The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DEVOLUTION (FURTHER POWERS) COMMITTEE

Thursday 3 September 2015

Session 4

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DEVOLUTION (FURTHER POWERS) COMMITTEE
20th Meeting 2015, Session 4

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Duncan McNeil (Greenock and Inverclyde) (Lab)

COMMITTEE MEMBERS

*Malcolm Chisholm (Edinburgh Northern and Leith) (Lab)
*Linda Fabiani (East Kilbride) (SNP)
*Rob Gibson (Caithness, Sutherland and Ross) (SNP)
*Alex Johnstone (North East Scotland) (Con)
*Alison Johnstone (Lothian) (Green)
*Stewart Maxwell (West Scotland) (SNP)
*Mark McDonald (Aberdeen Donside) (SNP)
*Stuart McMillan (West Scotland) (SNP)
Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Clancy (Law Society of Scotland)
John Dickie (Child Poverty Action Group in Scotland)
Nile Istephan (Scottish Federation of Housing Associations)
Emma Ritch (Engender)
Bill Scott (Inclusion Scotland)
Rachel Stewart (Scottish Association for Mental Health)
Professor Neil Walker (University of Edinburgh)
Talat Yaqoob (Women 50:50)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Devolution (Further Powers) Committee

Thursday 3 September 2015

[The Convener opened the meeting at 09:00]

Interests

The Convener (Bruce Crawford): Good morning everyone, and welcome to the 20th meeting in 2015 of the Devolution (Further Powers) Committee.

Before we come to item 1, I welcome Malcolm Chisholm MSP to our meeting. As of 5 pm last night, Malcolm is a new member of our committee—he has taken over from Lewis Macdonald. I am sure that all members would like to thank Lewis for his contribution during his time on the committee. We warmly welcome Malcolm to the committee and look forward to working with him. Do you have any relevant interests to declare?

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): They are probably not relevant to this committee, but I usually declare my union memberships—I am a member of the Educational Institute of Scotland and Unison.

Decision on Taking Business in Private

09:00

The Convener: Item 1 is a decision on taking in private items 5 and 6. Item 5 is a letter to the Secretary of State for Scotland, which at this stage is in draft form, and item 6 is our work programme. Do members agree to take the items in private?

Members *indicated agreement.*

Scotland Bill (Constitutional and Equalities Provisions)

09:01

The Convener: Agenda item 2 is the constitutional and equalities provisions in the Scotland Bill. With the bill now reaching its final stages in the House of Commons, we will take evidence from two panels of witnesses today with a view to making a submission to the United Kingdom Government on where we still believe the bill needs to be improved.

The first of the panels is with us now. We will take evidence from the panel on constitutional and equalities provisions and, if we have time, we will move into wider areas, because committee members wish to ask further questions on the evidence that panel members have provided.

I also welcome to the committee today Christine O'Neill, our adviser. The first panellists are Michael Clancy OBE, who is the director of law reform at the Law Society of Scotland; Neil Walker, who is a professor of public law at the University of Edinburgh; Talat Yaqoob, who is the chair of Women 50:50; and Emma Ritch, who is the executive director of Engender Scotland.

I will open with a very general question, folks, just to get a feel for where we are. What is your overall assessment of the Scotland Bill? Are there areas that could be improved? Does it deliver entirely on the Smith commission proposals? If there are major shortcomings, what are they?

Who wants to kick that one off?

Duncan McNeil (Greenock and Inverclyde) (Lab): There is nothing good in it at all.

The Convener: There is good stuff in it. Does Michael Clancy want to kick off?

Michael Clancy (Law Society of Scotland): Sure, convener. Thank you very much and good morning.

The question I would ask is: how long have you got?

The Convener: We have an hour, but I am not asking you to take an hour—take as short a time as you can.

Michael Clancy: Let us reflect on where we were almost a year ago today, when we were in the throes of the pre-referendum rush. A series of events took place immediately after the referendum, starting with the Prime Minister's statement on 19 September and leading swiftly to the Smith commission, which, as members know, had a very truncated time in which to analyse what further powers should be devolved to the Parliament. In that context, as members know, the business of formulating the Smith agreement with Lord Smith and the political interlocutors was, at times, a tested and testing process that was conducted under extreme time pressure. When Lord Smith reported, that resulted in the draft clauses that the Government published in—I think—January.

The upshot is that we have a Scotland Bill that has a lineage that goes back to immediately after the referendum and which was written in the context of the referendum and the desire of the political parties to come to an agreement to fulfil the so-called vow.

The convener asked how the bill relates to the Smith commission. Many people have different views on that. In many respects, the analyses that have been done by the Scottish Parliament information centre and the House of Commons library show that there are some parts that immediately and completely transfer the Smith recommendations, some parts in which the extent to which that happens is open to interpretation and other parts in which there is not a complete transfer. There are also parts that are new.

I will not go into a detailed analysis, because members have all seen and know the bill. One has to pay some respect to the Scottish Parliament information centre for having produced its analysis.

The Convener: It would be helpful to hear the Law Society's view of the major areas that still require to be addressed in order to ensure that the Smith commission's proposals are met. It would be useful to get your views on the record.

Michael Clancy: We have produced a memorandum of comments on the bill: you have seen all 16 pages of it. We have participated fully in the process in the House of Commons. We briefed MPs at the second reading and submitted amendments, which some MPs were moved to table and which were debated. We will continue with that approach when the bill reaches report stage. The amendments were designed to cover areas where we thought there were deficiencies in the bill or where the bill could be improved. I will just canter through them.

We focused on clauses 1 and 2.

The Convener: You can just give me the main areas.

Michael Clancy: Okay. Clause 1(1) says:

"A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements."

We focused on the phrase "recognised as", and we focused on the same phrase in clause 1(2), which says:

"A Scottish Government is recognised as a permanent part of the United Kingdom's constitutional arrangements."

In clause 2, we focused on the word "normally" and sought its removal. We also promoted amendments to clause 2 that were designed to elaborate the clause by including aspects of the Sewel convention that were not referred to by Lord Sewel in the debate in 1998. Those form the content of "Devolution Guidance Note 10".

We also considered clause 10, and the provisions regarding super-majority. As we move towards the report stage, we will be seeking an amendment to the matters that will be included in the super-majority provisions by having the term of the Parliament included in that.

On clause 31, which concerns the Crown Estate, we considered that Lord Smith's report, which said that the Crown Estate should be devolved to the Scottish Parliament, was not being enacted in the way in which he and the political interlocutors had in mind. I think that that was because there was some sort of idea that the Parliament has some kind of Executive powers. Although that is not the case, the provisions about the Treasury having discretion with regard to the making of a scheme struck us as not being fully in tune with Lord Smith's report, so we will seek to make that mandatory, following agreement with the Scottish Government.

The Convener: That probably gives us enough of the flavour of your approach.

Michael Clancy: Lastly, we said something about the provisions on fixed-odd betting terminals.

The Convener: Stuart McMillan will want to ask about that later, if we have the time.

You are telling us that some areas of the bill need to be improved to match up to Smith—I think that that is a summation of what you have said.

Michael Clancy: That is our view. Some of the areas are quite technical. Other people will have other views that are more in tune with their political persuasions, but—as you know—I am not a politician.

The Convener: Indeed. Would somebody else like to respond?

Professor Neil Walker (University of Edinburgh): I would like to go back to the original question, which was about our overall impression of the Scotland Bill and its implementation of Smith.

There are two problems. First, there is a sense in which Smith was always damned if it did and damned if it did not. If you reform the constitution through the *Daily Record*, you are always going to be in trouble. There is a sense in which Smith, like the vow, was always stuck with the dilemma of quick responsiveness versus serious consideration of the issues, which is an impossible balance to strike—although I am not saying that there are not areas that can be improved. The problem is exacerbated by the fact that we are on moving terrain. Since Smith, we have had an election, a new mandate and calls for new powers, and it is difficult to keep that new mandate and new agenda separate from the initial Smith agenda. Smith is operating in difficult territory.

Having said that, I agree that there are areas of Smith—particularly on constitutional questions, which I am happy to refer to in more detail—where improvements could have been made and of which it seems there has not been full implementation, through the Scotland Bill, of the spirit and the letter of Smith.

The Convener: We will come on to permanency and the legislative consent memorandum convention in questioning.

Emma Ritch (Engender): I echo the concerns that colleagues have raised about the rushed process of the Smith commission itself and the rushed legislative process, which has not involved civil society to the extent that the conversation that took place before the Smith commission process did.

Our specific concerns are about social security and equalities, which Talat Yaqoob and I are uniquely positioned to talk about in your two evidence sessions today. In Engender's submission to the Smith commission and in our evidence to the commission we made the point—which was echoed by many equalities organisations—that there is a case for devolving equalities wholesale to Scotland. Equalities interrelate with many issues that are within the Scottish Parliament's competence, and there is a degree of awkwardness in the separation of concerns and the reservation to Westminster. Smith did not get to the devolution of equalities wholesale, although we continue to call for that as the most sensible solution to the problems regarding equalities.

It is alleged that clause 32 of the bill will devolve to the Scottish Parliament the power to create gender quotas on public sector boards. The Smith commission said that the power would be transferred but that it would not be limited to that specific power, and we took that to mean that there would be provision for allowing the Scottish Parliament to create temporary special measures—time-limited, almost positive-discrimination measures—that would enable the Scottish Parliament to act in a number of domains. For instance, that might include a time-limited quota for modern apprenticeships in order to enable women, disabled people and black and

minority ethnic people to be specially appointed to those apprenticeships. We thought that a provision would be created to enable the Scottish Parliament to decide when it would be useful, in the specifically Scottish context, to do that.

09:15

Having consulted the Equality and Human Rights Commission, which has given evidence to the committee, having spoken with lawyers specialising in equalities and with people in the UK Government Equalities Office, and having attended discussions with the Scotland Office, it is our understanding that clause 32 does not contain the minimum requirement that would enable the Scottish Parliament to introduce gender quotas, so we are calling for that clause to be completely redrafted to enable that to happen. We should also go beyond gender quotas and deal with things that are not limited to some subclause of the Smith commission agreement, by enabling the Scottish Parliament to have additional powers to decide when, in its opinion, temporary special measures should be introduced.

Talat Yaqoob (Women 50:50): I echo what Emma Ritch has said. Women 50:50 is a single-issue campaign, so we are here specifically to discuss gender quotas. We, too, got legal advice, and we worked with Engender. Contradictory advice was given to us as to what exactly clause 32 means and on whether we could implement quotas. That is problematic. The provisions need to be clear and distinct on what Scotland can and cannot do.

We are calling for clause 32 to be rewritten, and for it to include what was originally in the Smith commission report about gender quotas on public boards, but not limited to some only. We believe that Scotland should have the ability to legislate for quotas, including those for 50 per cent of women in elections to the Scottish Parliament, public boards and local authorities.

The main thing that we are calling for is clarity, and for the provisions to echo what the Smith agreement originally said. They should allow Scotland to go further. We are not talking about a requirement for Scotland, but about devolving the ability even to have this debate in Scotland and to implement the measures if the Scottish Parliament votes to do so. I repeat that the most significant thing for us is to have clarity on the issue.

The Convener: That was very helpful. Thank you, folks. We will start off by discussing permanency—Stewart Maxwell will begin on that.

Stewart Maxwell (West Scotland) (SNP): I begin by quoting from the evidence from the Law Society of Scotland and from Professor Walker. The Law Society's evidence states:

"The use of the phrase 'recognised as permanent' has a different nuance from a statement that 'the Scottish Parliament and Scottish Government are permanent institutions'. The difference in wording between the Smith Report and the clause is significant."

Professor Walker has written in a similar vein and goes on to say that a

"durable character ... if not ... permanence, could be achieved by the requirement for its abolition of a super-majority at Westminster, or of the consent of both ... Parliaments, or, as the present Committee itself suggested, of a majority of the Scottish electorate voting in a referendum".

I will start with Michael Clancy. Could you expand on comments in your written evidence, in particular on the point that

"The difference in wording between the Smith Report and the clause is significant"?

The Convener: Keep your answers as short as you can, guys. Having read the papers, I realise that there is a lot of background and case history that could come out in this discussion, but it would be very helpful if we could just cut straight to the chase.

Michael Clancy: It is different because it is different. It is different because if we say that something "is a permanent institution", that is different from its being

"recognised as a permanent institution".

I would ask, "Recognised by whom?" What is that distance, to which Professor Walker refers in his paper, meant to represent? It seems to put the matter at arm's length, whereas a statement that something is permanent has a different ring about it.

We can talk shortly about what it means to be permanent within the context of the current constitutional understanding of what the United Kingdom Parliament can and cannot do, and that is fair enough, but if there is meant to be a symbolic statement in the form of a legislative phrase, let us think about symbolism.

"'There shall be a Scotland Parliament.' I like that."

We frequently hear that quote from Donald Dewar, from the days when he was debating the previous Scotland Bill in 1998. "A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements. I like that" does not have the same symbolic ring to it. Perhaps "A Scottish Parliament is a permanent part of the United Kingdom's constitutional arrangements" would have more of a symbolic ring to it. I think this is the question: why did Smith agree to propose that? If the answer is that it is a symbolic statement that is meant to signal a political frame of mind, we should be as direct and to the point about it as we possibly can.

Stewart Maxwell: Professor Walker has given possible examples of how to beef up the way of describing this—I am trying to avoid the word "permanence", in a sense—that would strengthen the symbolism of the statement that the Scottish Parliament and the Scottish Government are permanent in the UK constitution. Can you expand on those examples and on your view of the various options?

Professor Walker: I will start by differing slightly from what Michael Clancy said. The problem is, if we go back to what Donald Dewar said and what the Scotland Act 1998 said, there is nothing in saying

"There shall be a Scottish Parliament"

that in any way contradicts our ideas of parliamentary sovereignty. It is a performative statement: the phrase

"There shall be a Scottish Parliament"

does not talk about permanence. It has a ring to it; everyone understands what that ring is. It is very important.

To talk about permanence is different because then you are going full-scale against our understanding of the constitutional theory. I assume that that is why the word "recognition" has been introduced, in acknowledgement of the fact that it does not matter how ringing the declaration is if what you are saying is contradictory to the deepest premises of the constitution. It still will not work. If you use the term "recognition", you are showing that you cannot do the impossible.

That brings me on to the second part of the question. If you cannot do the impossible, what is possible? What can you do? Clearly a range of things can be done. We can extend our super-majority provisions, which we find elsewhere in the bill, especially vis-à-vis questions of devolution of the authority to run the Scottish political system—the electoral system and so on. We can imagine the super-majority provision, perhaps independently of or in some way linked to, a provision about another referendum. That is another possibility. We can certainly imagine a requirement that you would have to have the consent of both the UK Parliament and the Scottish Parliament. All those things could be effective.

Even though we have a tradition of parliamentary sovereignty that says that we cannot entirely bind any future Parliament to the provisions of an earlier Parliament, we have another constitutional rule that says that we can amend and adapt the manner and form in which a later Parliament can change the law. If you want to introduce provision on a referendum or a super-majority, there is at least some indication in our constitutional theory that that would be taken seriously.

Stewart Maxwell: I want to follow up on that a little bit. I accept absolutely that we cannot bind future Parliaments; there is no argument about that. However, it seems to me that changes to the bill such as using the phrase that was suggested in the Law Society submission, that

"the Scottish Parliament and Scottish Government are permanent institutions"

or using a similar phrase, removing the word "recognised", introducing a super-majority and so on—while it is still symbolic, in some senses—would, in effect, make it exceptionally difficult for any future UK Parliament to go against those aspects of the bill if it was enacted. Do you agree?

Professor Walker: If the procedural rules that I mentioned were to be introduced, that would make it more difficult. I am not sure that the removal of the words "is recognised by" would make a great deal of difference. In both cases, it is a fairly ringing declaration and in both cases, it is purely symbolic and expressive. I do not think that that is the key point; the key point is the type of procedural—

Stewart Maxwell: —the kind of hurdles that we would have to cross.

Professor Walker: Yes.

The Convener: I think that Duncan McNeil has a question.

Duncan McNeil: Michael Clancy wants to respond.

Michael Clancy: Mr Maxwell used the phrase "exceptionally difficult". I do not think that anything can be made exceptionally difficult when dealing with the principle or theory of parliamentary sovereignty in that sense, because a Government with a majority in the United Kingdom Parliament can always change the law.

I understand what Professor Walker said about the procedural rules. As I showed in my submission, the Northern Ireland Act 1998 has provisions about a poll for the purposes of changing Northern Ireland's status. Later editions of Dicey's "Introduction to the Study of the Law of the Constitution" show that his thinking about permanency changed subtly between 1885 and 1914—I am indebted to Professor David Edward for this—because of the way in which Parliament was changed by virtue of the Parliament Act 1911 and the Government of Ireland Act 1914.

In his introduction to a later edition, Dicey thought that the brake on parliamentary tyranny would be a referendum. That fits with the procedural arrangements under which people would seek to ensure that the United Kingdom

Parliament could not change the law without having to climb over some kind of hurdle.

The Convener: I call Duncan McNeil.

Professor Walker: Can I come in?

The Convener: Let Duncan ask his question first.

Duncan McNeil: I do not know whether context is important here; the whole point is that we want to bring about a durable constitutional settlement. Where there is a will, there is a way, but I do not know whether this is the way.

We read in the submissions that no Parliament can bind another Parliament. There is a question of durability or whether the settlement would need to be revisited regularly. In that context, would it be a better way forward to use all the other mechanisms that we can use so that there is a clear declaration, which might be symbolic but might mean that there is recognition from both Governments of the new settlement's durability and that there is trust?

I know that that is difficult when the Governments do not share the same views on devolution. I do not know whether we are dealing with a legal point, but the context is that we need to build in an element of agreement about a constitutional settlement for the short, medium or longer term. We could proceed on the proposed basis. We do not need to solve the legal conundrum of permanency. Is that what Professor Walker is saying?

Professor Walker: I agree. Any legislation has an audience. One audience is the judges, so how would they interpret it? Another audience is made up of politicians and the public. People talk about our constitution being a political constitution; all that that means is that the constitution gets its resonance from its being a fundamentally political statement to a political audience. In that respect, the expressive aspect is important.

I have one very obvious point to make about permanence that has not really come up. Permanence is a double-edged sword. If I were a nationalist, I would be somewhat concerned about the concept of permanence, because it means more than that there can be no drawing back. It might also imply that that is the end of the constitutional story or journey.

People in this room have very different conceptions of permanence. Some might want to go back, some might want to stand still and some might want to go forward. Permanence has different meanings to different audiences.

09:30

The Convener: I have a final comment on the subject. At the end of the day, politicians at Holyrood and Westminster can decide how they frame the final legislation, and I hope that we can finally pass a legislative consent motion. However, those who really matter are the people of Scotland, and the widely held view in Scotland is that it is the people's view that is sovereign, not the Parliament's. It would be extraordinary if we had a bill enacted that did not give the people the choice about whether our Parliament exists. Regardless of all the other issues, that is the kernel.

Professor Walker: I think that that is generally accepted.

The Convener: Does Michael Clancy agree?

Michael Clancy: I think so. Another thing about audiences is that, if the audience is the judiciary and we get to the point of litigation on the constitutional question, it will be dissipated in the general morass of a constitutional crisis.

The Convener: I was going to go on to the Sewel and LCM process next, but instead I will go on to equalities, because we have done a fair bit on the constitution, we have written evidence on it and I am conscious of the time. I ask Alison Johnstone to kick off on the equalities issues.

Alison Johnstone (Lothian) (Green): I will address my questions to Emma Ritch and Talat Yaqoob. I thank you both for being here, and I put it on the record that I am a member of the Women 50:50 group. You both call for the redrafting of clause 32 of the Scotland Bill. Emma Ritch noted in her submission that Engender has had discussions with experts on equalities law but that they have not produced a clear answer. Clarity on the issue is required—Talat Yaqoob made that point clearly in her introduction.

Although I have seen it time and again, I am still astonished by the figure in Engender's evidence that 85 per cent of the £26 billion of cuts have impacted on women. In that context, it is terribly important that we see better gender representation. Will you expand on your concerns about the impact of not getting clause 32 right?

Talat Yaqoob: To speak specifically about women's representation, if we were not to get clause 32 right, it would become a political debate that would have to happen again and again. We need the ability to implement quotas to be devolved to Scotland so that we can get political representation right and decision making for women right as well.

On page 6 of his letter, David Mundell said:

"The clause provides a framework within which the Scottish Parliament can introduce additional equal opportunities measures, including gender quotas."

That goes beyond the Smith agreement to say that this is not just about public boards. On my first reading of that sentence, I read it as saying that the matter will be fully devolved and that we will be able to legislate for quotas in the Scottish Parliament, in local councils and on public boards. That is fantastic, as far as our campaign is concerned.

However, the problem is whether the issue will become political if clause 32 remains unclear by the time we get to the voting on the Scotland Bill. The clause needs to be specific and to include what is devolved so that we can get political representation right for women.

From where I sit, the Smith commission, the recent letter from the Secretary of State for Scotland and the Scotland Bill are giving us three different levels of devolution on gender quotas. That is unhelpful for women's political representation in Scotland.

Alison Johnstone: But the secretary of state's suggestion seems positive.

Talat Yaqoob: Absolutely. We have welcomed it, but it is important that it translates into what appears in the Scotland Bill, because all that we currently have is a welcome statement in a letter. We also welcomed the Smith commission's view on gender quotas for public boards, but that was not translated into the Scotland Bill. We therefore cannot afford for clause 32 to be unclear.

What I read in the secretary of state's letter is that there will be absolute devolution of gender quotas. How and where that is implemented is for the Scottish Parliament to define, and that is what we are calling for. The issue is the translation of what is in David Mundell's letter into the Scotland Bill, which needs to be as clear as day, as far as the campaign is concerned.

Emma Ritch: I agree. Because of how equality law works, the framing of clause 32 does not seem to us, to the experts we have consulted or to the Equality and Human Rights Commission to provide for what Mr Mundell's letter and the language of the Smith commission agreement contain.

It is entirely right to link women's representation to the economic situation in which women find themselves as a result of decision making that does not take a gendered approach. Moreover, as a member of the Women 50:50 group, we echo the group's concerns. Women's representation has never been about jobs for the girls; it is about different decision making that includes an understanding of women's particular life experiences.

We are concerned that our equality provisions more broadly depend entirely on Westminster. Scotland has a public sector equality duty that requires Scottish public bodies to take an equalities approach in developing policy and considering the large issues of the day, but that provision is much weaker at Westminster Government level and was weakened further after the Fawcett Society sought a judicial review of the 2010 emergency budget. Basically, the UK Government decided to stop carrying out equality impact assessments to ensure that it could not be challenged. We are concerned that, without clear and substantive devolution of equalities, whether we are talking about temporary special measures or the narrower issue of quotas, we will be dependent on a law that seems to be unclear and whose effect is, as it were, increasingly being reduced.

Alison Johnstone: The Engender submission highlights the fact that 60 per cent of carers are women and that the withdrawal of discretionary housing payments is having a massive impact. You obviously feel quite strongly that, if we do not address the gender quota issue, it will take even longer to change the situation and get things right.

Emma Ritch: Absolutely. In our briefings, we make a number of specific recommendations on the social security measures. We are concerned about what seems to be the Scotland Bill's general approach of constraining as much as possible the Scottish Parliament's decision-making powers. For example, its definition of disability is different from that in the Equality Act 2010, and it defines a carer in a narrow way that depends on a specific kind of benefit that Westminster determines. It also prevents the Scottish Parliament from awarding benefits to those who have been sanctioned. Recent press coverage of the quality of decision making on sanctions by jobcentres increasingly makes that a concern. We have therefore called for a number of specific amendments to the clauses that cover social security and are also concerned broadly about the clarity of the equalities clause.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): I will ask about the point that has been made on part 1 of the Equality Act 2010, which relates to socioeconomic inequalities. Do you have a route map that goes from the means of avoiding socioeconomic disadvantage to ensuring that clause 32 is much better when the bill is finally approved? Does that concept provide the best way of dealing with what you called the awkwardness of the phrase "not ... limited to" in the Smith commission report?

Emma Ritch: In our view, the socioeconomic duty is separate from everything else. We are not concerned about that element, which simply

activates a clause in the Equality Act 2010 that had previously lain dormant and which anti-poverty campaigners in Scotland were quite keen to see form part of the bill.

Rob Gibson: If that is the case, how do we deal with the fact that the Scottish Parliament will remain disabled from enacting any legislation that contains provisions that impose a requirement that is prohibited by the Equality Act 2006 or the Equality Act 2010?

Emma Ritch: That is the nub of the question. The way in which equality law works is that you have to have not only the power to do the positive thing that you want to do but, if there is a measure of discrimination that is proscribed by the equality acts—by their nature, that applies to temporary special measures such as gender quotas—you also have to have the power not to be bound by the acts. That is the crux of the issue, which is not adequately dealt with in clause 32. I am not sure that I am exactly qualified to give you the road map that you asked for, but tearing this up and starting again seems to us to be the most sensible way forward.

Rob Gibson: That sounds pretty good to me. I do not know whether Talat Yaqoob wishes to comment.

Talat Yaqoob: We have had this discussion, as Emma Ritch said—she is on our steering group as well. Currently, political parties have the ability to put in voluntary, temporary special measures until 2030. That exception came from the Equality Act 2010 from Westminster. However, we can take a step forward only if there is a specific special measure and, as Emma Ritch said, only if another special measure is taken at Westminster. We could be at a point where the Scotland Bill does not include a provision and we have to request a special measure again in a year's time. It needs to be clear that, if Scotland wants to go to the level of special measures or quotas—as it should do to fairly represent women—it should have the ability to do so, and that decision should be made in the Scottish Parliament.

The Convener: For the record, is it your advice to us that the Equality Act 2010 prohibits quotas?

Emma Ritch: Yes—it does.

The Convener: In effect, we are being given a power that we cannot use.

Emma Ritch: I do not think that we are even being given a power—that is my understanding.

The Convener: I asked about that just so that we have clarity.

Malcolm Chisholm: I was encouraged by the letter from David Mundell that Talat Yaqoob mentioned. In fact, I was happy to retweet her tweet this morning that drew attention to it. I wonder whether he just does not understand the wording of his own bill. We go back to the question why the phrase

"except to the extent that provision is made by the Equality Act 2006 or the Equality Act 2010"

was proposed in the first place. I suppose that the other issue is whether omitting those words would deal with part of the problem but not give all that is required. Is that the view of both of you?

Talat Yaqoob: We were pleased about the letter, but you are quite right. It is perhaps not just David Mundell who does not understand the wording, but legal experts. That brings us back to the fact that the bill needs to be explicit and clear.

The letter says that there are measures that would allow us to introduce gender quotas while the Equality Act 2010 remains reserved. That can happen and it is what happens currently with temporary special measures to allow political parties to implement voluntary quotas. However, that is a specific special measure. What needs to be added is a specific statement that Scotland can implement the measure and that it does not contravene the Equality Act 2006 or the Equality Act 2010.

Duncan McNeil: I seek a bit of clarity and the Law Society's view on this, because I think that the paper mentions a debate rather than—

The Convener: That is where I was going.

Malcolm Chisholm: I wanted to hear Emma Ritch's view as well.

Emma Ritch: I entirely agree with Talat Yaqoob.

Malcolm Chisholm: Okay.

The Convener: It is good to have people with legal expertise here. Does Neil Walker want to come in?

Professor Walker: I will make a general comment to link this discussion with part of our earlier discussion. The detail of what we are talking about is massively important, and it is also important that it is linked into a broader philosophy of what we mean by self-government under the new Scotland Bill. For example, the provisions on the devolution of powers to specify the terms of Parliament and the age of electors et cetera are all part of what I see as an agenda of political self-government. They say that part of our constitutional autonomy now is that we decide on our own system of government. It is arguable that that includes a lot of the stuff on gender. If we decide on our own system of government, it is important that we decide on questions such as gender quotas in public bodies and political

parties. That fits neatly and well within an agenda of political self-government.

We then move to an agenda of economic self-government, which is a different and much more contentious agenda that goes beyond the Smith provisions. Included in that is a much broader menu of issues about equality, which includes some of the questions that have been raised this morning.

I am making the point that there is a minimal interpretation of what is meant, which fits easily within an idea of political self-government, and a broader interpretation—which I agree with, by the way—that is part of a much broader agenda of what we might mean. I am not sure what David Mundell meant by his letter and I suspect that he does not know either, but it is somewhere between those two possibilities.

09:45

Michael Clancy: I do not have a particular view on the correspondence on the bill between Mr Mundell and the convener, but I will take the matter back to our equalities law committee so that it can add its view to the opinions that have been expressed this morning.

The Convener: That would be helpful.

As they are in the same area, we will move on to issues that are to do with disabilities, which have begun to emerge in the answers.

Mark McDonald (Aberdeen Donside) (SNP): I note from Engender's submission that there is concern about clause 19 and the narrow definitions of "disability" and "carer". My question is specifically for Emma Ritch, but other witnesses might want to comment, too. You are particularly concerned about the impact on women, because they provide care for loved ones to a disproportionate extent. Could you put your concerns on the record? What alternative approach could be adopted that would give you some comfort?

Emma Ritch: I will summarise what we are asking for. We want the Scottish Parliament to be able to determine its own definitions of "disability" and "carer" and we do not want them to be restricted in the way that the definitions in the bill are. We are particularly concerned about the definition of "carer", whereby carers who are in work in the formal labour market would be denied carer's benefit. The experience of many women who care, and of some men who care, is that they have to juggle paid work and care. Therefore, given the consequences for them—they might suffer ill health or poverty and their ability to participate in civil society and to progress in their chosen profession or employment might be affected—it is completely nonsensical to deny them support that the Scottish Parliament might determine to be appropriate.

Mark McDonald: I do not know whether anyone else has a view on clause 19.

On the carer's benefit, clause 19 says:

"'disabled person' means a person to whom a disability benefit is normally payable."

A decision might be taken at Westminster to end the provision of a particular disability benefit. Would that have the knock-on effect that those who had previously received the carer's benefit might lose that benefit as a result of a decision that was not taken by the Scottish Parliament, which, to all intents and purposes, is supposed to have power over the carer's benefit?

Emma Ritch: Exactly.

Mark McDonald: So you want that provision to be removed or a provision to be inserted that explicitly gives the Scottish Parliament the flexibility to determine how it defines "carer" and "disability" in relation to the provision of benefits.

Emma Ritch: Exactly.

The Convener: Does anyone have a different view? I see that all the witnesses are of the same view.

I want to move on to other areas of welfare, particularly top-ups, which Stewart Maxwell wants to ask about, but there are two areas that we need to cover first, one of which is the constitutional position surrounding LCMs.

Linda Fabiani (East Kilbride) (SNP): I hope to be quick. Excuse me for having left the room, but I could not see you before. I can now, and you all look lovely.

I want to ask about legislative consent motions. I know that there is a lot of legal discussion about the insertion in the bill of the word "normally", but there is another issue that I picked up from Michael Clancy's submission—I had not come across it before. I would like you to expand on your use of the word "significant" in relation to "Devolution Guidance Note 10". The bill says that the Westminster Parliament will not normally legislate without the consent of the Scottish Parliament. You say:

"It is significant that DGN10 also requires the consent of the Scottish Parliament in respect of provisions of a Bill ... which would alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers".

You observe that

"Clause 2 would not apply to this latter category of provision."

Is that omission concerning? What effect could that have? Why do you consider it to be significant?

Michael Clancy: It is concerning. Our constitutional law committee looked at the issue. It thought that that was an omission from the bill. As I say in our submission, "Devolution Guidance Note 10" requires

"the consent of the Scottish Parliament in respect of provisions of a Bill"

that affects either

"the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers".

That applies to this bill, and it applied to the Scotland Bill that was considered in 2011, to which, you will remember, the Scottish Parliament was required to give its consent. That process is part of the process that is set out in "Devolution Guidance Note 2".

If we do not have a provision that extends clause 2 to require the Parliament's consent for those purposes, it would be theoretically possible for the United Kingdom Parliament to enact legislation for Scotland without the Scottish Parliament's consent. It can do that anyway under section 28 of the Scotland Act 1998; indeed, the UK Parliament can always legislate for Scotland.

The Sewel convention was brought into the bill in order to deal with parliamentary sovereignty—the primacy of the UK Parliament. We need to have in the bill the second leg of Sewel, which has developed subsequent to the Scotland Act 1998 and the debates in Parliament that brought in Lord Sewel's comment, to ensure that the fullness of respect between the UK and Scottish Parliaments is made clear.

When we talk about "normally" here, it is important to note that the wording in clause 2 is exactly what Lord Sewel said in the debate in July 1998—I was there when he said it. We have proposed an amendment, which I hope will be tabled and debated, to remove the word "normally" from the clause. The principal aim of that is to probe what "normally" is supposed to mean. Perhaps when debating the matter the minister will be able to elaborate on what an abnormal situation would be. When would a matter be so abnormal that the United Kingdom Parliament would legislate without the Scottish Parliament's consent? That is where we sit on the matter.

Linda Fabiani: Does that tie in directly with what is in "Devolution Guidance Note 10" but has been left out of the clause?

Michael Clancy: One would expect that "Devolution Guidance Note 10" would continue to apply. That would be the normal understanding. However, in a sense, if one part of the Sewel convention is included but another part is not, that would be an example of the canon of interpretation that says "inclusio unius exclusio alterius"—if one thing is included, another is excluded. We must make it clear: either "Devolution Guidance Note 10" will continue to apply or the matter will be put in the bill.

Professor Walker: I think that "Devolution Guidance Note 10" has to continue to apply, because it specifies a convention that applies regardless of what the law says. If we are to reduce conventions to law, it would certainly help if we did so fully and not just partly.

The problem here is that, if anything, the second limb of Sewel—the one about Westminster unilaterally varying powers, which is not mentioned—is even more significant than the first limb. It says that the UK Parliament is still in charge of the terms of the Scotland Act 1998.

I suspect that the reason why the second limb was not initially included is that, if there was qualification with the word "normally", that would be political dynamite. It would mean that, in some circumstances, the UK Parliament and the UK Government retain the right unilaterally to vary the terms of the Scotland Act 1998. That is a very profound political statement to make. The concern is that that is not included because, if it were included, it would have to be included within the terms of the "normally" qualification.

Linda Fabiani: Right. So you do not think that it is just an inadvertent slip.

Professor Walker: I do not think that it is an inadvertent slip. I think that it was done precisely because including it would make it transparent that that aspect of the convention was subject to the "normally" qualification. I do not think that it is inadvertent.

The Convener: Stuart McMillan will pick up on a final issue to do with fixed-odds betting terminals, on which the Law Society of Scotland has given some evidence.

Stuart McMillan (West Scotland) (SNP): The Law Society of Scotland's submission is quite clear about the situation regarding clause 45 and fixed-odds betting terminals. It indicates that, if the clause were agreed to, in Scotland there could be two different sets of legislation in place for betting shops and fixed-odds betting terminals. A question came to me about that. If that were to happen and further down the line a UK Government decided to change the law to reduce the stake from £100 to less than £10, how would that affect the provision as it is drafted? How would that affect any potential opportunity for a Government here to deal with the situation?

Michael Clancy: Thank you very much for a very interesting question.

Clause 45(6) says:

"The amendments made by this section do not apply in relation to a betting premises licence issued before this section comes into force."

Therefore, the devolution of the power to the Scottish Parliament does not apply to the previous arrangements. That is the situation that you have sketched out. We would have two sets of law coming from two legislatures applying to the same kind of machine in a betting shop or other premises. The scenario that you have painted of a change in the law at the UK level would mean that some machines would have a different level of stake from others. A change of law at the Scottish level would mean exactly the same thing.

We said in a paper that we gave to the Local Government and Regeneration Committee in response to its call for evidence on those machines—that paper went in after I submitted my paper to this committee—that there should be a closer relationship between the clause and the existing regulations for the licensing of those machines: the Categories of Gaming Machine Regulations 2007 and the Gaming Machine (Circumstances of Use) (Amendment) Regulations 2015. The bill should clearly state the relationship between the content of those regulations and the bill's provisions, and clause 45(6) should be deleted because it is appropriate for the Scottish Parliament to have the power to regulate all the machines in such premises rather than there being potential confusion about which law applies to which set of machines.

The Convener: Okay. That is quite clear.

I am sorry, folks, but because of the time we will have to move on. I have some evidence on FOBTs on the record now, which is helpful.

I thank our witnesses for coming along and giving us some very useful evidence. I suspend the meeting to allow a changeover of witnesses.

09:59

Meeting suspended.

10:03

On resuming—

Scotland Bill (Welfare Provisions)

The Convener: We resume with agenda item 3 on the Scotland Bill welfare provisions. I welcome the witnesses who are here to give evidence: John Dickie is director of the Child Poverty Action Group in Scotland; Nile Istephan is vice-chair of the Scottish Federation of Housing Associations; Bill Scott is director of policy at Inclusion Scotland; and Rachel Stewart is public affairs officer from the Scottish Association for Mental Health. Thank you very much for coming along and being prepared to give us evidence.

We will move straight to questions.

Stewart Maxwell: I will try to be as quick as possible. I want to cover two issues. One is the issue of whether we have the power to create new benefits and the other is on universal credit.

In its submission, the Child Poverty Action Group talked about the fact that the Smith commission's report says:

"The Scottish Parliament will have new powers to create new benefits in areas of devolved responsibility."

However, the submission goes on to say:

"The UK Minster for Employment noted during the Bill's Committee Stage that the UK Government had never interpreted para 54 of the Smith Commission Report as intending to extend the range of areas in which the Scottish Parliament can create new benefits."

Could you expand on your concerns in this area and talk about what has been published so far and what it means for the devolution or otherwise of the power to create new benefits?

John Dickie (Child Poverty Action Group in Scotland): Clearly, there is nothing in the bill that explicitly states that there will be new powers to create new benefits in all areas of devolved responsibility. My understanding is that that statement in the Smith commission's report was interpreted in the draft clauses as simply focusing on the power to create new benefits in the area of welfare.

I think that further clarity is needed. We are not constitutional lawyers. The feedback that we are getting now, as the Secretary of State for Scotland's letter made clear, is that the UK Government thinks that the Scottish Parliament already has the power to create new benefits in areas of devolved responsibility. That is not something that we were particularly aware of before and it raises issues of interpretation around how that works.

Clearly, what is behind all this is that social security generally is still to be reserved. In that case, when does a benefit in a devolved area of responsibility become a social security benefit and, therefore, something that would not be capable of being legislated on under the current terms of the Scotland Bill? That is perhaps an issue that is more for constitutional lawyers.

We feel that there needs to be much more clarity on the question of whether the Scottish Parliament has the power to create new financial benefits across areas of devolved responsibility. To us, that is not clear yet.

Stewart Maxwell: Do other members of the panel have clarity on this issue?

Bill Scott (Inclusion Scotland): No—and I do not think that the UK Government has clarity on the issue, either. As you mentioned, it said at Westminster that it had no intention of devolving that power and then the letter from the secretary of state said that the Scottish Parliament already has those powers. Those things do not seem to fit together. If the latter position is correct, that could have been made clear in the Westminster debate. That would have been the time to state that the Scottish Parliament already has those powers and that there is no need to legislate. Instead of that, amendments that tried to clarify the position were knocked back.

Stewart Maxwell: It certainly came as a surprise to me that we have always had those powers, and I am sure that it came as a surprise to Government ministers too.

My question about universal credit is to do with an issue that was raised in Engender's evidence but which I did not get a chance to ask it about. Engender is concerned about clause 25 on universal credit and the persons to whom and the time when universal credit could be paid. In particular, it is concerned about the requirement for the UK secretary of state to approve any changes to that payment schedule. It points to examples from Wales and Northern Ireland of cases in which delays have been caused. In its view, that creates dangers and risks, particularly for the physical safety of women.

Does anyone have a view on the statements by Engender, which I am sure you have read, about the general area of the devolution of universal credit and the veto, or otherwise, that might be in place?

Nile Istephan (Scottish Federation of Housing Associations): I will have a quick go at that one. I think that clarity on that flexibility is important. If there is a need to secure payments on a more regular basis, that is important from the housing association perspective, because we believe that keeping people on the right side of their rent arrears is always better than trying to remedy the situation should they become heavily indebted.

It does not seem to me to be clear enough at this stage what powers the Scottish Parliament will have in that regard and, more important, what the effect of those powers would be, administratively. I suppose that you could have those powers nominally, but we would need to know what the implications of exercising those powers would be for the information technology systems and so on. If those powers are to be exercised, they must be exercised in a safe way so that people have the comfort of knowing that, when a decision is made, those payments will flow through in the intended way.

The SFHA has looked at devolution of welfare payments in Northern Ireland, and while Northern Ireland might have the nominal ability to do that, in practice there has been lots of tension between the Northern Ireland Assembly and the UK Government over the matter. The dispute has had negative consequences for claimants in Northern Ireland and it is one of the reasons why we have emphasised strong intergovernmental co-operation as an important feature in exercising those duties.

There are administrative issues to do with how that power would be followed through and whether the computer systems would allow payments to be made easily and more frequently, and then there is the issue of intergovernmental co-operation between Holyrood and Westminster to make that happen.

Stewart Maxwell: Rachel Stewart, what is your point of view?

Rachel Stewart (Scottish Association for Mental Health): Universal credit will not be applied to many of the people we support until quite far down the line, because disability is so far away from the delivery of universal credit. We are hoping that, by the time our service users are receiving universal credit, all the kinks in the system will have been ironed out and the transition can happen smoothly.

Bill Scott: We are very concerned, because disabled women are more likely to suffer from domestic violence and sexual abuse. It is therefore absolutely essential to keep payments in place for people who are fleeing that type of treatment.

I understand the point about a veto for all time, but an effective veto for somebody in that situation is a period lasting weeks, not six months or a year.

Stewart Maxwell: That is my concern and I think that you are expressing the same point of view. Can I just be absolutely clear that it is the possibility of delay in the practical implementation

of changes that the Scottish Government or the Scottish Parliament might wish to make that is the crux of the issue?

Bill Scott: Yes.

John Dickie: The administrative powers offer real opportunities to do things differently, but expectations that this will become a shared area of social security delivery need to be managed. There will have to be agreement between the two Governments, and it is important that that is done in an efficient and timely way.

There are also issues around what is administratively possible in ensuring that payments reach the main carer in situations in which there are power imbalances or domestic violence within a household. A universal credit claimant gives bank account details and the money goes into that bank account, so there is only so much that the system can do to ensure that the money reaches the right person in the household. I sound a note of caution about that. There will be opportunities to do more to ensure that universal credit money is paid at a frequency that makes it easier for people to budget, and that it is paid to the person in the household who is most likely to use it to support and provide for their children. It is not a catch-all fix.

Stewart Maxwell: I accept that, but I hope that you will accept that the only example that we have at the moment is the Northern Ireland example, and Engender makes it clear that it is concerned about the delays that have been experienced in Northern Ireland as a result of the complex processes and does not want that situation to be replicated here.

John Dickie: Absolutely. The key to all this is genuine commitment from both Governments to make the process as effective and efficient as possible and to respect the policy decisions that are made, wherever the policy responsibilities lie post-devolution.

Duncan McNeil: Is that what you mean when you say in your submission that we need to take care

"to ensure devolution is not a cover for further cuts"?

What do you mean by that?

10:15

John Dickie: The situation is not clear yet—understandably, in some ways. The issue is about devolving responsibilities to the Scottish Parliament and about how benefits will be administered post-devolution under the responsibility of the Parliament here in Scotland. We are keen to flag up at this stage that we think that the benefits should be legislated on and administered at a national level, with policy responsibility remaining at a national level. There should not be further devolution to local authorities, as has happened in England with social funds, for example, where cuts have been made to the value of social security support.

There is a need to ensure that, as powers are devolved in important areas of social security such as sources of income and financial support for individuals and families, there are clear national systems in place to provide accountability and minimum standards, with systems of review and appeal in place so that people can challenge decisions. We think that that is best done at national level. We will be lobbying for the Scottish Parliament to protect, if not enhance, the value of those areas of social security that have been devolved.

Mark McDonald: I wonder whether that segues into the points that I was going to raise.

The Convener: It does, but it also relates to discretionary housing payments. I call Stuart McMillan first, but I will come back to you, Mark.

Stuart McMillan: The Inclusion Scotland submission highlights the fact that

"80% of the Scottish Households affected by the Under Occupation Penalty contain a disabled person",

and you highlight the challenges around the clause concerned. Can you provide any further information on that, please?

Bill Scott: Information on?

Stuart McMillan: Regarding that 80 per cent and any further challenges that clause 22 would mean for families and households.

Bill Scott: It is about eligibility for discretionary housing payments. At the moment, the bedroom tax can leave people with no housing benefit. Clause 22 says that a discretionary housing payment cannot be paid to somebody who is not in receipt of housing benefit. A large proportion of people who are currently in receipt of DHPs are disabled people and their families, so if that restriction remains in place, it is likely to have a disproportionate impact on disabled people and their families.

There are also restrictions on housing benefit because of the benefit cap. As we know, the cap is being lowered, which will begin to affect more families. Although disabled people and their benefits are exempt from the benefit cap, there can be an effect on their families. If a disabled person is being cared for, premiums might go into income support, housing benefit and so on, so they could get caught by the benefit cap, lose housing benefit and be refused a discretionary housing payment.

We are concerned about the restriction on the ability of the Scottish Parliament and local authorities to make discretionary housing payments when they view people as being in extreme need and want to keep them in the houses where they currently live. For a disabled person and their family, that might be a physically accessible house, where they can get about. Instead, the discretionary housing payment might be refused, and the person could lose their tenancy and suddenly be put into an inaccessible house. The person's care needs and what the local authority has to supply daily might rise astronomically, because they might no longer be able to bathe or go to the toilet themselves in the house where they end up.

Stuart McMillan: The Child Poverty Action Group's submission discusses discretionary payments in relation to clauses 23 and 22. With regard to clause 23, your submission says:

"Failure to refer to this group in the Scotland Bill 2015, and put beyond doubt the protection of families under exceptional pressure as a priority group in their own right, could put the health and wellbeing of some of Scotland's most vulnerable families at serious risk."

Can you provide us with some more information on that?

John Dickie: Yes. There is an opportunity here to fix something that, as far as we can understand it, was an oversight in the original section 30 order giving the Scottish Parliament the competence to set up the interim Scottish welfare fund and then to pass the Welfare Funds (Scotland) Act 2015 and put the fund on to a legislative footing. The order did not refer to families under exceptional pressure as a distinct priority group in their own right for occasional financial and other assistance and support.

In practice, the Scottish welfare fund has developed in such a way that families under exceptional pressure have been treated as a priority group, but the fact is that they are not. They are not named in the devolved legislation, because the Scottish Government does not believe that the Parliament has the competence to ensure that families under exceptional pressure are a priority group in their own right. At the moment, the people in those families also have to be qualifying individuals—in other words, they have to be at risk of homelessness, leaving or going back into institutional care or otherwise living an unsettled way of life. That is an additional hurdle or criterion that those families did not have to face with the UK social fund in relation to community care grants, and as far as we understand it, it was not the intention behind the interim Scottish welfare fund and has certainly not been the practice of the fund itself.

As I have said, there is an opportunity to put that right and ensure that the Scottish Parliament has the competence to ensure that families under exceptional pressure can be a priority group in their own right for support under the Scottish welfare fund. That is the amendment that we are seeking, and it would give the Scottish Government the power to go back and amend the 2015 act to ensure that this group is very clearly an eligible priority group in its own right.

Stuart McMillan: Finally, on the issue of discretionary housing payments and the bedroom tax, which has already been touched on, do you believe that the bill will give Parliament the power to eradicate the bedroom tax once and for all?

John Dickie: Picking up on Bill Scott's point, I do not think that it will be eradicated totally, because of the constraint that a person needs to be in receipt of housing benefit before they can receive a discretionary housing payment. As the bill is framed, discretionary housing payments cannot fully mitigate the impact of the bedroom tax.

Looking into the future and assuming that universal credit is fully rolled out, the powers over the housing element of universal credit will provide a route for abolishing the bedroom tax. However, that is still some way off. As for what will happen immediately once the powers come to Scotland, discretionary housing payments in themselves will not be able to mitigate the bedroom tax fully, because the bedroom tax will reduce some people's housing benefit to zero and they will still be short of what they need to pay their rent.

Rachel Stewart: I should point out that, when it budgets for discretionary housing payments, the Scottish Parliament will also have to consider the Welfare Reform and Work Bill, which is going through Parliament and which will freeze housing benefit for the next four years. After all, if the housing benefit bill does not meet people's needs, the discretionary housing payments will have to be higher.

Stuart McMillan: That point certainly needs to be considered in the wider discussions on the financial framework.

Nile Istephan: As far as the efficacy of DHPs in mitigating the bedroom tax is concerned, I have to say that it strikes me as an overly cumbersome way of addressing a particular issue.

We can put a lot of time and effort into clarifying how discretionary housing payments can help to mitigate the impact of another policy or approach, but if it is about giving full autonomy to the Scottish Parliament and it is the Scottish Government's and Parliament's intention to remove the operation of the bedroom tax from Scotland, then DHPs are probably not the best route for doing that. It leaves

all sorts of opportunities for confusion and misunderstanding, because agencies have to be able to access people to assist them with and support their applications for DHPs, and there is their renewal and the bureaucracy of the payments. If the intention is to remove the bedroom tax from Scotland, DHPs are probably not a very efficient way of doing that.

Stuart McMillan: What is your recommendation?

Nile Istephan: If you are talking about the spirit of the Smith commission and Scotland having complete autonomy, the powers should be fully devolved. If the Scottish Government wishes to remove the operation of the bedroom tax from Scotland, that should be the requirement rather than seeking to mitigate the tax through another route.

Bill Scott: Discretionary housing payments will not be payable if the DHP has to be made because the person has been sanctioned. Again, sanctions are impacting disproportionately on disabled people. Obviously, all the people who are sanctioned on employment and support allowance are, by definition, disabled people, because they have either a long-term health condition or an impairment. A significant number—more than 20 per cent—of people who are on jobseekers allowance are disabled people.

More than 50 per cent of the sanctions that are imposed on those who are on employment and support allowance are overturned on review or appeal, but in the meantime the person has lost their benefits. That means that, because a discretionary housing payment cannot be made, they could also lose their tenancy. If they become homeless and have a mental health condition or a physical impairment, for example, that obviously becomes an extreme situation for them to cope with. Because of becoming homeless, many people suffer relapses in their condition, the condition becomes much worse—drug and alcohol problems can obviously arise as well—and they have to be hospitalised.

I think that it is wrong to restrict the Scottish Parliament's ability to say that a discretionary housing payment can be made in the interim while a person is appealing a decision or having it reviewed. Ultimately, there is really no decision until the review or appeal has taken place.

The Convener: Rachel, you began to tease out some of the issues around future interactions between policy differences at the UK and Scottish levels. The Smith commission did not recommend that housing benefit should be devolved, but you have just described a circumstance whereby a UK Government policy decision would have an impact on discretionary housing payments in Scotland. Our primary job is to ensure that everything in the Smith commission proposals is delivered, but it is also part of our responsibility to examine interactions between policy differences. It would be helpful if you could give us a bit more detailed information on that at some point following this meeting.

Rachel Stewart: I would be happy to do that.

The Convener: I certainly had not picked up on the issue—I am not sure whether committee members had—of interaction between a policy lever in one place and a lever in another place, and the potential impact of that. If we have time today, I want to look at that issue. However, in the meantime, I am going to Mark McDonald for a question.

Mark McDonald: My question is on clause 19 of the Scotland Bill, particularly as it relates to definitions of disability and carers. The written submissions included a number of comments on the restrictive nature of those definitions. From your perspectives, what difficulties do you see arising from their restrictive nature? What would you prefer to see instead? The Engender Scotland representative on the previous panel essentially agreed that, if we are to have true devolution, what should be in the bill is an expression of the right of the Scottish Parliament to determine who qualifies for disability and carers benefits.

Rachel Stewart: We would support the statement that it should be for the Scottish Parliament to decide the definition of disability. When a bill has two different definitions of the same thing, which is the case with regard to clause 19 and—I think—clause 26, that is not very helpful. It might mean that, based on those restrictive definitions, people would qualify for one benefit but not for another.

We are a member of Disability Agenda Scotland, and we want a much more social view to be taken of disability—one that takes account not only of a disabled person's condition, but of how they can approach their life—rather than a medical view. At present, what is in the bill is restrictive. We are concerned about the effect on people's benefits, especially when it comes to fluctuating conditions such as mental health conditions.

10:30

Bill Scott: The Smith commission was very clear in the statement that it made in paragraph 51 of its report. It said:

"The Scottish Parliament will have complete autonomy in determining the structure and value of the benefits at paragraph 49"—

the devolved benefits—

"or any new benefits or services which might replace them."

We think that the definitions of the terms "carer" and "disability benefit" are restrictive. In relation to disabled people, the bill says that a payment cannot be made solely on the basis of someone having a particular condition, yet under the disability living allowance rules and the attendance allowance rules someone who undergoes regular dialysis would automatically qualify. The bill is saying that, in future, the Scottish Parliament will not be able to ensure that they automatically qualify for benefit.

Similarly, someone who is born with severe visual impairments—someone who has no eyesight or virtually no eyesight—automatically qualifies for the mobility component of DLA, but in future they will not automatically qualify for any new benefit that replaces it. The powers are being fettered before they have been devolved.

There are restrictions on the number of hours for which someone can be in education and still receive the carers allowance. If the Scottish Parliament wanted to have an employability initiative to get young carers into work after they have left school, the bill would restrict their ability to maintain the carers allowance support that they currently receive in the event that they chose to go to college to get additional qualifications and skills. We think that, in imposing such restrictions, the bill is at odds with the new employability powers that are being devolved.

The carers allowance amounts to about £3,000 a year, yet it involves 35 hours of full-time care a week. A carer would still have to provide that amount of care to continue to qualify for the carers allowance. If that care were substituted by the local authority, it would cost five to 10 times as much for the local authority to provide the same service. Carers, regardless of their age, provide huge benefits to the state by providing unpaid care, but the bill will mean that they will be able to better themselves by getting skills and qualifications only if they do so by spending less than a certain number of hours on that. We think that the Scottish Parliament should have the discretion to set where the limits will be and that it should have full powers over that benefit.

The Convener: Can I tease that out a wee bit? In effect, you are saying that there has been a long-standing convention at Westminster whereby under-16s do not receive carers allowance and that, even if we in Scotland decided that we wanted to pay an allowance to under-16s in such circumstances, we would not be able to do so.

Bill Scott: No. You would not be able to pay an allowance to someone who was under 16, nor would you be allowed to pay one to someone over the age of 16 who was in regular education.

The Convener: That is helpful.

Bill Scott: We are talking about quite a small number of hours—about 16 hours a week, I think. Carers allowance could not be paid to someone who was at college.

Mark McDonald: The definition in the bill says that a "relevant carer" is someone who

"is 16 or over ... is not in full-time education, and ... is not gainfully employed".

The use of the phrase "not gainfully employed" raises some questions.

Currently, people can receive carers allowance provided that they do not earn more than a certain amount or work more than a certain number of hours—I cannot remember where the distinction lies—so to simply define it as "not gainfully employed" creates some difficulties beyond the current stipulations under carers allowance.

What seems to be being transferred—perhaps John Dickie or Nile Istephan can comment on this—is the administrative ability to alter the amount that is paid. There is no policy flexibility in relation to how the payment is applied or defined or who receives it. That strikes me as an anomaly in the definitions.

John Dickie: Even as it is currently defined, there would be important opportunities for the Scottish Parliament and the Scottish Government to improve people's access to disability and carers benefits and their adequacy, so I would not want to overplay the point. However, I echo what others have said. There is concern that we are freezing in time a view of what a disability benefit looks like and its structure, and the same applies to benefits for carers, meaning that future Scottish Governments and Parliaments will not be able to develop new approaches to supporting people with disability and carers in a broader way based on their needs and, potentially, trying to support people into work or training.

The example that we have used is that we might want to provide support to disabled people with lower levels of disability who would not meet the quite high thresholds that are locked into the bill as it is currently presented. The impact of those people's disability may be largely financial; it might not require additional supervision or prevent them from doing their day-to-day activities, but it might impose an additional cost.

It is not clear why we are locking in the current structure of disability benefits and carers benefits when Smith says, as others have mentioned, that the Scottish Parliament should have complete autonomy in developing the structure. That is not possible as the bill is currently framed, as far as we can see.

Mark McDonald: You talked about locking in the current structure. The legislation will not take

effect for a period of months, and the implementation stages will follow that. We know that, in the intervening period, about £12 billion-worth of welfare cuts will be implemented, which could radically change how some benefits are structured and defined and radically shift the goalposts. The structure may not even be restricted to the current landscape, as you say. It may be restricted to a future landscape, which would further restrict the flexibility of future Scottish Governments.

John Dickie: There are two different issues. First, if the definition of a disability benefit in the Scotland Bill is not amended, it will not change, which will constrain what the Scottish Parliament and Scottish Government can do in relation to disability benefits. Secondly, if the scale of cuts and changes to disability benefits continues as it is, the system of support that is in place at the point of devolution and transfer, which the Scottish Parliament will pick up responsibility for, will be much diminished. Those constraints are built into the Scotland Bill.

Bill Scott: Everybody is talking about £2.5 billion-worth of benefits being devolved to Scotland, but if the transfer from disability living allowance to personal independence payments goes ahead as scheduled—we cannot know whether it will—we will lose £350 million to £400 million from that budget alone.

Mark McDonald: Is that the global sum or the Scotland-specific sum?

Bill Scott: It is the Scotland-specific sum. That is what we will lose. Again, that will restrict the Scottish Government's scope and ability to define a disability benefit and who it is payable to. There will be a much smaller pot or budget to work with, so the scope for innovation will be much reduced.

The Convener: Thank you. Let us move on to the area of employment support. Linda Fabiani has a question.

Linda Fabiani: Bill Scott has used the word "restrictive" a few times to describe things, and it strikes me, from some of the evidence that you have given about employment support, that it is restrictive for certain types of folk who perhaps need help. I would like you to expand on something that is in your submission. We know that the Smith recommendation on employment support has not been implemented, because, under the draft clauses, it is now limited to the long-term unemployed entering a programme of development. You say that one of the key groups to suffer consistent poverty is those who circulate in and out of low-paid work. That strikes me as being obvious—we all know that—but we are getting powers that we cannot use to assist one of the groups that we know could really do with some help.

Bill Scott: In fairness to the UK Government, it says that you have powers to intervene in that area already. However, if you wanted to create a new programme to specifically address that issue, clause 26 would prevent your doing that. That is what we find difficult. A lot of disabled people who are lucky enough to have jobs—only about four in 10 of those who are of working age do—are in entry-level jobs or low-paid employment, and they often get only seasonal employment and are in and out of low-paid work for most of their working lives. However, you cannot intervene to break that cycle because the periods of their unemployment do not last for a year, so you will never be able to address that.

Linda Fabiani: Even if we carried on having specific small programmes, initiatives and so on, we would not have the power to really get to the root-and-branch issues that underpin the problem.

Bill Scott: Yes. Those who are in low-paid work are now the main group of people who are living in poverty—it is not just those who are unemployed who live in poverty.

Linda Fabiani: I am interested in the access to work scheme. Yours is not the only submission that says that it is a shame that that scheme is not being devolved. Can you tell us a wee bit more about it?

Bill Scott: Access to work was not specifically addressed in the Smith commission recommendations one way or another. Access to work is a programme that supports disabled people who are entering employment and which helps people who acquire impairments, or whose impairments become more severe while they are in work, to retain employment. It can pay for adaptations to the workplace, personal support, software and computers for people who suffer vision loss, for example. Its total budget across the UK at the moment is about £105 million, which is quite small, and the amount that comes to Scotland is only about £6.5 million to £7 million of that. So, it is not a huge amount of money to be devolved but it could mean that workplaces that were already adapted could be adapted for disabled workers who followed the first disabled worker in.

The scheme can make a real difference by opening up workplaces to disabled people, and it makes a huge difference in allowing disabled people—people who have strokes or who acquire impairments later in life—to get back into the workplace relatively quickly. In terms of employability, it is one of the things that you should have in your toolbox to address the physical and informational barriers to being in a

workplace that people face, but it will not be available in any Scottish employability scheme, which seems wrong to us.

10:45

Rachel Stewart: We called for access to work to be developed, and we were very disappointed when it was not included in the Scotland Bill. Only 4 per cent of people who receive the access to work grant have a mental health problem, yet they make up the biggest group of people on employment and support allowance. About 50 per cent of people in Scotland on ESA-WRAG—the work-related activity group—are there because of their mental health problems. Having a more aligned benefit could be very beneficial, and the access to work grant would help those people at the point when they are moving into work. It could also be helpful for those with anxiety issues, as money could be provided for their transport to work; for example, they could use that money towards taking a taxi if they are unable to take a bus, which would keep them going to work. The money could also be used for mental health awareness training in workplaces. Indeed, there is no reason why it could not be, because it is simply a pot of money that is used to support people with disabilities in the workplace. The training could have a knock-on effect for people who do not have a diagnosis.

People mainly drop out of work as a result of stress and ill-health. The grant could help to transform workplaces. We are working with the anti-stigma movement, through the see me campaign and so on. Employers say that they are reluctant to take on individuals with mental health problems, because they do not understand the issues. Therefore, moving the access to work grant to Scotland would be beneficial.

Last year, the House of Commons Work and Pensions Committee investigated access to work. It found that the system was overly centralised and hard to access for the disabled. According to Liz Sayce, who recently led a review on employment support, the grant is the best-kept secret.

Linda Fabiani: Is that the grant that local authorities administer on behalf of DWP?

Rachel Stewart: It is administered by Jobcentre Plus

Linda Fabiani: Is it?

Rachel Stewart: Yes—and that is why the UK Government says that it should not be transferred across.

Linda Fabiani: Okay.

I think that what you have said is absolutely right. I hope that I am not the only person here who did not understand how the scheme worked—I see that no one else is admitting to that. [*Laughter*.] It is a lesson in itself that we do not know about it.

Bill Scott: It is a very flexible benefit. As I said, it provides people with support to get into work; it can also provide on-going support for transport, as Rachel Stewart said, and for personal assistance at work. It is absolutely essential. Several of my colleagues at Inclusion Scotland could not work without access to work support.

Linda Fabiani: I think that I might have heard about the scheme.

I have one final wee question. Rachel Stewart's submission says:

"SAMH notes that the Scottish Government could end up effectively administering DWP programmes without accessing real powers to transform them".

Is that the crux of what we have been talking about today—the inability to be transformational on what we can do?

Rachel Stewart: I spoke earlier about the impact of some of the other Westminster legislation. An element of that will have an impact on the administration of the work programme and work choice when they are devolved to Scotland in April 2017.

The roll-out of PIP is due to start in Scotland next month. It is a concern that many people who qualify for DLA will not qualify for PIP because they are not disabled enough to meet the regulatory requirements. Work choice is the specialist disability support programme into work, while work programme is more of a catch-all, and it takes people—both older and younger than 25—who are long-term jobseekers, and those who are on employment and support allowance and who have been transferred over from incapacity benefit.

If people lose their access to disability living allowance, they might just be filtered through on to a work programme and not receive the specialist support that they need. In that situation, even though they continue to have a disability, they will not get state support for it.

On administering the programmes, we have concerns because Jobcentre Plus will remain reserved and the filter on to the programmes will still be in Westminster. When I was preparing for today, I read through our submissions over the past year. They started off positive—

Linda Fabiani: So did we.

Rachel Stewart: But, as time has gone on, they have got less so.

The Convener: We have gone into the detail there, but I want to ask, for the record, about employment support. On page 5 of his letter to us, under the heading "Clause 26—Employment Support", David Mundell says:

"I ... believe that clause 26 delivers ... on the Smith Commission Agreement."

Does it?

Rachel Stewart: On page 25?

The Convener: It is on page 5. He says in relation to clause 26—employment support:

"I therefore believe that clause 26 delivers a substantial transfer of powers to the Scottish Parliament and delivers on the Smith Commission Agreement."

I need an answer on the record—does it or does it not?

Rachel Stewart: We do not think that it does.

Bill Scott: No.

The Convener: Is that view shared by you all?

John Dickie: It is not a particular area of expertise for us, so I will leave it to those who are more knowledgeable to comment.

The Convener: I want to get into the detail of the interaction issue a bit more. This point is not directly related to the evidence that you provided, but there was an announcement recently from the Scottish Government that, from January 2016, 16 to 19-year-olds would become eligible for a weekly educational maintenance grant.

Do you consider that the bill as currently drafted would allow payments of that kind to be extended to individuals who are receiving in-work support on programmes such as the work programme or work choice? You may need to think about that and come back to me. The issue is the interaction. If we are doing things in Scotland, what are the implications from a UK perspective? Does that involve too much detail to go into at this time?

John Dickie: There is too much detail in that particular issue, so I would need to go away and look at it.

There is the whole issue of getting Governments to work together to ensure that the different levels of support that are available through different levels of government—local government, the Scottish Government and the UK Government—work together to improve the overall support that is available to individuals and families.

Perhaps an example of where that interaction has not worked over the past few years relates to kinship care payments. We had strong policy intent in Scotland to provide additional support to kinship carers, but the way in which that has played out in practice has meant that, in many cases, kinship carers have lost entitlement to UK benefits. It has become a hugely complex, tortuous business for kinship carers.

The situation could be resolved by any level of government. Local authorities could just raise the rate to make sure that they are paying an adequate foster care allowance rate of payment to kinship carers; the Scottish Government could require all local authorities to do that; and the UK Government could change the regulations on reserved benefits to ensure that people did not lose their entitlements to UK benefits. The situation could be resolved but it has not been; it has been left as it is. The result has been that kinship carers are left out.

That is an example of where a devolved responsibility and UK responsibilities are interacting and where there has been a failure to find a solution that protects people. As we go forward, there are lessons to be learnt from that experience.

The Convener: I have another couple of areas in my head that I will not explore with you today because it would put you on the spot a bit too much. However, if you do not mind, I might write to you about some of the other areas of potential interaction to ask what you think the implications might be, so that we can get a bit more clarity on some of these jagged-edged issues.

Duncan McNeil: I will pick up on John Dickie's comments and indeed the comments in the Scottish Federation of Housing Associations submission about the transition, which is already difficult.

The process does not seem very transparent. There seems to be a lack of clarity, a lack of involvement and a lack of scrutiny in real, probing terms. Different Parliaments and different committees are examining the process, which is challenging. It has been recognised, certainly in the federation's submission, that intergovernmental relations are essential. That chimes with some of the committee's concerns.

The SFHA attached some of the Calman proposals to its submission. Those proposals are quite old now but, recognising that, they include some recommendations about ad hoc committees and joint committees, about UK ministers and Scottish ministers appearing at various committees of the Parliament and about greater access. Would any of you like to comment on the record about that area of work and about how members of the committees—and, indeed, the interest groups—can provide the right level of scrutiny not just during the transition but going forward?

Nile Istephan: I will have a quick go at that question.

I think that you are right. Whatever people's individual views are and whatever party-political views there are about the process, we are trying to think practically about how we can make what we have in front of us work as well as we can. Our concern relates to the questions that we have struggled with today, which are complex, and it feels to us that they are getting more complex as we delve further into them. In the meantime, some reforms are progressing, and we are struggling to understand how various policies, processes and benefits are interacting with one other. That is a struggle for us to keep on top of.

On the claimant's perspective, an objective of some of the reforms is to simplify the system, but it feels to us that the system is becoming increasingly complex and opaque. Possibly the end result somewhere down the line will be that some of the issues will be clarified.

That experience has informed our call to halt the further roll-out of universal credit and to get some of the machinery right in intergovernmental co-operation. Whatever that intergovernmental co-operation ends up being, it needs to inform the processes and make collective decisions in the interests of claimants. At the risk of repeating myself, we do not want to get a system in which there are the difficulties that were experienced in Northern Ireland. We recognise that, in the interim, whatever the rights and wrongs of some of the changes are, they are awfully confusing to people in respect of knowing what they mean for them, planning their lives and going about their business.

That is a bit of a vague answer on the intergovernmental machinery, but the issue is really important.

Duncan McNeil: I have a straight question. There are groups that report to ministers that meet regularly and talk about social security and exactly what we have spoken about this morning. What has your engagement been with them? Do you know when they meet? Do you know who is in them? How well have you been kept informed? How well are you able to influence what is going on?

The Convener: Bill Scott probably wants to answer that.

Bill Scott: I am involved in a lot of groups, but they are all Scottish Government ones. I have not been involved in any intergovernmental meetings whatsoever.

Duncan McNeil: Scottish Government and UK Government officials meet, but you do not know anything about that.

Bill Scott: I know that the meetings are happening, but—

Duncan McNeil: But you do not know when and you do not know anything about the agendas, for example.

Bill Scott: No.

John Dickie: It is important to bring in the voices of the claimants who receive the benefits and the organisations that work with them. A lot of negotiation is going on between the Governments just now, but the issue is about creating a framework in which those benefits will be decided and developed right into the future. We need to future proof that. We might get different views from people who are already on the benefits and the organisations that work with them. Their interests are different; they are not necessarily the same as the interests of the two Governments.

Bill Scott: We are certainly willing to take part in those meetings, but that has to be at the right stage, which is an early stage.

I used to be a civil servant a long time ago—I worked in the Department of Employment—and I know that no end of buck-passing took place between the Department of Employment and the Department of Health and Social Security back in the 1980s about which was at fault when benefits went astray. The local authority was usually a third player in the ring.

We are now going to bring in an extra layer of complexity for people who apply to the system. They will not necessarily know who to go to for which benefit. We need to ensure that the structures do not let people slip through the cracks and that people who have genuine issues—mental health issues, communication difficulties or learning difficulties—know where to go to and can get help.

That needs co-operative work between both Governments, but it also needs the involvement of the third sector, for example—it knows those people and what issues they confront and how they can be addressed—so that systems can be set up to cope.

Linda Fabiani: I remember that someone said that they regularly met a welfare reference group from the voluntary sector to inform the discussions. That might have been when the secretary of state or somebody from his office was here. I do not think that I have just made that up.

John Dickie: There is a Scottish Government welfare reform scrutiny group, which I think a few of us are on. It has not dealt with or scrutinised those issues.

Linda Fabiani: I am convinced that the Scotland Office said that it was doing something. Can we look back and find out what that was said? I do not think that I dreamt it.

The Convener: We will check whether Linda Fabiani's recollection is correct and whether there is a reference group. If that was said, I suggest that we write to the secretary of state to ask who is on that group.

Linda Fabiani: Absolutely.

The Convener: I thank the witnesses for coming and giving us evidence. That was very helpful. The area is incredibly complicated, and there are lots of potential interactions between what the Scottish Government and the UK Government might do and the implications for each side. That is making our job very interesting.

Intergovernmental Relations (Parliamentary Oversight)

11:00

The Convener: We move on to agenda item 4. Members will recall that we intend to publish a report on parliamentary oversight of intergovernmental relations in early October. Do members agree that, following the publication of that report, we should seek a debate on it in the chamber in late October or November?

Rob Gibson: It would be a good idea to have that debate. The question is: what length of debate? We can see that there are ways in which the matter needs to be teased out. Duncan McNeil has been very strong about the way in which we need to develop those things. I suggest that we seek a debate.

The Convener: Okay—so we need a debate in which there is enough time to debate the issue properly.

Rob Gibson: Yes.

The Convener: I can try to negotiate that on our behalf as we go through the process.

Is everybody happy with the suggestion that we go for a debate?

Members *indicated agreement.*

The Convener: We will now move into private session.

11:01

Meeting continued in private until 11:18.

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