OFFICIAL REPORT
AITHISG OIFIGEIL

Education and Skills Committee

Wednesday 8 November 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 8 November 2017

CONTENTS

EDUCATION AND SKILLS COMMITTEE
28th Meeting 2017, Session 5

CONVENER

*James Dornan (Glasgow Cathcart) (SNP)

DEPUTY CONVENER

*Johann Lamont (Glasgow) (Lab)

COMMITTEE MEMBERS

*Colin Beattie (Midlothian North and Musselburgh) (SNP)
*Ross Greer (West Scotland) (Green)
*Clare Haughey (Rutherglen) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Ruth Maguire (Cunninghame South) (SNP)
*Gillian Martin (Aberdeenshire East) (SNP)
*Oliver Mundell (Dumfriesshire) (Con)
*Tavish Scott (Shetland Islands) (LD)
*Liz Smith (Mid Scotland and Fife) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

John Swinney (Deputy First Minister and Cabinet Secretary for Education and Skills)

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Education and Skills Committee

Wednesday 8 November 2017

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (James Dornan): I welcome everyone to the 28th meeting in 2017 of the Education and Skills Committee, and I remind everyone to turn their mobile phones and other devices to silent for the duration of the meeting.

Item 1 is a decision on whether to take in private all future consideration of the draft stage 1 report on the Children and Young People (Information Sharing) (Scotland) Bill. Are members content to take that consideration in private?

Members *indicated agreement.*

Witness Expenses

10:00

The Convener: Item 2 is to ask whether members are content to delegate to me sign-off of witness expenses for the committee's education reform work.

Members *indicated agreement.*

The Convener: Thank you.

Children and Young People (Information Sharing) (Scotland) Bill: Stage 1

10:01

The Convener: Item 3 is our final evidence-taking session on the Children and Young People (Information Sharing) (Scotland) Bill. I welcome John Swinney, the Deputy First Minister and Cabinet Secretary for Education and Skills, and his Scottish Government officials Ellen Birt, who is the bill team leader, and John Paterson, who is a divisional solicitor. Thank you for coming along today.

Cabinet secretary—I understand that you want to make a short opening statement.

The Deputy First Minister and Cabinet Secretary for Education and Skills (John Swinney): Thank you, convener. I welcome the opportunity to be with the committee today to discuss the Children and Young People (Information Sharing) (Scotland) Bill.

I want to say at the outset that I accept unreservedly the Supreme Court decision, and that, as a consequence, I accept that the information-sharing provisions in the Children and Young People (Scotland) Act 2014 did not adequately respect the right to private and family life. The bill addresses the issues that the Supreme Court raised and will ensure that the rights of children and young people and their parents are respected.

The bill has two overarching objectives. First, its provisions will support agencies and individuals to work with children, young people and families in an integrated way. It also facilitates the lawful and proportionate sharing of information. That will ensure that every child and young person can better access the support and help that they need if they are to succeed.

Secondly, the bill will allow the sections in the 2014 act on the named person service and the child's plan to be commenced. Without the bill to address the Supreme Court judgment, those legislative provisions cannot be commenced, which would, in effect, remove two key elements of the getting it right for every child approach, which are entitlements that arise from families themselves having asked for improvements in the support that they need and want.

That approach is required because too many children and families continue to struggle to navigate services, and too many children and young people do not get early access to support that could help them to succeed. An approach whereby we rely on the good practice of some

people and hope that others will catch up will not deliver for every child and young person. That is why legislation is required.

We know that effective and proportionate sharing of information is essential to getting it right for every child. That is why the duty to consider sharing information, which is at the heart of the bill, is necessary. For the first time, relevant authorities and named person service providers will be required by law to consider the information that they hold, and whether the sharing of that information could support, promote or safeguard the wellbeing of a child or young person. The bill also provides professionals with a focus on considering the consequences for wellbeing of not sharing information when consent to share is not granted.

The measures in the bill must provide the clarity and certainty for which many people are looking, in relation to how to share information lawfully in the context of fulfilling the functions of the getting it right for every child approach.

I have listened closely to and carefully considered all the evidence on the bill that the committee has taken during stage 1. As I said in my letter earlier this week, I accept that there is more that I can do to ensure that we give everyone the certainty and clarity that they are looking for, following the Supreme Court decision, in relation not just to the bill's provisions, but to the measures to which the bill will give effect, and the broader getting it right for every child ambitions.

Many witnesses have called for greater clarity about what the named person is and is not. We will therefore develop and deliver a positive awareness-raising campaign, which will make clear for children, young people, parents and practitioners what the getting it right for every child approach is about, and how the named person will support them. The Government will lead the campaign, but we will ensure that input from others informs our approach.

Witnesses also expressed concern about resources and support for implementation. I have reflected on the evidence that was presented to the committee. I confirm that further financial resources, over and above those that are set out in the financial memorandum, will be provided to assist implementation beyond the first year of introduction. I intend to consult stakeholders on the detail of that multiyear approach as the bill proceeds.

The code of practice that is provided for in the bill is an important part of the suite of materials that will be made available to practitioners to support their work. Although I had hoped that the illustrative draft code of practice would demonstrate how the power to make a binding code in primary legislation could work to address the issues that were raised in the Supreme Court judgment, I acknowledge that that approach has not had the intended effect.

It is essential that we get right the code of practice that is provided for in the bill, as well as the statutory guidance that is required under the 2014 act and other support materials that will be required. To ensure that, I will establish this month the getting it right for every child practice development panel. The panel will have an independent chair and will include broad relevant stakeholder membership to ensure that the materials are workable, comprehensive and user friendly. That approach will allow for full and proper consideration of changes to data protection law that will result from the European Union general data protection regulation and the United Kingdom Data Protection Bill. The panel will ensure that the experience and expertise of practitioners informs the material through dialogue and interaction with the wider stakeholder community, and that practical knowledge of information sharing in the public sector and children's services is the foundation for the development of the materials.

As I outlined to the Delegated Powers and Law Reform Committee, my intention has always been to ensure meaningful dialogue and scrutiny of the code of practice by Parliament. I am happy to accept the recommendation of that committee that Parliament be given final approval of the code of practice. I will lodge an appropriate amendment at stage 2.

I am determined that the bill will ensure that everyone who works to support children, young people and families in Scotland will not only be doing so within the requirements of the law, but will feel confident in fulfilling our collective ambition to get it right for every child. I look forward to answering questions from the committee.

The Convener: I record my thanks to everyone who has contributed to the committee's work on the Children and Young People (Information Sharing) (Scotland) Bill. In particular, I thank the attendees at the focus groups that took place last week for taking time out of their evenings to contribute to our evidence taking.

Earlier this week we received a letter from several organisations that originally had a great many concerns—they still have some—but now seem to be coming round to saying that it is important that the bill be passed. What has happened to make them change their position since we started taking evidence?

John Swinney: My attempt to try to be helpful to the committee—by providing a draft illustrative code of practice without all the consultation that

we would ordinarily put into such an effort—has proved not to be helpful. The bill makes some very clear changes to the law in relation to the provisions of the 2014 act by establishing the duty to consider information sharing, as opposed to there being an obligation to share information, which the Supreme Court judged is not consistent with the article 8 provisions of the European convention on human rights. The approach that we have taken, which has been informed by other decisions of the Supreme Court, is to rely on informing that duty to consider through a code of practice. That code of practice will be binding. However, for it to be binding it must be clear and informative.

I took a decision late in the preparation of the bill to submit to the committee an illustrative code of practice along with the bill. Because I took that decision late, there was no opportunity to have a broad consultation. I thought that it would be helpful for the committee to see what a code of practice might look like. I accept that that has created some confusion and uncertainty among stakeholders. In listening to the evidence over the course of the past few weeks, I have made it clear to stakeholders that the provisions of the draft illustrative code of practice are just that—draft and illustrative—and are not the final product. I have set out to stakeholders and the committee the approach that I intend to take to ensure that we have a full, engaged and participative approach to formulation of the code of practice. I welcome the comments of stakeholders who have embraced that approach.

The Convener: Will the stakeholders who wrote the letter be consulted? Will they be part of the solution for the new code of practice?

John Swinney: Yes.

Liz Smith (Mid Scotland and Fife) (Con): Cabinet secretary, can I take you back to when the Children and Young People (Scotland) Bill first went through Parliament? At the time, we were advised by the Scottish Government that the legal advice was accurate, but that turned out not to be the case. Independent legal advisers warned of a potential danger that was exactly what turned out to be the decision of the Supreme Court. I have a question that is important to the committee, as we attempt to scrutinise the bill. Can you outline what legal advice you have taken this time?

John Swinney: I need to put the question from Liz Smith into a wider context. Prior to Parliament passing the Children and Young People (Scotland) Act 2014, the Government had obviously taken the necessary advice in preparing that bill and introducing it to Parliament. The 2014 act was then tested in both the outer house and inner house of the Court of Session—the highest courts in Scotland—and both courts dismissed the legal challenges to the legislation. The case was then referred to the Supreme Court.

When we look at the practice of the Supreme Court in the period between 2014, when the act was passed, and the judgment that emerged in the Supreme Court in July 2016, we can see that it had been pursuing a consistent line of legal interpretation and analysis in a number of judgments that had not preceded the passing of the 2014 act, but had followed it. In a host of different questions, the Supreme Court required public authorities to set out interpretations of legislative provisions, as the Supreme Court said, "in accordance with the law". The emergence of that strain of thinking in the Supreme Court's considerations post-dated the 2014 consideration of the Children and Young People (Scotland) Bill. Obviously, that influenced the Supreme Court's judgment in July 2016.

I accept that interpretation of the law moves on and that the Supreme Court has jurisdiction over those questions. That is why, at the outset of my comments to the committee this morning, I unreservedly accepted the Supreme Court judgment. In defence of the advice that the Scottish Government took in 2014, I point out that that advice was based on the legal debate at that time. Obviously, the decisions of the outer house and inner house of the Court of Session were taken in that context, as well. The world moved on subsequent to 2014, with the decision of the Supreme Court, which is why I am now taking the steps that I am taking with the Children and Young People (Information Sharing) (Scotland) Bill.

Liz Smith will know the conventions that ministers follow on whether legal advice has or has not been taken. However, I can say to the committee that I would not be here today if I had not taken all the necessary advice that I believed I should and ought to take—and follow—in getting to the point that we are at today.

Liz Smith: Thank you for that, cabinet secretary. Notwithstanding the context that you have given, the fact of the matter is that the Supreme Court made a ruling that has been very difficult for the policy of the 2014 act. Our difficulty as a committee in scrutinising the Children and Young People (Information Sharing) (Scotland) Bill is that members of the legal establishment are very concerned that the bill does not address or, in some cases, does not fully address, the legal concerns that were raised by the Supreme Court.

Our scrutiny responsibility is to ensure that we hold the Scottish Government to account on the legal advice that has been provided; we have heard that there is still a great deal of concern about the legal context of the bill. That needs to be set against your comments to the Delegated Powers and Law Reform Committee, in which you

said that advice—in particular, the advice that was provided to that committee by the Faculty of Advocates—was incorrect. Could you explain to this committee why you believe that the legal advice that you have taken addresses all the concerns of the Supreme Court?

10:15

John Swinney: The issues that were raised by the Supreme Court related to two questions: the proportionality of the approach that we had taken to information sharing, and how we had distilled the legal framework to ensure that the framework in which they operate would be clear to practitioners. Those two issues lay at the heart of the Supreme Court judgment.

The measures that I have taken are designed to inject proportionality into the information-sharing process. The bill does not provide for a duty to share information; it provides for a duty to consider sharing information. We will set out in the code of practice how that proportionality should be exercised.

The Supreme Court judged—this relates to my point about the need to set out the provisions in accordance with the law—that we had not marshalled our propositions in such a way that practitioners could readily access that information. I think that the Supreme Court said that a "logical puzzle" lay at the heart of it all. The bill that is before the committee makes the appropriate provision.

I will turn to some of the evidence that the committee has considered on the legal question. Liz Smith is absolutely correct to say that the Faculty of Advocates has raised issues in that respect, but in its submission on the bill the Law Society of Scotland said:

> "The move from a duty to share to a power to share information, and an emphasis on the need to consider whether information is relevant and can be shared, is a helpful safeguard from the perspective of ensuring proportionality."

I cite those two points, which have been made in the legal debate that the committee has heard, to illustrate that it is not a new situation that we find ourselves in. We are legislators—we deal with legal debate about various provisions, and we must come to decisions. It is a situation that we find ourselves in constantly. We have looked carefully at the issues that the Supreme Court judgment raised—which I am acutely aware must be addressed—and we have taken the necessary advice and steps to get us into the position of being able to introduce a bill for Parliament to scrutinise that will enable us to address those issues.

Of course, that will not make the legal debate disappear. I accept that there will be legal debate about the issues in question, but I say to the committee that the Government has taken the necessary steps to address those points.

Liz Smith: I am sure that other colleagues want to come in on this point, too, but I make the point again that, as a committee, we are in an exceptionally difficult position It is very clear that, in 2013 and 2014, there was legal opinion out there, which was subsequently proved to be correct, that the Children and Young People (Scotland) Bill gave rise to a lot of legal issues.

We have before us a Scottish Government that is telling us that the new bill—the Children and Young People (Information Sharing) (Scotland) Bill—has addressed those concerns. To use the cabinet secretary's own words, time moves on and part of time moving on is that there is new legislation coming down the line, in particular in terms of data protection, in the not-too-distant future.

However, there is also legal opinion that is still questioning—in some cases, significantly questioning—whether the Scottish Government has got its legal advice correct. In my opinion, that legal opinion matters very much to the rest of the debate, and it matters to effective scrutiny by Parliament. So, I ask the cabinet secretary again: are you absolutely confident that the bill will not be challenged in a legal context again?

John Swinney: First let me come back to something that I have said already, which contests the point that Liz Smith is making about legal debate in advance of the 2014 bill. The 2014 bill was tested in the outer house and the inner house of the Court of Session.

Liz Smith: And it was proved to be wrong.

John Swinney: I beg your pardon.

Liz Smith: It was overruled.

John Swinney: It is not for me to question the judgments of the inner house or the outer house. My duty as a legislator is to respect the decisions of the courts, and those two courts validated the approach that we had taken. Subsequently, it went to the Supreme Court, which took a different view. I am respecting that opinion because it is my duty to respect what the courts say. For completeness, I am making the point that the legal position that was taken by the Scottish Government was validated by both the outer and the inner houses of the Court of Session, so it is wrong to say that there was no legal judgment or debate on the questions.

On the second question, asking whether I can say that the bill will not be challenged legally, that is not for me to say. I cannot stop individuals

challenging the bill legally. This is a free country and people can make whatever legal challenges they wish. From my point of view, the issues that were raised by the Supreme Court judgment are the issues that I am obliged to address if I wish to commence the provisions of parts 4 and 5 of the 2014 act. That is precisely what I am bringing before Parliament, with confidence that the provisions have the legal foundation to address the issues.

Ross Greer (West Scotland) (Green): It has been suggested that a number of organisations that expressed concern have changed their positions and have moved on, and that that was simply down to an initial lack of understanding of what the Government was proposing. Although that is understandable, given that there seems to have been a failure to live up to the promise of a summer of comprehensive consultation, I think that it is about something far more substantial than that. Evidence from the Children and Young People's Commissioner Scotland states that the new bill

"is intended to address the technical deficiencies in the CYP Act relating to information sharing by amending the Act to ensure it is compliant with the Data Protection Act (DPA) 1998 and with the ECHR. The bill as currently drafted does not achieve this."

Why has the Children and Young People's Commissioner Scotland taken that position? What has he not understood?

John Swinney: It is for the Children and Young People's Commissioner to set out to the committee his rationale. The Supreme Court raised two important questions for the Government to consider, and I addressed them in my answer to Liz Smith a moment ago. The Government has made provisions that engage directly with those two questions.

Mr Greer said that there was a suggestion that stakeholders had not understood the Government's provisions. That is not my position. The Government did not explain effectively its provisions in the draft illustrative code of practice, and I have set out for the committee why that happened. I made a judgment during the preparation of the bill that it would be better to provide the committee with a draft illustrative code of practice, because I thought that the committee would say, "We've got this bill and it's dependent on a code of practice. Where's the code of practice?" I thought that, for completeness, I would provide a draft illustrative code of practice to show the type of territory that we would be covering.

However, I accept that we did not have adequate time to consult with stakeholders, who would have been able to give us a more enhanced proposition. I cannot expect those stakeholders to be comfortable with the contents of the draft illustrative code of practice, because they did not have adequate opportunity to participate in the process.

There is no lack of understanding on their part but an acceptance on my part that, we decided to do something while we were preparing the bill, but we did not have adequate time to engage our stakeholders on it. I will make sure that we do so as we proceed with the bill and design the code of practice.

Ross Greer: The provision that was set out in the 2014 act was deemed disproportionate. The Government's proposal is to bring in a new provision for a statutory duty to consider sharing information. Bearing in mind that there will almost certainly be a further legal challenge, would it not have been legally more secure, instead of introducing a new provision, simply to state that information sharing should take place under existing data-sharing frameworks?

John Swinney: In my view, that is precisely what we have done. We are saying in the bill that the consideration of information sharing that must be undertaken must be entirely compatible with the existing legal framework. In the bill's supporting documentation that is available to practitioners, we will address the second issue in the Supreme Court judgment by setting out clearly a distillation of what the framework looks like to enable practitioners to take forward their judgments when exercising that duty to consider.

Ross Greer: There was a requirement in the 2014 act to have regard to the views of the child or young person, taking into account their level of maturity and so on. Why is that no longer the case?

John Swinney: It will be the case. The way in which judgments around the seeking of consent to share information are to be arrived at and the clear involvement of children and young people in that process will be set out in the code of practice.

Ross Greer: Thank you.

Ruth Maguire (Cunninghame South) (SNP): We have had feedback from stakeholders that GIRFEC—getting it right for every child—is a world-class practice framework. Two of its elements are the named person and the child's plan, which are parts 4 and 5 of the 2014 act. What will the impact be if we do not bring forward the information-sharing provisions?

John Swinney: As things stand, I cannot commence parts 4 and 5 of the 2014 act. The provisions on the child's plan and information sharing cannot be commenced without alterations, because the Supreme Court has raised issues with the legal framework. If we do not secure that

legislation, those elements of the 2014 act cannot be commenced.

Ruth Maguire: In the Government's stakeholder engagement, have you heard any alternatives that address the Supreme Court judgment and allow commencement of parts 4 and 5 of the 2014 act?

John Swinney: The Government arrived at the contents of the bill after a period of consultation that took place in the latter part of 2016. The information that we gathered in that discussion with stakeholders led us to the formulation of the bill. I am satisfied that, at that moment, we had a good and open discussion with stakeholders about the correct approach to addressing the issues that were raised by the Supreme Court, which got us to the legislation that is in front of the committee.

I did not hear approaches that would have enabled us to do this differently—to achieve the purposes that were envisaged in the original legislation of ensuring that the named person proposition was more widely available in Scotland through legislation—or that would enable that to be achieved without the changes to the law that we are now making. That dialogue was very helpful in getting me to the point of realising what measures we had to take to ensure that that was the case.

10:30

Oliver Mundell (Dumfriesshire) (Con): I heard what the cabinet secretary said in response to colleagues about not having control over whether individuals choose to challenge the legislation. Given the complexity of the issue, and the fact that a leading family law Queen's counsel, the information commissioner and a number of other legal experts have told us that the bill is open to challenge, how much confidence does the cabinet secretary have in the legal advice that the Scottish Government will be successful in the event of a legal challenge?

John Swinney: The judgment on that question is informed by looking at what the Supreme Court said in July 2016 and identifying whether the issues that were raised have been adequately and directly addressed by the provisions in the bill. That is what I focused on in my thinking and in the advice that I have taken. I want to be in a position in which, if the legislation is challenged, the challenge will be unsuccessful. My consideration has been focused on the direct questions of proportionality and codification, if I could summarise them in that way. The provisions of the bill directly address those questions so I am confident that the Government has now addressed the issues that the Supreme Court raised. Fundamentally, I have to accept that that is my best assessment of it. If there were to be a challenge, the courts would have to determine that challenge.

Oliver Mundell: That is one of my big concerns. A huge amount of damage could be done if there were to be another successful challenge, because it would derail a huge part of the Scottish Government's and this Parliament's agenda. Making such a tricky decision is difficult for the committee because we do not have access to the Scottish Government's legal advice and a large part of it is based on the cabinet secretary's assessment of the law and how much confidence he has about that legal advice. Given how controversial the issue is and the size of the challenge, is the cabinet secretary willing to take personal responsibility and to consider his own position if the legislation falls apart? I am trying to get a feel for how confident the cabinet secretary is about the advice and on what scale.

The Convener: The committee is not really the place to ask for the cabinet secretary's resignation. [*Laughter*.]

Oliver Mundell: I am only asking for his resignation if the legislation falls apart.

John Swinney: From the way that the question was heading, I thought that Mr Mundell was going to ask me if I would place a bet on it, which I most definitely will not.

Oliver Mundell: I would also take that kind of assessment. On a scale of one to 10, how confident are you?

John Swinney: The committee knows me well enough to know that I fulfil my ministerial responsibilities in a deadly serious fashion. I have taken all proper advice and consideration to come to the conclusions that I have reached. I have come to the meeting this morning and been quite candid about a misjudgment that I made when I gave the committee a draft code of practice that was illustrative and had all the caveats in the book, but which created more confusion. I did not want to do that and I am sorry that the committee has had quite a bit of its time taken up by the debate on the code of practice, which is not the subject and the question that the committee is being asked about. That is my judgment of the past few weeks.

In coming to the committee with the bill, I have taken all the necessary advice to satisfy me in my judgment that the two issues of proportionality and codification have been addressed in the bill. If there is a legal challenge, the courts will determine that.

Mr Mundell raised the issue of derailing our agenda, but the agenda can be derailed in a host of different ways. It can be derailed by practitioners becoming anxious about deploying

some of the measures because they do not feel that there is a clear legal framework in place. I am trying to put a clear legal framework in place. The agenda can also be derailed by a court challenge that says that it is not fit for purpose, and that would be a judgment for the courts.

I am not bringing to the committee something that is unnecessary—it is something that we need to do if we want to have in place the support that makes the child's plan and the getting it right for every child agenda meaningful through the exercise of the named person responsibilities. That is the basis on which I have reached my conclusions.

On the final point raised by Mr Mundell, I take responsibility for all my decisions as a minister. I have to be accountable for all those decisions.

Oliver Mundell: May I ask a number of technical questions, convener?

The Convener: How big a number?

Oliver Mundell: I will stick to three snappy questions.

Cabinet secretary, you said that the legal framework had changed since 2014. Given that there are three pretty prominent cases listed in the "In accordance with the law" section of the Supreme Court judgment—Sunday Times v United Kingdom, Gillan v United Kingdom and Silver v United Kingdom—can you talk me through how you felt the original bill met the considerations of the those cases?

John Swinney: The point that I was making in my answer to Liz Smith was that it is clear that the thinking of the Supreme Court had developed subsequent to the passage of the 2014 act and that the Scottish Government had formed its view on that approach prior to the thinking of the Supreme Court becoming clearer.

Oliver Mundell: I think that the Supreme Court also took issue with foreseeability. Paragraph 77 of the Supreme Court judgment starts to address that. How did the cabinet secretary interpret what was set out in paragraphs 76 and 77 of the 2010 judgment in Gillan v United Kingdom, which was made before the 2014 act was passed? Those paragraphs talk about who legislation is intended to cover and giving people protection against arbitrary interferences. Had the Scottish Government considered those legal issues last time around, and does it consider that it has met the requirements this time around?

John Swinney: The questions in the essence of the Supreme Court's judgment of 2016 on our provision were driven by a requirement to ensure that the codification of different provisions was set out in a fashion that made clear the obligations on practitioners and authorities, but was not seen as obligatory before 2014 or by the judgments that were made by the Court of Session in either the inner house or outer house at that time. My point is that the Supreme Court's judgments have taken a form that requires them to be part of the legislative framework and legal consideration that we had to take into account. The bill before the committee is designed to do exactly that.

Oliver Mundell: Thank you.

Colin Beattie (Midlothian North and Musselburgh) (SNP): I would like to consider the concept of wellbeing. The Supreme Court said that wellbeing is not defined and that the only references available were the eight SHANARRI indicators—safe, health, achieving, nurtured, active, respected, responsible and included—which have been around for a very long time and some of which are very vague. Does "wellbeing" need a more specific definition, to ensure that the legislation is implemented consistently?

John Swinney: The question of wellbeing was addressed in the 2014 act, which sets out the eight wellbeing indicators. Those are subjective terms, but they are designed to provide a context within which professionals can exercise professional judgment about how effectively a child or young person's wellbeing is supported.

That is not a new framework; it is a framework within which professionals have been operating for some time, and it assists them in formulating their judgments about whether the wellbeing of young people is being properly supported. The definition is set out with a clarity with which professionals are familiar and which enables them to exercise their judgment.

Colin Beattie: Some practitioners commented that there needs to be flexibility in the definition of wellbeing, because a definition that is too tight will lead to discrepancies in implementation and interpretation. They said that the definition of wellbeing is sufficiently flexible that different practitioners can interpret it for the purposes of their own discipline, trusting to their professional expertise, which works well. Do you agree, or is the definition too loose?

John Swinney: That is the framework within which professionals want to operate. The named person provision is about taking proactive measures to intervene earlier to provide support before problems become more serious and affect the welfare and safety of a child—which brings in a completely different regime—or might crystallise into issues that require greater public sector intervention to meet a child's needs. We are all familiar with the rationale: the earlier that we intervene to support a child or young person and their family, the better. The definition of "wellbeing" in section 96 of the 2014 act is designed to create

the framework within which professionals can operate to exercise that judgment.

Colin Beattie: Witnesses also commented on training in different local authorities and said that, in some local authorities, training might take people down the road of a slightly different definition of "wellbeing". That seems to be welcomed by practitioners, but would it create a difficulty if there were a national roll-out of training? Would that be precluded?

John Swinney: No, because the legislation is predicated on the exercise of professional judgment, and it is for professionals, whom we trust ordinarily, regularly to exercise their responsibilities to consider and interpret the characteristics that we are talking about and decide whether there is a requirement to offer support or to intervene in a particular way to meet the needs of young people. A range of indicators is set out in section 96, but it is up to professionals to decide how best to exercise their judgment within that framework.

Colin Beattie: Some witnesses told the committee that there should be a definition in the bill or in the code of practice. From what you are saying, it seems that you do not think that that is the case.

John Swinney: We have the wellbeing indicators, which are very clear. What is important is that, in education and training for the exercise of responsibilities in that regard, we pay careful attention to the practice of professionals and ensure that it informs the guidance that is available to anyone who is required to exercise responsibilities in this way.

10:45

Liz Smith: I want to pick up on a fundamental dilemma that we face. The cabinet secretary was right to say that there are practitioners who believe that the wellbeing principle is flexible and allows for professional judgment. The problem arises if they are challenged on that judgment, which will probably happen more now that they have a duty to consider whether to share information. If they are challenged, they will be much less secure in the knowledge that their judgment is accurate, given the subjective nature of the SHANARRI indices. My understanding is that one of the Supreme Court's concerns was about the subjective nature of the judgment on wellbeing, which might suit flexibility and professional judgment but will not suit the situation with the SHANARRI indices. What is coming through loud and clear is the concern among professionals that if they get legally challenged on something, the SHANARRI indices will not be adequate for defining wellbeing.

John Swinney: I do not accept that point. The SHANARRI indicators are part of the framework of consideration in which professionals exercise their responsibilities, and I do not think that anything in that framework will change as a consequence of the bill. There is obviously the question of the judgments that are arrived at by professionals in that respect. Fundamentally, though, the areas of activity that we are talking about here are ones in which professionals can judge the best way to provide support to a child or young person and their family. As a society, we rely on those professionals to make that judgment.

Liz Smith: I seek clarification on that. Do you accept that the change from the duty to share to the duty to consider whether to share adds a complexity that is part of the concern for practitioners?

John Swinney: No. The reason why we are legislating now and why we legislated in 2014 is because good practice is deployed in some but not all parts of the country. The bill gives impetus to our intention to ensure that we take a more proactive and preventative approach, so that good practice is available consistently, and more widely, across the country. That is why we legislated in the first place. Essentially, what we are completing in the current process is the framework that enables that widespread availability of good practice.

The Convener: Before I let Daniel Johnson in, Johann Lamont can come in with a supplementary question.

Johann Lamont (Glasgow) (Lab): My question is about what the duty to consider sharing information looks like. The duty to share information has the benefit that it is simple. Someone has an obligation to share and, if they do not share, we can test whether they are responsible for the fact that they did not share. What would a duty to consider look like? How would somebody prove that they had considered whether to share? That would involve a different exercise of professional judgment. Would you expect there to be proof, such as written evidence or a log? What would the evidence look like?

John Swinney: What we envisage, which is something that we will have to discuss very carefully with our stakeholders—

Johann Lamont: Sorry, but has that not been discussed?

John Swinney: It will be part of the discussion to ensure that we have the—

Johann Lamont: Sorry, but when you decided to move from a duty to share to a duty to consider whether to share, was it not discussed what that

would look like and what the implications would be for anybody who was going to exercise that duty?

John Swinney: Yes. We have discussed the nature of the change of responsibility from a duty to share to a duty to consider, although we need further discussion about what might well be a requirement to demonstrate how the duty to consider is exercised. As we go through that process, it is important that we listen carefully to stakeholders and practitioners to ensure that the duty to consider whether to share is not burdensome, that it is consistent with the exercise of professional duties and that it addresses the issues that the bill requires to be addressed.

Johann Lamont: With respect, I would have expected that work to have been done before you put the duty to consider into a bill. Whether or not the duty is doable or achievable, I would have expected you to have thought about what it might look like first, instead of introducing the duty then having the conversation later. It seems to be the wrong way round.

John Swinney: The good practice that demonstrates how professionals should consider those points already exists. It is a case of engaging with the professions to ensure that they implement the duty in a fashion that is consistent with that good practice.

Daniel Johnson (Edinburgh Southern) (Lab): The bill does not alter the scope, nature or quality of the information that can be shared, because that is set out in the Data Protection Act 1998, which allows information to be shared on the basis of a threshold for child protection. Does the cabinet secretary agree with that assertion? If so, is it conceivable that information would ever be shared on the basis of wellbeing if it does not meet the child protection threshold that is set out in the 1998 act?

John Swinney: Unless I misunderstand the question, Mr Johnson invites me to make a distinction that cannot exist because, in all circumstances, there is an obligation on practitioners to operate within the existing legal framework on data protection.

Daniel Johnson: The reason that I ask that question is that clarity is at the heart of the matter. Clarity is important to the duty to consider sharing information, if for no other reason than that it was one of the things that the Supreme Court set out. My concern is that we are asking practitioners to consider sharing information on the basis of wellbeing, when what they are permitted to share is dictated by the child protection issues that are set out in the 1998 act. We are asking them to consider sharing information on the basis of one set of criteria, but what they are permitted to share is dictated by another set of criteria. That led Janys Scott from the Faculty of Advocates to describe the situation as "a difficult juggling act", while Kenny Meechan described the bill as

"trying to reconcile two almost irreconcilable points."—[*Official Report, Education and Skills Committee*, 20 September 2017; c 11.]

What is the cabinet secretary's response to that point?

John Swinney: The practitioner must operate within the law, which will stipulate that their actions in relation to any question of wellbeing have to be consistent with the Data Protection Act 1998. Where a child protection issue is at stake—I add this only for completeness—the 1998 act provides exceptions that allow information to be shared if there is concern that a crime has been committed. That would not, I emphasise, be available on the basis of wellbeing, because the 1998 act does not provide for that to be the case.

Daniel Johnson: Do you accept that the bill explicitly asks practitioners to consider sharing information on the basis of one set of criteria when the scope of what may be shared is set out by the Data Protection Act 1998 and successive legislation?

John Swinney: Yes.

Daniel Johnson: You said that information sharing is necessary for the role of the named person and the operation of that policy. Ross Greer asked you about alternative approaches. In the view of Janys Scott and Clan Childlaw, the policy could proceed without the information-sharing provisions on the basis that information can already be shared under existing law. Why does the cabinet secretary feel that the named fperson role cannot be put into practice if information sharing is on the basis of policy rather than legislation, which would remove that complexity altogether?

John Swinney: It is for the reason that I gave to Liz Smith a moment ago, which is that we have good practice in some parts of the country but not others. The aim of the bill is to allow us to take forward good practice to support children, young people and their families in all parts of the country. The decision to legislate on the issue was prompted by the 2014 act.

We are in a hiatus now. If we set the clock back to before 2014, we see legislation being taken forward whose purpose was to roll out good practice. We now find ourselves with some legislative uncertainty. My worry would be that if we do not complete the journey, that good practice will not be rolled out and, because of uncertainty about the legal framework, we will only have a rolling back of good practice.

Daniel Johnson: My understanding is that information sharing is but one component of the named person role. There are other parts, including liaising with families, co-ordinating with services and being a single point of contact, none of which is fundamentally undermined by the information-sharing provisions that are not being brought forward. Indeed, information sharing could still take place.

I accept that elements of the named person role might be more difficult to carry out without the information-sharing provisions, but I do not see why the role is fundamentally flawed if they are not brought forward.

John Swinney: In essence, the duty to consider information sharing requires all professionals to consider whether there is something that they need to act upon as part of the provision.

Much of the issue is tied up with our original thinking, in the run-up to the 2014 act. We were trying to ensure that more young people had access to support, because such support was not available in all parts of the country. The 2014 was intended to provide the legislative impetus to ensure that that good practice could be deployed.

We now find ourselves with, I think, a considerable amount of nervousness in the professional community on the issue. The committee and Parliament have two choices about how to address that. They can either agree to the bill and, in so doing, create legislative certainty, or they can choose not to agree to the bill and try to ensure that the practice that Mr Johnson has talked about, which is largely on a voluntary basis, prevails in Scotland.

I am concerned that, because of the legal debate that we have had and the hiatus that we are in, unless we provide legal certainty through the passage of the bill that good practice will be undermined.

Gillian Martin (Aberdeenshire East) (SNP): You have just mentioned the nervousness among practitioners, cabinet secretary, but there is also considerable nervousness among families now that the named person legislation and information sharing have been discussed in the media and in society at large. You mentioned a public information campaign. How is that going to disseminate confidence to families and children who might have to use the named person service?

John Swinney: We will want to make sure that we adequately and effectively counter the clear unease and uncertainty that have been created as a consequence of the Supreme Court's decision and the pause that we have had to put on the implementation of the legislation. We must take care to proactively and dispassionately set out the merits of the legislation, the services that are available and the supportive role that is envisaged. It is important that we try to ensure that members of the public—whether they are a child or a parent—are equipped with that information.

11:00

Gillian Martin: Will the code of practice be written in such a way that it will be understandable to families? They might want to read it to know how their information might be shared.

John Swinney: That must be a requirement. The code of practice will be of no value if people—whomever they happen to be—cannot understand it. Anyone with a relationship to the code of practice must be able to understand it.

Tavish Scott (Shetland Islands) (LD): I have a couple of questions about the code of practice. First, however, I will defend Oliver Mundell. When Mr Swinney was in Opposition, he regularly demanded that lots of us resign. [*Laughter*.] I will pass over a few of his press releases from those days.

John Swinney: I have a very different recollection of events, Mr Scott.

Tavish Scott: Well, indeed.

Does the cabinet secretary accept that much of the evidence on the code of practice that has been laid before the committee and, I am sure, his office, reflects the fact that practitioners believe the code to be central to the provisions of the proposed legislation?

John Swinney: Yes.

Tavish Scott: Therefore, can the code be finalised prior to the finalisation of the UK Data Protection Bill?

John Swinney: Yes.

Tavish Scott: You are certain.

John Swinney: Yes.

Tavish Scott: When will that be?

John Swinney: I do not know when—

Tavish Scott: Will it be in 2018?

John Swinney: If Mr Scott will forgive me, predicting the course of the UK Government is not something that any of us can do with great confidence at the moment.

Tavish Scott: I can predict its end.

John Swinney: I am being flippant when I should not be. I accept that there may well be changes to the legislative framework. We, in this Parliament, do not have competence over all the issues that may be affected by the data protection framework. We do not have legislative

competence over data protection. Therefore, if any legislative changes are made, we will have to act in a way that is—and ensure that we have guidance and a code of practice in place that are—compatible with whatever legal framework emerges.

Tavish Scott: I entirely take the point that we do not know when that will be. However, to the best of your knowledge, it will not be in the next six months, will it?

John Swinney: No, I would not think so.

Tavish Scott: No. In your letter to the committee of 6 November, you say that you will establish a practice development panel later this month. Will that panel undertake work on the code of practice, or do you envisage different consultation on the code of practice?

John Swinney: The panel will undertake work on the code of practice.

Tavish Scott: Am I right in saying that you have yet to appoint a chair or members of the panel?

John Swinney: That is correct.

Tavish Scott: When will those people be in place?

John Swinney: I will do that very swiftly.

Tavish Scott: When do you envisage the panel concluding its work?

John Swinney: The group will conclude its work in a timely fashion once the bill has completed its passage through the Scottish Parliament and after due consultation and dialogue has taken place to get us to a point at which the framework is judged to be effective and appropriate and comes forward for parliamentary scrutiny.

Tavish Scott: Is it fair to say that there is no reason why the panel could not begin its work irrespective of the stage that has been reached on the matter?

John Swinney: Assuming that the bill moves into the further stages of parliamentary scrutiny, the panel's work can start.

Tavish Scott: I am interested in the language that you use in your letter. You say:

"The Code to be made under the Act, once passed, will quite properly start from a blank piece of paper."

Why do you refer to a "blank piece of paper"?

John Swinney: I was trying to say that I will not oblige the panel to take the illustrative draft code of practice as its starting point.

Tavish Scott: At this stage, the committee has no sight of what the code might look like.

John Swinney: It does have sight of that, because I provided a draft illustrative code of practice. I accept that it was perhaps not the finest piece of work that the Government has ever produced, but it is there to help the committee in its deliberations.

This is exactly the dilemma that I judged would be part of these proceedings. The question that the committee has to answer is whether it supports the general principles of the bill, which envisages the creation of a code of practice. My judgment was that the committee would ask me for a code of practice to be available while it considered the bill, and that is why I provided the draft illustrative code of practice. Equally, I could have taken the view that that was for another day, later in the process. However, the committee could then have asked me the question that Mr Scott has just asked me.

The advice that I have taken is that the only way in which we can address the issues that the Supreme Court identified is by introducing the bill and following it with a code of practice that is formulated in such a fashion that it commands the confidence of practitioners, professionals, members of the public, children and families. We must do that properly.

Tavish Scott: I did not frame the question in that way, but I take your last point, that the code of practice must command confidence. We are dealing with what is, in some senses, a very narrow piece of legislation to which the code of practice is core, as you accepted in your original answer. The dilemma in which the committee finds itself is in having to give consent to a narrow principle in response to the Supreme Court's ruling when we do not know what will be in the code. Gillian Martin made a fair point in saying that the code must appeal to families. The code that we have seen might appeal to lawyers, but it certainly does not appeal to families.

John Swinney: Fundamentally, the question that Mr Scott put to me was answered by the commitment that I gave at the outset, that Parliament will have the final say on the contents of the code.

Tavish Scott: That is another way of looking at it, but that is—

John Swinney: I am sorry, but I think that that is a significant way of looking at it. The committee is not being asked to sign up to the code of practice today, nor is Parliament.

Tavish Scott: No, indeed.

John Swinney: The committee is being asked to sign up to the general principles of the bill.

Because I have listened to the committee's evidence, I have conceded, in a change to the

proposition, that Parliament will have the final say, through a vote, on the contents of the code of practice. The provisions of the bill already envisaged that I would lay a draft code of practice in Parliament, that the code of practice would be available for consultation in Parliament for 40 days and that I would have to take account of any comments on the draft code that were expressed by Parliament within that 40-day period. I now propose to amend the bill to include another stage in that process whereby the code will come back to Parliament for it to decide—it will not be me who decides; it will be Parliament—whether it is acceptable. That is a huge change in the position.

Tavish Scott: Sure. However, the absolute opposite view to that is that the code of practice is core to the bill—as, I think, we have agreed—so it must therefore be the fundamental starting point for how the committee considers the bill. I totally accept that you have moved and have suggested new ways for Parliament to deal with the code, which could be welcomed by those who see the parliamentary process as the right process. Nevertheless, despite all that you have just said about that, the fundamental issue for the committee is that we do not have a code. You are asking us to approve the bill without a code.

John Swinney: I am not asking you to approve the code.

Tavish Scott: You will at a later stage.

John Swinney: At a later stage, Parliament will have the opportunity to accept or reject the code. The code is not new law. I went through that point in detail with the Delegated Powers and Law Reform Committee. It is not new law; it is explanatory information, and Parliament will be the judge of whether it is satisfactory.

Under no circumstances is the committee being asked to approve a code at this stage; it is being asked to approve the general principles of the bill, which requires us to produce a code. That code is already subject to significant parliamentary scrutiny, and I have just accepted another layer of scrutiny whereby Parliament will have a veto over the decision to accept the code.

Tavish Scott: Yes, but the principles are nothing without the code, are they?

John Swinney: The code cannot happen unless Parliament votes for it.

Tavish Scott: We are going round in circles. That is as much my fault as anyone else's.

I have one final question. I will quote the Royal College of Nursing Scotland, which I presume sent the same email to all of us overnight. It is important to note that the RCN supports the principles of the bill but does not support the bill as introduced, because it does not consider it to be the answer to the question. The RCN specifically says that the duty to consider sharing information

"may undermine the principles of GIRFEC by resulting in defensive practice."

The committee is pretty hot on practitioners, because the evidence has been powerful. Does the cabinet secretary accept that concern? If so, what is the answer to it?

John Swinney: The answer is that there will be a variety of different opinions, because the committee has had letters from a variety of organisations that are involved in this area of policy, including the Aberlour Child Care Trust, Children in Scotland, Crossreach, Includem, Children's Health Scotland, Social Work Scotland, One Parent Families Scotland, Enable Scotland and the Convention of Scottish Local Authorities.

Tavish Scott: I agree with all of that, Mr Swinney, but I am talking about the RCN specifically.

John Swinney: In the field of health, the Nursing and Midwifery Council has said:

"We can currently see no conflict between the draft legislation proposed and our own regulatory approaches, notably our Code."

The Royal College of General Practitioners has said:

"We welcome the amended wording of the Bill, as it meets our concerns regarding the threat to doctor-patient confidentiality contained in the original Bill".

The General Medical Council has said:

"We warmly welcome the proposed move away from creating a mandatory duty to share information about children and young people with a Named Person."

Those issues are the subject of discussion and debate among organisations. If Mr Scott is looking for evidence there is plenty of evidence of organisations that are saying—

Tavish Scott: Is the RCN wrong, then?

John Swinney: The RCN has its opinions and is entitled to express them. As Mr Scott knows, I simply marshal the evidence of different opinions for the committee to judge.

The Convener: Daniel Johnson wants to ask a brief question.

Daniel Johnson: I want to clarify something about the status of the code of practice. I hear what the cabinet secretary is saying. Will those provisions be subject to parliamentary scrutiny in the bill, and will that apply to future changes to the code of practice, or will they have the status of secondary legislation?

John Swinney: Section 1(4) of the bill introduces new section 26B of the 2014 act. New section 26B(6), states:

"The Scottish Ministers must lay before the Scottish Parliament a draft of a code of practice they propose to issue."

New section 26B(7) states:

"The Scottish Ministers must not issue the code of practice until after the expiry of the period of 40 days beginning with the day on which the draft code was laid before the Parliament."

New section 26B(8) states:

"The Scottish Ministers must, in the code of practice they issue, take account of any comments on the draft code expressed by the Parliament within that period."

Those three new subsections are already in the bill. If the committee approves the principles of the bill at stage 1, I will lodge for the committee's consideration a stage 2 amendment that will apply an additional provision, which will say that the code of practice cannot be put in place until Parliament has agreed to that. If we were to bring forward any subsequent code of practice—to take account of changes in data protection legislation, for example—we would have to go through the same process.

The code will not have the status of secondary legislation because it is not legislation; it is explanatory information. I am trying to address what I clearly detect is a parliamentary concern about how the guidance can command sufficient authority and confidence in Parliament by enabling that proposal to be considered by Parliament and by giving Parliament, rather than me, the final say.

11:15

Oliver Mundell: I understand that the Scottish Government has been engaging with a number of outside organisations about the draft code of practice and some of the changes that are set out in the cabinet secretary's letter. On parliamentary scrutiny, the committee has spent a long time taking evidence from various organisations, some of which have given evidence based on something that is now no longer as central to our consideration of the bill. How does the cabinet secretary expect the committee to scrutinise what I see as a sort of shadow consultation with a set group of organisations?

John Swinney: The committee will make its judgments based on what it hears.

Oliver Mundell: Will the Scottish Government share any more detailed information about the discussions that it has had and the concerns that it has heard from some of those organisations, including those that have written a letter to revise their position from that which they submitted at the start of the committee's evidence taking?

John Swinney: I set out a fair summary of all those issues in the letter that I sent to the convener on Monday.

Oliver Mundell: How many organisations did the Scottish Government meet ahead of the committee taking evidence but after they had submitted written evidence to the committee?

John Swinney: We meet organisations constantly. I see them and talk about these issues constantly, and I have volunteered to the committee the information that I have listened to and heard the evidence. I have watched every week of the committee's proceedings. I am alert to the concerns that have been expressed, and they have been addressed openly.

I have come to the committee and accepted that there have been elements of the steps that we have taken that we have not got right. Mr Mundell asked me earlier about my accountability. I have come here and said that I made a judgment. I said to my officials that we are going to have to put a draft illustrative code of practice into the bill. It was not part of our original plan, so that is not what the committee was asked to judge. The committee was asked to judge whether we should have a duty to consider sharing information and whether we should have a code of practice. I decided to add that in during the proceedings. We could not undertake the consultation, and I have accepted that we did not get that right.

I am not hiding anything from the committee. The committee has heard the evidence and I have listened carefully to it. I addressed the issues in an open, published letter to the convener of the committee on Monday, and I am here to answer questions about it.

Oliver Mundell: Do you accept that some people who gave written evidence to the committee changed their oral evidence on the basis of reassurances that they received in private from the Scottish Government that the committee was not aware of when it took that oral evidence?

John Swinney: The world moves on. I wrote a letter to the committee on Monday that sums up the changes that I am making to the approach in light of the feedback that I have had from individuals. There was nothing private about it. I sent a published letter to the committee and I am sitting here in a televised meeting that can be seen by anyone around the world to explain what I have done. There is no secret information. I have simply listened to the evidence that the committee has taken and realised that we have some difficult issues to address, and I am addressing them openly in front of the committee.

The Convener: This will be your final question, Oliver.

Oliver Mundell: You potentially shared the Scottish Government's intentions for the future of the bill with some organisations that were giving evidence to the committee before they appeared at the committee. Could that have affected the evidence that they gave?

John Swinney: I do not actually think that that is the case, Mr Mundell. I would have to look at all the dates.

There is a logical inconsistency in Mr Mundell's point. I have listened to the evidence that has come to the committee. I have seen organisations come here and express their concerns. I have then gone away and had various discussions with people so that I can better understand their perspective, and I have formulated a letter to the committee. I sent that letter and it has been published, and now I am here before the committee to give evidence and be answerable.

We work with and are in dialogue with organisations all the time, but I do not think that I shared my private thinking with anyone before they gave evidence. I am here to give evidence today, and I set out my position to the committee on Monday.

Ross Greer: Forgive me if this is a naive question; the issue came up during a recent visit to a group of practitioners and I told them that I would raise it. The practitioners were concerned that, because the code's primary purpose is to ensure legal compliance, it might never be possible to shape it into a document that they will find accessible and usable. They mooted that the code should in essence be directed not at the practitioners but at their legal representatives—the local authority legal services department and so on—and that the practice guidance should be directed to the practitioner. Is that possible?

John Swinney: If I understand you correctly, you are asking whether it is desirable for the code of practice to be addressed to the legal representatives and the guidance to be addressed to practitioners. Is that right?

Ross Greer: Yes. As it stands, the code of practice is for practitioners, but the practitioners' concern is that it might not be fashioned in such a way that they will find it usable and that, perhaps, if it is not directed at them—

John Swinney: It has to be usable by practitioners. That is the challenge. We must make sure that we get it right, as part of our dialogue with them.

The Convener: Ross Greer's point touches on something that Liz Smith talked about. Is the issue partly that individuals fear being held legally responsible? Is it that practitioners want to ensure that the body is held responsible and not the individual?

John Swinney: Let me provide a little clarity on the point. The code of practice has to be available to and usable by anyone who is exercising the responsibilities that we are talking about. We have to get it into a shape and character that enables that to be the case.

The legal responsibility for any decision or approach that is taken falls on the organisation, not the individual. The legal position on that is crystal clear.

Daniel Johnson: Janys Scott said on that very point that the code of practice will balance such complicated legal points that she could not conceive of it being straightforward. Do you accept that? How will you seek to resolve the complex legal points in the code of practice?

John Swinney: We have to articulate it in such a way that it will be usable by practitioners in the services that operate in this context. We have to get the necessary input to ensure that the document is usable by practitioners.

Daniel Johnson: Was Janys Scott wrong to question the possibility of that?

John Swinney: Well, that is her opinion.

Tavish Scott: In relation to schools, cabinet secretary, you are saying that it will be not the headteacher but the local authority that is legally responsible in this context.

John Swinney: Correct.

Tavish Scott: And the governance reforms that you published yesterday will make no difference to that.

John Swinney: Correct.

Tavish Scott: Thank you.

Clare Haughey (Rutherglen) (SNP): Cabinet secretary, you will be aware from the evidence that we have heard from practitioners and professional bodies that there is significant concern about staff and practitioners having time to receive the correct training to enable them to implement the named person approach. That certainly came through at our focus groups last week.

I am pleased that you said that there will be additional funding—I think you used the expression "further financial resources". Will you expand on that? What will be available to organisations so that they can roll out training, particularly in relation to parts 4 and 5 of the 2014 act?

John Swinney: We made provision in the 2014 act for funding to be available, and funding was

distributed to relevant local authorities and public bodies to support the necessary training and equipping of professionals to take forward their responsibilities.

I want to ensure that we adequately address the issues of resourcing that have been raised by different bodies. As we take the bill forward, my plan is to work with stakeholders to identify how the provision of such support can be put in place to address those issues. At later stages of the bill, I will make specific provisions on that available to the committee.

Clare Haughey: Will the panel that you are convening have some input to that training, assuming that some of it will be different from what was originally rolled out?

John Swinney: Yes. I want to ensure that the panel can shape that agenda.

Clare Haughey: Can I assume, then, that some of the organisations that have raised that concern will be part of that panel?

John Swinney: Yes, they will be.

Clare Haughey: Another issue that was raised with us was about people and organisations that are not named persons but will feed information in to named persons. Is there some provision for training for those people and organisations?

John Swinney: Yes. We will also take forward wider awareness-raising approaches to ensure that there is a wider understanding of the role of the named person and how individuals can contribute to the valuable work that named persons will represent.

The Convener: Liz Smith has a supplementary question.

Liz Smith: Mr Swinney, on training, you have acknowledged in your letter and again this morning that there will be an increased cost. Can you give us an idea of what that cost will be?

John Swinney: I cannot do that at this stage because I want to have a dialogue with stakeholders to ensure that I can address the issues properly. I will take that forward during the passage of the bill to ensure that I can adequately assess what is required and be in a position to give Parliament clarity on that.

Gillian Martin: I have some questions on the training that happened before the Supreme Court judgment, when local authorities thought that the scheme was going ahead. Was funding given for training at that point? What happened to that funding as a result of the hiatus that we have had?

John Swinney: If my memory serves me right, we distributed just over £10 million to local authorities. As with all such funding, it was distributed to local authorities and that is where it remains.

Gillian Martin: Some local authorities will have already put training in place and some will not. I imagine that the picture varies across the local authorities.

John Swinney: Yes.

Gillian Martin: Are you getting any feedback from those local authorities that carried out training a few years ago that there is a need for more training? They may have spent some of the training budget already because they thought that the scheme was coming in, and now they will have to redo that training.

John Swinney: All local authorities confirmed to us after the passage of the bill that became the 2014 act that they were ready for implementation. We had a commencement date of August 2016, and the training activities of local authorities were taken forward in that context. The evidence has indicated that there is a desire and a need for further training and support, and that is what I want to discuss with stakeholders to ensure that we can adequately address that.

Gillian Martin: I have one further question, which goes back to the duty to consider sharing information and any documentation that might be required as a result. Are you taking into account that there might be an increased workload for certain practitioners as a result of the decisions on that? How has that been addressed?

John Swinney: When I look at the exercise of responsibilities by public servants at the local level, I see that many public servants operate in the space where they assess and consider the needs of individuals and how they can most effectively support them. Much of that existing practice goes on among teachers, who consider the wellbeing of children in their care, and health visitors. We have substantially expanded the number of health visitors in Scotland and further expansion is under way. A lot of that activity is already being undertaken.

The bill envisages the duty to consider sharing information being applied on a more widespread basis, and that will change the nature and character of some of the work that is being done. It also has to be borne in mind that, where the practice has been rolled out, it has resulted in a reduction in case load because of the proactive work that has been undertaken to achieve the objective of the named person policy—that is, to avoid more complex cases arising because earlier intervention has prevented that need from crystallising.

11:30

Johann Lamont: It strikes me, in this conversation and in all the evidence that we have taken, how far away this feels from the real world and the young people we want to support. I am sure that you share that concern.

Can you guarantee that resources will not be removed from providing for young people and children in order to fund training?

John Swinney: Yes.

I share the concern that Johann Lamont raised at the start of her question. In one of his questions, Mr Scott referred to the difficulty with this bill being that we are having to address a very narrow, albeit important point because of the issues raised by the Supreme Court judgment. However narrow it is, the point is critical to enabling us to pursue the larger agenda, which is about supporting the wellbeing of children and young people in our communities. The bill is a challenge because the committee has to scrutinise this very narrow point in order that the larger picture can be taken into account.

Johann Lamont: My concern is that the committee will have to judge whether the legislation makes the situation better or worse for young people. It also strikes me that the evidence, to which you have obviously paid a lot of attention, lacks a ringing endorsement of the legislation. The evidence has not even included your position, which is that the legislation is absolutely necessary in order to protect young people. In fact, many of the practitioners have said that it is what they do anyway, so the legislation is unnecessary, and they predicate their support for the bill on the quality of the code of practice.

At best there are people who are committed to the named person scheme and to GIRFEC who say that they can make the legislation work. You have already mentioned the letter that the committee received from a group of charities, which was interesting and very useful to us. We were grateful for it because it outlined their support for the need for a duty to consider sharing information. I do not want to misrepresent what the letter said, because clearly the overall conclusion was that we should support the bill, but I will read out one paragraph:

> "We recognise that significant concerns remain. At this stage, we are prepared to work with the Scottish Government with the aim of producing a Bill and Code that can be supported by the majority of the children's sector and, ultimately, the Scottish Parliament. Our current support is contingent on the Scottish Government working effectively with the sector to produce revised measures that address the concerns expressed to date, satisfactorily."

The committee is now in the position that it is expected to support a bill that has only conditional support from its strongest advocates, who, in that letter, contemplate the possibility that it will not succeed. Do you accept that that is a dilemma for the committee? In fact, the letter appears to me to suggest that those organisations want to work with you from a base point of asking how we can make the policy work, rather than saying that the bill should be passed and then they will see how we can make the best of it.

John Swinney: My response to that has to be set within the context of the wider position of every one of those organisations, which is that they want to see the named person provision put into practice and take effect. Some of their experience, in some parts of the country, is of that provision already working, voluntarily, while in other parts of the country it is not—hence the need for legislative impetus to put the provision in place.

None of those organisations is casting any doubt on the importance of having named person provision, which is the legislation that is already on the statute book. However, for that to commence and have its potential realised, the bill that is before the committee needs to be passed.

Johann Lamont: With respect, that is not what they say.

John Swinney: Convener, may I please complete my point? I am not interpreting what the signatories of that letter are saying; I am purely and simply making a factual point to the committee that the named person provision cannot be commenced on the basis envisaged by the 2014 act unless this bill is passed.

I have accepted that there is a job of work to be undertaken on the code of practice, as my exchange with Mr Scott helped to clarify significantly, and whether that is enacted will ultimately depend upon a parliamentary decision. I have put much more involvement and participation for Parliament into the process than was originally envisaged in the bill. That is a crucial part of the approach that I am taking.

My final point about the letter from the organisations is that they support the concept of the process that the Government is undertaking, but they want to be immersed in ensuring that it takes the correct course and I have committed the Government to that.

Johann Lamont: With respect, cabinet secretary, they say more than that. They say that their "support is contingent" on the successful conclusion of that work, which is a very different thing. They are contemplating the possibility that the legislation may not work. We know that they support the named person scheme and seek to continue to support it. If they believed that the bill was required in order to deliver it, they would say that, but they do not. They say that their support for it is contingent upon an effective outcome. The

committee is being asked to support a bill without knowing that that outcome is guaranteed. I am sure that you will accept that that is a major problem.

On the question of unintended consequences of the legislation, a very significant amount of evidence—not from everybody, I appreciate; some people said that they would do their best to make it work—was from people who felt that defensive practice would develop. I understand that other people have said that it has already developed because of the uncertainty. Do you share my concern that a consequence of the legislation may be that people begin to practise even more defensively than they have in the past, to the detriment of our shared commitment to the safety of our young people?

John Swinney: The events that were associated with the Supreme Court challenge have created a very difficult set of circumstances for practitioners—circumstances that we did not want to see. The letter from the group of organisations makes it quite clear that the legal uncertainty is creating some of that risk-averse practice. We have to make a judgment about how to resolve that issue, because I am at one with Johann Lamont in wanting to see clear process and practice in place to support the wellbeing of children in our society.

If we want to reach the destination identified by Johann Lamont, we have to wrestle with the best way to do that in the light of where we find ourselves in the aftermath of the Supreme Court judgment. Will our ability to get to that destination be aided or hindered by the passage of the bill?

In my view, it will be aided by the passage of the bill because we will be able to put in place the legal clarity that will enable good practice to be undertaken safely within the law and within the parameters of good guidance.

If we do not pass the bill, the concept of the named person will go into hiatus. As a consequence of that, the opportunity to support the enhancement of the wellbeing of young people in Scotland will be diminished.

Johann Lamont: That is your view, but it is not a view that everybody shares. Do you accept that a significant number of people in the legal profession do not accept that there is legal clarity in the matter, and think that there are significant problems with it?

John Swinney: The committee has heard different legal opinions. Johann Lamont is absolutely right; what I have just expressed is my opinion. I have given my opinion to Parliament and the committee can consider it; that is the process.

Ultimately, the committee will also want to consider on what basis I would come to the committee with a bill. What will I have gone through to make sure that the bill is robust enough to meet the needs of the legislation? I have gone through the necessary process to get to this point. In that context, the bill helps us to provide legal clarity, although I accept that there will always be legal debate about some of the provisions.

There is legal debate about provisions in bills that the Parliament has passed. They have been tested in court and, on a number of occasions, the courts have rejected them, while on other occasions, they have supported them. This is not a new concept.

Johann Lamont: No, it is not unique. As I understand it, the main thing that the Government has done to address the concerns of the Supreme Court is move from a duty to share information to a duty to consider sharing information. Can you confirm again that you have not had a conversation with stakeholders about what the duty to consider sharing information would mean for the individual practitioner and for the local authority or organisation that employs them, and whether it would be workable? That is a pretty fundamental point.

John Swinney: We went through that process during the latter part of 2016 when we discussed how to respond to the judgment, and we arrived at the duty to consider sharing information. We have discussed that with the national implementation group and our stakeholder forums. I want to make sure that stakeholders have the opportunity to shape what that looks like in reporting or process terms. We need to give adequate space for stakeholders to inform the practice.

Johann Lamont: Going from a duty to share to a duty to consider sharing information is a pretty fundamental way of dealing with the problem. Surely, in deciding on that move, you would test the practicality and the implications of such a duty. Would you have to write down your considered view and give evidence for what you had considered and rejected? What implications would that have for a practitioner in terms of defensive practice? It cannot be that you decided to have a duty to consider sharing information without testing what that would mean in the real world and what the implications for individual members of staff or practitioners would be.

John Swinney: Our position on your final point is crystal clear. The responsibility rests with the organisations involved. There will be issues of professional practice that will affect many professionals that will be the subject of on-going discussion on a variety of grounds, not only about the named person.

We have discussed the approach of having a duty to consider sharing information as being the approach that enables us to address the question of proportionality that the Supreme Court raised in its judgment, and we have applied that approach to the legislation. I am simply saying that I want to make sure that stakeholders are fully involved as we finalise the detail of how that is undertaken.

11:45

Johann Lamont: But you have not road tested the impact of the duty to consider sharing information on the individuals who would have to do it. Do you accept that there will be an impact on an individual, given the context of the bridge between wellbeing and child protection? In the past there has been a problem; people have not supported the policy when we would have expected them to, so it is about individual practice. There would be an implication for people—a professional expectation on them to behave in a particular way. The duty to consider sharing information is significant and it is not just about local authorities and charitable organisations. It will involve individual professionals and, therefore, the legislation will stand or fall by the capacity for that duty to consider sharing information to be deliverable without them using defensive practice.

John Swinney: Good decision making by professionals already relies on proper and effective recording of information; it is an essential part of all judgments that are applied by professionals. I am making the simple point that I do not want to finalise the details of the reporting arrangements until such time as professionals have the opportunity to shape them, as part of the on-going process. Johann Lamont will know from her extensive experience in this area of activity that the good recording of information to support good-quality decision making is an essential component of the process.

Johann Lamont: There is an issue about resources. We accept that you have made more resources available and that there will be a judgment about whether that goes to children's organisations, which is where you would focus them if you had the choice.

I will make one last point, which is not a partisan point and I make it quite seriously. One of the problems with the named person policy has been the way in which it has been represented—the lack of confidence in it and the lack of understanding of its purpose, even by its strongest advocates. You say that you will have a national campaign. Have you looked at the idea of having a national campaign that is not conducted by the Scottish Government, given that people who do not support the policy have no confidence in what the Scottish Government has done? I am not casting aspersions on the Government, which I think has in large part sought to deliver the named person policy from the best of intentions, but that lack of confidence will surely not be addressed through a national awareness campaign led by the Scottish Government. Have you looked at other options for how that might be done?

John Swinney: I am certainly prepared to do so, because Johann Lamont's point may have some real substance. It may be that the best way to address the issue is to take that into a different sphere and find a different way of going about it. I will certainly give active consideration to that point.

The Convener: A number of witnesses shared some of Johann Lamont's concerns about the responsibility that could be laid on them in judging the difference between wellbeing and child protection, but the concern seemed to be more that they were not sure that the local authority, health board or other organisation that was legally responsible would be held responsible. They said that if they were given those guarantees some of their problems would disappear. Will strict guarantees be given to individuals that they will be held responsible in a way that might lead to a legal case only if they have done something that is criminally wrong, as is the case just now, without the named person scheme?

John Swinney: Section 19(8) of the 2014 act says:

> "Responsibility for the exercise of the named person functions lies with the service provider rather than the named person."

There is protection in law—in existing statute—which would be commenced with these provisions. That is in the 2014 act.

The Convener: Do you consider that the practitioners will, in most cases, be able to continue to use informed consent as a basis for sharing wellbeing information?

John Swinney: I imagine that that approach will be taken almost universally.

The Convener: Thank you very much for your evidence.

11:49

Meeting continued in private until 12:47.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba