections 26 and 27 only, and all the amendments to them. Our Justice Committee colleagues will deal with the rest of the bill.

As all the amendments are in the minister's name, I will call him to open the debate on each of the four groups by moving the lead amendment and speaking to all amendments in the group. I will then call any other members who wish to speak on the group. Finally, I will invite the minister to wind up and indicate whether he wishes to press or withdraw the lead amendment.

We will follow normal procedure if a division is required. When we reach amendments on the

marshalled list that have already been debated, I will ask the minister to move or not move the amendment. If the minister does not move the amendment, any other member who is present may move it. Finally, I politely remind the officials who are accompanying the minister—I am sure that they know this already—that they cannot speak during proceedings.

Section 26—National Confidential Forum

The Convener: I move to the first group. Amendment 1, in the name of the minister, is grouped with amendments 6 to 10.

The Minister for Public Health (Michael Matheson): Thank you, convener.

The bill aims to be as clear and consistent as possible. The amendments in this group are designed to achieve that aim in relation to published reports about the national confidential forum.

The bill creates a duty of confidentiality—at paragraph 13 of proposed new schedule 1A—which applies to information obtained in connection with the carrying out of the NCF's functions. The duty of confidentiality is a crucial part of the NCF provisions, as it gives participants some security and certainty about who will have access to their testimony.

The duty of confidentiality in paragraph 13 will not apply to information that is already in the public domain. A person can disclose information provided to him or her in connection with the NCF if it has already been published or made widely available to the public.

Amendments 1, 8, and 9 are designed so that the restrictions on information contained in reports published by the NCF and reports by the Mental Welfare Commission that refer to the NCF are consistent with the duty of confidentiality. The effect of the amendments is to permit information that is already in the public domain to be included in such reports.

That means, for example, that an institution could be identified in a report about the NCF if the institution had been the subject of an inquiry and the results had been made available to the public. An individual who had been convicted of a criminal offence against children in institutional care could also be identified in a report.

Three parts of the bill deal with reports about the NCF: section 4ZD(1)(c), referring to annual reports of the Mental Welfare Commission; paragraph 11 of proposed new schedule 1A, in relation to reports by the NCF based on the testimony that it hears; and paragraph 12 of proposed new schedule 1A, concerning NCF annual reports. The

amendments will enable information already in the public domain to be included in all such reports.

I make it clear that the amendments will not alter in any way the duty of confidentiality in relation to information not in the public domain. The amendments will also not alter the requirement placed on the NCF to preserve the anonymity of participants, others referred to in testimony and establishments providing institutional care mentioned in the testimony.

Amendment 6 addresses an issue raised by survivors and other stakeholders at stage 1, which was supported in the committee's report. Recommendation 18 of the report states:

"Survivors ... will expect to recognise their testimony in the reports of the NCF".

The committee asked me to explore the coding of testimony, as practised in the confidential committee in Ireland, which was included in the reports of the Ryan commission that investigated child abuse in the Irish Republic. The current provisions concerning confidentiality at paragraph 11(2) of new schedule 1A might make it more difficult for the NCF to use a coding system in its published reports. That is because the current wording bars even the remotest possibility of being able to identify participants. Since the individual codes could, in association with the list of names, lead to the identification of participants, it is not clear that a coding system could be adopted by the NCF in light of the existing bill provisions.

Changing the wording by inserting a requirement for a "real risk" of identification allows for a higher threshold. It means that a coding system could be introduced by the NCF unless for any reason the disclosure of certain information in a report could create a real risk of identification of the person providing testimony to the NCF.

I make it clear that coding is an operational matter for the NCF and that, as such, we would not seek to prescribe how it should be designed or managed. I am also mindful of the possibility that in some cases coding could cause distress to participants, so use of such a system will need to be considered carefully by the head of the NCF. It could vary, for example, depending on the nature and focus of a report from the NCF.

Amendment 7 proposes to delete paragraph 11(2)(b) of proposed new schedule 1A. This is a technical amendment to improve the clarity of the bill. No substantive change will be made to the confidentiality requirements for reports, which remain as set out in paragraph 11(2)(a). Paragraph 11(2)(b) states that a report of the NCF must not

"include any other information which is subject to a confidentiality restriction under paragraph 13."

Paragraph 13 of proposed new schedule 1A sets out the confidentiality requirements for information provided to the NCF in connection with its functions. An exception is provided for in paragraph 13(3)(b) to allow reports to be prepared. Since the reports are excepted from the confidentiality provision, it is somewhat confusing and circular for paragraph 11(2)(b) to refer back to paragraph 13.

The bill's provisions seek to strike a balance between the duty of confidentiality, which as its name makes clear is an essential part of the national confidential forum, and the need to produce reports. Amendment 7 does not affect that balance but simply clarifies the provisions.

Finally in this grouping, amendment 10 proposes a change to paragraph 13(3)(b) of new schedule 1A, which will provide an exception to the national confidential forum's duty of confidentiality when disclosure of information is necessary to enable the national confidential forum and the Mental Welfare Commission to produce their annual reports. As currently drafted, that part of the bill refers only to reports that are based on testimony received and does not include annual reports that the national confidential forum is required to produce under paragraph 12 or annual reports from the Mental Welfare Commission.

Amendment 10 will allow exceptions to the duty not to disclose information from the NCF to apply to the NCF and the Mental Welfare Commission's annual reports. That will enable the NCF and the Mental Welfare Commission to provide important information in annual reports about, for example, the number of participants, their age and gender, the arrangements for hearings, and other business that is undertaken by the NCF. The confidentiality provisions in relation to reports will apply to all three types of report.

I move amendment 1.

Rhoda Grant (Highlands and Islands) (Lab):

This is fraught with difficulty. The reports need to show people the outcomes of the testimonies that they give while protecting their confidentiality. Will the victims be involved in the drawing up of the reports, and will they have sight of the reports before they are published? That could help to overcome some of the problems that come about when victims think that something is being disclosed that they do not want to be disclosed. They can see that what they have said is not being treated differently from what they thought. It might be an idea to put draft reports to the victims so that they can look over the parts that pertain to themselves and give some feedback. Would that be helpful? Is that something that you see happening?

Michael Matheson: I think that it would be generally helpful—

The Convener: Minister, I do not mean to be rude but we have to treat this as the debate. I have to take other comments first, if there are any.

No other committee member wishes to come in so I will give the minister the opportunity to sum up and respond.

Michael Matheson: What Rhoda Grant suggested could be a helpful approach to dealing with some of the possible concerns about the contents of reports on testimony. It is a matter for the NCF itself and I would expect it to engage with different stakeholders and consider the best way of laying out a report and the process that is used before publishing a final report on an element of testimony. I would have thought that the NCF would wish to consider Rhoda Grant's suggestion as part of the way that it goes about drawing together the reports and testing them before they are finally published.

Amendment 1 agreed to.

Section 26, as amended, agreed to.

Section 27—NCF: constitution and operation

The Convener: Amendment 2, in the name of the minister, is in a group on its own.

Michael Matheson: Amendment 2 acknowledges the views that have been expressed by a range of stakeholders during stage 1. The committee will recall that I gave a commitment to consider the views of, and evidence from, experts on children and young people, in order to explore the possibility of lowering the age of eligibility for the NCF from 18 to 16. I have considered how likely it is that 16 and 17-year-olds will want to participate in the national confidential forum; stakeholders and experts expect that not many young people will take up the opportunity to participate immediately on leaving the care system. There are other ways in which care leavers can raise concerns about their time in care, including through robust complaints processes and independent advocacy.

It has also been made clear to me that lowering the age of eligibility will be fair and will put young people in the same position as adult applicants to the NCF. The committee will recall that Children 1st expressed the view that

"it is not appropriate or acceptable for a child to have to wait several years to reach the age at which their testimony becomes valid."

It is clear to me that 16 and 17-year-olds should, at the very least, be given the opportunity to have their experiences and testimony heard in the safe and confidential setting that the NCF will offer.

I have also considered whether the NCF is an appropriate setting for a young person between the ages of 16 and 18. I have taken advice on that, and the view of those whom we consulted is that the NCF can accommodate young people because the process is designed to be flexible and to take into account the individual needs of participants, including their age and capacity.

10:15

The bill envisages that those who wish to participate will no longer be in institutional care. The NCF is intended to deal with historical matters, so participants must have left the institution in which they were resident before they can take part. I accept that there could be situations in which a young person who had left institutional care might return to institutional care after taking part in the NCF.

I would like to add that, once the head of the NCF is appointed, he or she will be independently responsible for providing information about advice and assistance to participants, and for taking practical steps to ensure that young people are clear about the opportunities that are open to them in relation to participating in the NCF.

I am clear in supporting the view that, for the purposes of the national confidential forum, an "eligible person" should be a person who is 16 years of age or over.

I move amendment 2.

The Convener: The minister has the option to wind up. If he does not wish to, I will proceed.

Michael Matheson: I am happy to let you proceed.

Amendment 2 agreed to.

The Convener: Amendment 3, in the name of the minister, is grouped with amendments 4 and 5.

Michael Matheson: I will speak to amendments 3, 4 and 5.

Under paragraph 7(2)(b) of proposed new schedule 1A to the 2003 act, an "eligible person" is a person who

"was placed in an establishment providing institutional care during the person's childhood".

Amendments 3, 4, and 5 will clarify the provisions that are set out in proposed new schedule 1A in subparagraphs (3) and (4) of paragraph 7, which relate to the definition of "institutional care" for the purposes of the bill.

The committee will be aware that the principal criterion for participation in the national confidential forum is the experience of having been placed in institutional care as a child. The

particular type or description of institutional care will be set out in an order, but the intention is that there will be scope to include all forms of institutional care, including private boarding schools, secure units and long-stay hospitals. The bill provides that everyone who was placed in such institutional care as a child is eligible, whether they were placed in that care setting by the state or through a private arrangement.

Amendments 3, 4 and 5 should ensure that the NCF can offer survivors of child abuse from a wide range of institutions the opportunity to participate. In amendment 3, I propose that the word “otherwise” that is currently in paragraph 7(3) of new schedule 1A be removed on the basis that it is not necessary and could be confusing. Its removal will result in a more robust description in relation to defining “institutional care”, and will mean that the key issues—that a care or health service was provided to children in Scotland at some time, that it included a residential element and that it is of a description or type prescribed by the Scottish ministers by order—are emphasised.

Amendment 4 will allow the intended bill provisions to be set out more clearly in relation to the three elements that I have mentioned. Replacing the existing wording in paragraph 7(4) with

“The conditions are that the care or health service”

will remove ambiguity and will clearly introduce the conditions that are set out in the rest of the paragraph.

Amendment 5 will remove the words “placed in care” from paragraph 7(4)(b) of new schedule 1A, to ensure that “institutional care” can be defined to cover a wide range of institutions in which children receive a care or health service. I am keen, for example, that young offenders institutions be included in the definition of institutional care. I consider that young offenders institutions come within the parameters of a care service, although that is only one of their functions, but I am not convinced that the words “placed in care” are particularly appropriate for persons who are sent to a young offenders institution. By deleting those words, we will ensure that young offenders institutions and other similar institutions, such as remand homes, will be included for the purposes of the NCF.

I ask the committee to support amendments 3, 4 and 5.

I move amendment 3.

The Convener: Thank you, minister.

Nanette Milne (North East Scotland) (Con): During stage 1, there were quite a lot of mentions of people who have been placed in foster care.

Will the redefinition of “institutional care” cover foster care?

Michael Matheson: You might recall that at the time we had commissioned a report on whether it would be appropriate to include foster care within the parameters of the national confidential forum, principally because the forum is about institutional care, and foster care is not considered to be a form of institutional care. We have only just received the first draft of the report, but we expect to see the final version before stage 3, which will enable us to consider the issue in more detail.

The committee will be aware that we want the national confidential forum to work very much on the basis of the experience of the time to be heard pilot, which focused on institutional care. We will consider the report in the context of our intentions with regard to the national confidential forum, so we will consider whether it is necessary or appropriate to include foster care in the NCF’s role.

Rhoda Grant: You said that we are talking about residential care. Will the scope of the NCF include non-residential care settings such as schools, where people can be quite vulnerable, or is it just about residential care?

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): I wonder whether the bill will still be a bit clumsy in referring to “conditions” and “a description”. Would it not be simpler if the bill said that in the new schedule 1A, “‘institutional care’ means a care or health service of a description or type prescribed by order,” and then said what the order must prescribe? It seems to be clumsy to have two different categories, but I accept that we are dancing on the head of a pin. I suppose that that is in the nature of the amendments.

Michael Matheson: I will deal with members’ comments in reverse order. We can reflect on Malcolm Chisholm’s point, and consider whether there is a need to tidy the wording further at stage 3 and to offer further clarification.

On Rhoda Grant’s point, schools are not covered, because there must be a residential element—as I said, if there is a residential element, an institution could come within the scope of the national confidential forum. We will consult on the order that we will make to prescribe the institutional settings that will be covered, so that people with an interest in the area can make their views known about what should be prescribed.

Amendment 3 agreed to.

Amendments 4 to 10 moved—[Michael Matheson]—and agreed to.

The Convener: Amendment 11, in the name of the minister, is in a group on its own.

Michael Matheson: Paragraph 13(5) of proposed new schedule 1A will provide that a member of the national confidential forum may disclose to the police information that has been given in testimony by a participant,

“to the extent that—

(a) it relates to an allegation made by a person who has given testimony that another identifiable person has committed an offence involving the abuse of a child, and

(b) it is, in the opinion of the member acting in good faith, in the public interest to do so.”

Amendment 11—the final amendment that we will consider—will remove the words “another identifiable person” from the paragraph, thereby removing a restriction that is unnecessary and has no clear rationale.

Testimony from people who participate in the national confidential forum might contain allegations that crimes have been committed without including information that clearly identifies the alleged perpetrator. However, such testimony might include information about matters such as dates and locations, which, if shared with the police, could lead after investigation to the identification of alleged perpetrators. My view is that the provision would be more appropriate if the words “another identifiable person” were removed. The wording could prevent NCF members from being able to report cases when it was clearly in the public interest so to do.

I make it clear that amendment 11 will not in any way affect the duty that NCF members will have under paragraph 13(4) of new schedule 1A to report offences where doing so is

“reasonably necessary to prevent the commission of an offence involving the abuse of a child.”

I do not want to alter in any way the protection for children who are considered to be at risk of abuse at the time when testimony is offered to the national confidential forum. Paragraph 13(4), which is not being amended, is designed to ensure that protection of children will be paramount when the forum considers whether to report allegations to the police.

As I said to the committee on 30 April, we are trying to balance the therapeutic value that can be gained from the forum with public interest and public safety. I ask the committee to support amendment 11.

I move amendment 11.

Amendment 11 agreed to.

Section 27, as amended, agreed to.

The Convener: That concludes the Health and Sport Committee’s consideration of the bill at stage 2. The Justice Committee will consider the remainder of the bill at its meeting on 12

November. Members should note that the deadline for lodging amendments to the remainder of the bill is 12 noon on Thursday.

I thank the minister and his officials for attending.

10:27

Meeting continued in private until 12:09.

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