The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

# EDUCATION AND CULTURE COMMITTEE

Tuesday 10 November 2015

Session 4

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## EDUCATION AND CULTURE COMMITTEE
**26th Meeting 2015, Session 4**

**CONVENER**

*Stewart Maxwell (West Scotland) (SNP)

**DEPUTY CONVENER**

*Mark Griffin (Central Scotland) (Lab)

**COMMITTEE MEMBERS**

*George Adam (Paisley) (SNP)
*Colin Beattie (Midlothian North and Musselburgh) (SNP)
*Chic Brodie (South Scotland) (SNP)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)
Liam McArthur (Orkney Islands) (LD)
*John Pentland (Motherwell and Wishaw) (Lab)
*Mary Scanlon (Highlands and Islands) (Con)

*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Angela Constance (Cabinet Secretary for Education and Lifelong Learning)
Sharon Fairweather (Scottish Government)
Ailsa Heine (Scottish Government)
Diane Machin (Disclosure Scotland)
Liz Smith (Mid Scotland and Fife) (Con)
Stephen White (Scottish Government)

**CLERK TO THE COMMITTEE**

Terry Shevlin

**LOCATION**

The Sir Alexander Fleming Room (CR3)

# Scottish Parliament

## Education and Culture Committee

*Tuesday 10 November 2015*

*[The Convener opened the meeting at 10:04]*

## Decision on Taking Business in Private

**The Convener (Stewart Maxwell):** Good morning, everybody, and welcome to the 26th meeting in 2015 of the Education and Culture Committee. I remind everyone to keep all electronic devices switched off at all times. We have received apologies from Liam McArthur, who thanks Loganair once again—that is a personal message from Mr McArthur—and I also welcome Liz Smith, who has joined us for agenda item 2.

Agenda item 1 is a decision on taking business in private. Do members agree to take item 5 in private?

**Members** *indicated agreement.*

## Higher Education Governance (Scotland) Bill: Stage 1

10:04

**The Convener:** Agenda item 2 is our final evidence-taking session on the Higher Education Governance (Scotland) Bill. I welcome to the meeting Angela Constance, the Cabinet Secretary for Education and Lifelong Learning, and her accompanying officials. Good morning to you all.

I believe that the cabinet secretary wishes to make a few remarks.

**The Cabinet Secretary for Education and Lifelong Learning (Angela Constance):** Good morning, convener and colleagues. I am very happy to appear before the committee this morning to discuss the bill.

The Scottish Government values our higher education institutions, and because of our faith in them and what they deliver, we are as a Government again investing more than £1 billion in the sector this year. In a nutshell, the Scottish Government wants this bill to enable more modern, inclusive and transparent governance. Informed by the recommendations in the 2012 review of good higher education governance in Scotland, we are of the view that elected chairs, modernised governing bodies and academic boards and enhancement of the definition of "academic freedom" can help deliver that vision. I reassure members that I have listened and continue to listen to the views of the committee and, indeed, all stakeholders on the bill, and we are also scrutinising the substantial amount of evidence that has been presented to this committee and other committees that are considering the bill.

Before I talk about some of the bill's provisions, I want to restate some points that I made in Parliament a few weeks ago. First, the Scottish Government does not seek to advance ministerial control of our institutions. Secondly, we are of the view that the bill does not add to any existing risk of reclassification by the Office for National Statistics of Scottish higher education institutions as public sector bodies, and I have written to the Finance Committee to that effect. Thirdly, further reclassification is an outcome that the Scottish Government would never want to realise. Finally, the Scottish Government has no intention of abolishing the post of rector.

Turning to some key provisions in the bill, I make it very clear that the Government supports the principle of elected chairs to higher education governing bodies. At this stage, though, I remain open-minded on how elected chairs will work in

practice and welcome any and all good ideas that will help us arrive at the best model for good modern governance. My overarching aim is to ensure that access to the position of elected chair is available to the widest possible pool of suitably qualified and skilled people. Over the summer, we started to talk to all stakeholders about a model for elected chairs; that active dialogue continues, and the Scottish Government is happy to keep the committee updated on those discussions. My aim is, where possible, to reach consensus through a continued dialogue with stakeholders, and I hope that, rather than simply lay down the Government's position, we might be able to co-produce solutions to some of the issues that were highlighted in the earlier consultation and on which a range of views was set out.

Generally, as we begin to plan for stage 2 of the bill's parliamentary consideration, we continue to examine all the constructive ideas and suggestions that the relevant committees of the Parliament and stakeholders have put to us. As I have already indicated to Parliament, I am open-minded about amendments and I am willing, for example, to examine sections 8 and 13 further.

I am delighted to take members' questions.

**The Convener:** Thank you very much, cabinet secretary. We will go straight to questions, and I will begin with Chic Brodie.

**Chic Brodie (South Scotland) (SNP):** Good morning, cabinet secretary. I find it very encouraging that, after our earlier debate on the matter, you are trying to reach consensus with stakeholders. How many university principals—not necessarily leaders of trade unions—did you and your officials meet prior to this stage?

**Angela Constance:** Obviously, I have on-going engagement with the higher education sector—

**Chic Brodie:** But my question is specifically with regard to the bill.

**Angela Constance:** With regard to the bill, I have certainly been party to two round-table discussions. In between those discussions, I have met other individuals, including current and former rectors, and my officials have carried out a range of engagements with a variety of stakeholders, whether they be principals, trade union representatives or student organisations. The engagement that I and my officials are carrying out is on-going.

**Chic Brodie:** We have the policy memorandum and the other accompanying documents, but how will the bill improve governance? What deficiencies in the governance of the universities and higher education have there been in the past? Can you give us some examples?

**Angela Constance:** The premise that I am starting from is not the premise that there is a deficit. I am not for a minute saying that governance in our university sector is poor, but I believe that it can be better. As part of the von Prondzynski review in 2012, a range of evidence was gathered, some of which articulated the concerns of some stakeholders. I know that the committee has heard from the National Union of Students Scotland and the University and College Union Scotland. I think that the UCU put it quite well when it spoke about the lack of connectivity that can sometimes exist in any institution between staff, trade union members and management.

However, I repeat that, for me, the bill is about continuous improvement. I think that we are quite right to expect the highest standards of governance. Overall, our universities are excellent. In return for the £1 billion-worth of investment that this Government has continued to put in every year, it is right that we expect the highest standards of governance.

The bill makes proposals in discrete areas that I and the Government believe will lead to improvements. The bill is about how we can continue to evolve university governance so that it reaches the very highest standards to ensure that all voices in the university community are heard.

**Chic Brodie:** I understand that, but you have just made the point that our universities are excellent and of the highest standard. That is why I am struggling to understand what needs to be improved. I know that you have talked to the UCU, but how many of the principals have you talked to?

**Angela Constance:** I would have to go away and add that up. I have probably met most of the principals in Scotland, either in the specific context of the bill or as part of the Government's broader engagement.

**Chic Brodie:** I asked what deficiencies there have been in an effort to understand why the Government is legislating. If we are to change the system, surely we need to know what needs to be improved. That is why I asked about deficiencies. Our universities are excellent—we know that many of them sit in the top 200 universities in the world. I understand the desire for more democratisation, which we support, but the bill includes some fundamental proposals that might be challenged.

I will play devil's advocate. What will happen if there is no improvement or, worse still, there is a diminution of performance? How will we recover from that?

**Angela Constance:** In relation to the first part of your question, just because an institution is good, that does not mean that it cannot continue to evolve and improve its governance. Bearing in

mind that our universities are good and world leading, we are right to expect them to be exemplars when it comes to governance. A body of work, led by Professor von Prondzynski, was completed in 2012. The bill aims to reflect the evidence that was gathered in that review and to implement the review's recommendations, particularly as some of them have not been followed through in the sector's code of good governance.

I suppose that, ultimately, we are striving for greater participation in decision making from within the institution. I fail to see how that can be a negative and how it cannot take any institution or, indeed, the sector forward. We know that good governance, in essence, has to include a range of skills and a diversity of people and that, where an organisation or institution includes all the voices and interests in the area, that enriches transparency and accountability and, at a fundamental level, enriches the decision-making process.

10:15

**Chic Brodie:** I accept that participation in decision making and democratisation is fine but, at the end of the day, somebody has to make decisions. We will come to that later.

On the basis that we cannot define what deficiencies there have been, how do you propose to measure outcomes that will indicate that we are improving?

**Angela Constance:** Some stakeholders have defined what some of the deficiencies have been. Certainly, the von Prondzynski review gathered a range of evidence and views from different stakeholders regarding concerns.

With regard to how we monitor how the von Prondzynski review, as articulated in the bill, is implemented and the impact that it has, we would want to do that working hand in glove with all stakeholders and with the sector as a whole. There is a university sector advisory board, which is currently reviewing its function. That board could have a renewed focus on governance, monitoring impact and measuring success and progress.

**Chic Brodie:** What kind of measures would be used to determine improvements that have taken place in a university because of a change of governance?

**Angela Constance:** It is more of a qualitative process than a quantitative, binary process. Again, we would want to come to an agreement with the stakeholders about the best way to measure progress, as opposed to forming a view ourselves about how we measure progress. We would not want to do that in splendid isolation.

**Chic Brodie:** I understand that, but it would be unusual not to have some quantitative measures of outcome improvement.

**Angela Constance:** There could be an outcome improvement plan.

**Mary Scanlon (Highlands and Islands) (Con):** I was pleased to hear in the recent debate on the issue in the Parliament that, where there is scope to alleviate concerns, the Government will listen. My party would welcome that.

The bill might have been received with delight by Professor von Prondzynski, but no one else in the university sector seems to think that it will be hugely beneficial. The bill has been described as a solution looking for a problem. When Chic Brodie asked about what deficiencies there are in the sector, you talked about the lack of connectivity that can sometimes exist. That seems a bit nebulous. It is strange to bring forward a huge piece of legislation to deal with something that might sometimes exist.

Can you talk about the review of the code of higher education governance? It seems to me that progress is being made with that. It represents an excellent example of the Government working well with universities rather than being on a collision course with them. Further, my understanding is that a huge amount of progress has been made in the process of implementing that code. For example, in the past year, 42 per cent of those who have been appointed to the boards have been women. Why should we bring forward legislation when the code of higher education governance seems to be working more constructively than the legislation will?

**Angela Constance:** The first point is that there is a wider university community that is broader than principals and managers of the sector. My experience from engagement with a range of stakeholders, including principals and chairs of court, is that, although some people are opposed to the bill in its entirety, there are many shades of opinion out there. I repeat that, as a Government, we will work hard to build consensus whenever and wherever that is possible.

Mrs Scanlon is right that progress has been made with the code—I would never demur from that. Not all aspects of the von Prondzynski review are reflected in the code. That review looked at a range of evidence on issues in and around governance, from Scotland, the United Kingdom, Europe and beyond.

We have to ask ourselves how we ensure that progress is on-going and how it will be anchored for the future. Although the bill is discrete in its elements and the changes that it seeks to make, it is very much about ensuring that governance can evolve to the highest of standards to ensure that

the sector is operating to the highest standards that we would expect in 21st century Scotland.

**Mary Scanlon:** Many of our universities have been around for over 600 years and we are all justly proud that Scotland's universities rank among the best in the world. You will have seen the evidence from people such as David Ross and Jocelyn Bell Burnell. As parliamentarians, we cannot ignore such academics, and they are concerned about the impact of the bill on governance and on the reputation of our universities here and abroad.

I cannot understand it when you talk about future proofing—I think that we are all still struggling with that. Chic Brodie asked whether the bill is going to be beneficial, what identified problems it will address and, if the bill is passed—as is likely given the Scottish National Party majority—what will be the measures of the future improvements and benefits. I am a member of the Public Audit Committee, which is looking at things such as remuneration committees, but the bill is silent on how the work on behalf of the governing body will be taken forward.

If no progress was being made at all and if the universities were not engaging with the Government, I would almost see a justification for the bill. However, tremendous progress has been made over the years and there is a good working relationship. That is actually being damaged by this punitive, unnecessary and counterproductive bill. We are all struggling to understand why heavy-handed legislation is necessary when good work is on-going across the sector, including an annual review of governance.

**Angela Constance:** I question an approach that says, "We are good, so leave us alone—there is no room for further improvement." The whole essence of striving for the highest of standards and for excellence is the notion of continuous improvement. What I am saying on behalf of the Government is not that universities are starting from a poor base—far from it—but that there is room for improvement. Surely that is in keeping with the very highest of standards. We acknowledge the progress that has been made through the code, but the code was devised and pulled together by senior people in the sector and it did not, in its genesis, include students, staff or trade unionists. I suppose that I would question that aspect of the culture. Surely it should be the norm for all the stakeholders to work together in social partnerships.

The bill is a discrete bill with some discrete measures. It is certainly not looking at overhauling all aspects of university governance. Mrs Scanlon is right that, as parliamentarians, we should listen to all views, including the views of eminent academics such as those whom she mentioned, but we also have a responsibility to listen to other academics, and I certainly get correspondence from a range of academics. They may not be as high profile as Jocelyn Bell Burnell or Mr Ross, but there is a range of views out there in the academic community, and parliamentarians have a responsibility to listen to all stakeholders.

We should bear it in mind that the stage 1 report has not yet been produced and that I have already indicated to Mr Brodie that we can, in collaboration with all parts of the sector, consider what would be a meaningful way to measure progress. On the point about remuneration, the newly reformed or constituted university court will look at remuneration through that prism of more diverse voices around the table of the governing body, which will make decisions on remuneration.

**Mary Scanlon:** The committee was careful in inviting academics to a round-table session. We had a wide range of academics, from bodies such as the Royal Conservatoire of Scotland to the University of Edinburgh and from small and large universities, and not one of them was in favour of the bill.

**Angela Constance:** I am not disputing the process that the committee went through—

**Mary Scanlon:** I am looking for the evidence—

**Angela Constance:** Up in my office, I have hundreds and hundreds of postcards from members of the UCU calling on the Government to enact the bill. It is fair to acknowledge, as I do, that there is a range of views, including a range of views from within the academic community.

**Gordon MacDonald (Edinburgh Pentlands) (SNP):** I have a quick question on a specific point, on which I am looking for clarification. When I met representatives of one of the universities last week, they raised a question about elected student representatives. I was informed that, under the bill as it stands, elected student representatives—the student president and vice-president—are not eligible to serve on the university court because, technically, they are not students because they are on sabbatical. Is that understanding of the bill correct? If so, do you intend to address that and remove the anomaly?

**Angela Constance:** What you describe would most certainly not be our intention, given that the policy documents on student representation on the governing body state that one of the representatives has to be the president of the students association, and that one of the two student members is to be a woman. We will go back and examine that carefully, but it is not our intention to exclude those people from serving on a university court. If there is some unintended consequence of the drafting, we would be willing to rectify that.

**Gordon MacDonald:** Thank you.

**The Convener:** We move on to ONS reclassification, on which Gordon MacDonald also has questions.

**Gordon MacDonald:** I want to ask about the potential risks of ONS reclassification. In your opening remarks, cabinet secretary, you said that do not seek to advance ministerial control or bring reclassification into being. In your view, is there anything in the bill that requires autonomous institutions to ask the Government for permission to conduct their business?

10:30

**Angela Constance:** No, there is not.

**Gordon MacDonald:** How confident are you that the provisions in the bill comply with the current indicators of Government control that are set out in the ONS's existing classification?

**Angela Constance:** Considerations regarding ONS reclassification have been absolutely central to the work that has gone on around the bill, and we considered ONS reclassification prior to the bill's introduction. I was asked to provide a summary of our work on the matter to the Finance Committee, and the letter that I sent to that committee shows the consideration that the Government has given to each of the indicators of Government control. We have looked closely at the "European system of accounts: ESA 2010" guidance, which contains various indicators of Government control. We have looked through all those indicators and we are confident that the bill complies with them.

**Gordon MacDonald:** On the Scottish ministers' powers to make regulations, can you say something about what future proofing means? Judging by past experience, how often are changes to the composition of governing bodies and academic boards likely to be required?

**Angela Constance:** On future proofing, the intention is that, where modest changes are required—perhaps at the request of the sector—we will have a mechanism for making them without requiring primary legislation. In the debate that took place in Parliament a few weeks ago, I indicated a willingness to look again at what is and is not required to achieve the bill's purpose. The sections that we are discussing are routine. Most legislation contains some facility to amend the legislation in the future, and the provisions are not designed to allow radical changes to be made to the bill, once enacted. How often have ministers had to return to Parliament to make use of such provisions? It is not something that I have yet been required to do. Perhaps my officials can give an overview from their knowledge of when that has occurred in the past.

**Ailsa Heine (Scottish Government):** It is difficult to generalise, because it depends on the piece of legislation. In some legislation, the provisions might be used more, whereas in other legislation, they might almost never be used. Other pieces of legislation that apply to the further and higher education sector include the Further and Higher Education (Scotland) Act 2005 and the Further and Higher Education (Scotland) Act 1992. The 1992 act contained powers to change the composition of college boards. They were amended in 2013 but, prior to that, they had never been used to change the composition of the boards or the constitutions of colleges. It is difficult to give a general answer.

The other point that is worth making is that, generally, such powers would not be used to make radical changes that went against the grain of the original legislation because that would give rise to the question whether such changes would be within the scope of the powers. We would hesitate to use the powers in that way because it would be unlikely to be within their scope to do the opposite of what the existing legislation did.

**Gordon MacDonald:** In your opening remarks, cabinet secretary, you said that you never want to realise a situation in which ONS reclassification takes place. However, if the ONS itself identifies that reclassification is a real possibility, what steps can the Government take to ensure that that does not happen?

**Angela Constance:** I will ask officials to talk through that process from a more technical standpoint but, obviously, the premise of my argument as a minister is that there is nothing in the bill that increases the risk of ONS reclassification.

As I said, the Government would always seek to avoid ONS reclassification because, although it would not happen overnight, if it occurred—and I do not accept that it would occur as a result of the bill—implications would flow from that. We have a broader relationship and engagement with the ONS.

I ask Stephen White to say something on the more technical aspects.

**Stephen White (Scottish Government):** My legal colleague might have a perspective to give but, from a policy point of view, the cabinet secretary has covered the issue. There is no intention at all to have a reclassification event happen. If it did, we would immediately set in train the process of considering how to remove the legislation or not implement or commence the parts of it that had been cited.

Ailsa Heine might have a perspective on the technical or operational moves behind that.

**Ailsa Heine:** After the reclassification of colleges in England, the Government introduced legislation to reverse it. Time would be given to implement any reclassification decision, in which case legislation could be introduced in Scotland to ensure that the universities were not reclassified. That would involve dialogue with the ONS to work out where the issues were and what its concerns were in relation to the government controls that it saw as leading to reclassification. The whole suite of legislation applying to universities would then have to be considered—not just the bill but the existing legislation.

**Gordon MacDonald:** Thanks very much.

**Mark Griffin (Central Scotland) (Lab):** Cabinet secretary, you said that you do not think that the bill presents any risk of reclassification but officials have told us that they believe that there is a risk, albeit a low one. Has the Government done any work or taken any legal advice that has resulted in that change of rhetoric or stance from our being told that there was a low risk of reclassification to our being told that there was no risk?

**Angela Constance:** I think that I said that there is no increased or additional risk as a result of the bill. Officials can speak about the on-going issues around ONS reclassification, but I stress that there has been no change in rhetoric at all.

**Mark Griffin:** We heard from officials that there is a low risk of reclassification as a result of the bill, so there seems to be a change in rhetoric. It would be helpful if that could be clarified.

**Stephen White:** I think that that dialogue with me and other colleagues might have been at the Finance Committee—we will maybe go back and look at the *Official Report* of that meeting.

There exists a risk that could be assessed without the bill. Someone might mention the advice that Universities Scotland has had from Anderson Strathern, which maps out a lot of the current features of the system that could be part of a risk assessment. Therefore, at the moment, we cannot say that there is absolutely no risk of reclassification without the bill. The Government's opinion is that the bill does not create additional risk. We will examine the *Official Reports* of this meeting and of the Finance Committee meeting and we will get back to the committee if there is any inconsistency between what I am saying now and what was said at the Finance Committee.

**Mark Griffin:** Thank you.

The review of the status of higher education institutions by the ONS covers English and Welsh institutions. Has the ONS been in touch to clarify whether that review will cover Scottish higher education institutions under the existing provisions?

**Angela Constance:** I am not aware that the ONS has been in touch with the Scottish Government about that. Sharon Fairweather might want to speak about our broader relationship with the ONS.

**Sharon Fairweather (Scottish Government):** It has certainly not been in touch with us about the classification work that it will do next year with regard to English and Welsh institutions.

**Mark Griffin:** Okay. Universities Scotland wrote to you on 29 October, cabinet secretary. Have you had time to respond to that letter?

**Angela Constance:** We are currently working through our response. I have seen the letter.

**Mark Griffin:** Okay. I think that it is fair to say that some of the comments in the letter criticise the Government's approach. One of them is:

"The Scottish Government's risk assessment in relation to ONS reclassification appears, from the content of the letter dated 5 October 2015 from the Cabinet Secretary to the Convener of the Finance Committee, to have completely overlooked the 5 specific indicators of control for non-profit institutions (such as HEIs) contained in paragraph 2.39 of ESA 2010".

You said that you are working through your response to the letter, but can you comment on that particular criticism?

**Angela Constance:** In broad terms, officials have considered carefully and closely all the guidance that ONS and the Treasury produce on the matter. As I said, we are looking closely at the detail of Universities Scotland's latest letter, and of course we will respond in detail to the specific points in it. That information will be shared with the committee.

**Mark Griffin:** Okay. Thank you.

**John Pentland (Motherwell and Wishaw) (Lab):** Stephen White said that there is no risk, or minimal risk, of reclassification, and in the letter to the Finance Committee, you summarise an analysis of that position. Is it possible for that analysis to be published and given to the committee, along with, perhaps, any legal advice that has been given?

**Angela Constance:** The Government always wants to be as helpful and forthcoming as possible. The Finance Committee initially asked for a summary of our work, and it has asked the Government for further information before the stage 1 vote. Given that we have received some detailed remarks from Universities Scotland and other stakeholders, we have an opportunity to cover in a future response to the Finance Committee some of the broader issues and some of the concerns that Universities Scotland has

raised. We will of course share that with this committee.

**Liz Smith (Mid Scotland and Fife) (Con):** Good morning, cabinet secretary.

Section 8 allows ministers to modify

"the categories of membership"

of governing bodies and

"the number of persons to be appointed".

Can you confirm that?

**Angela Constance:** Yes.

**Liz Smith:** Thank you. Can you also confirm that the Government did not consult on that section?

**Angela Constance:** Yes. That is correct. The Government consulted on its proposals for legislation. The sections that relate to regulation and enabling powers were included in the bill as introduced and, obviously, part of this stage 1 process is to allow scrutiny of and feedback on those provisions. The Government consulted on policy as opposed to a draft bill.

**Liz Smith:** I will probe that point further. Can you explain the difference between your comments in the chamber on 28 October, which you repeated this morning, and the comments that officials made to the committee on 6 October? You said that you are

"crystal clear"

that

"the Scottish Government does not seek to advance ministerial control of our higher education institutions".—[*Official Report*, 28 October 2015; c 39.]

I have the *Official Report* of our meeting of 6 October here, and officials confirmed to the committee that the bill adds a power for ministers. That is a contradiction.

10:45

**Angela Constance:** But the bill does not seek to give ministers any new powers over the appointment of chairs or of members of governing bodies or committees.

**Liz Smith:** It is not about the names of the people; it is about the power. On 6 October, your officials confirmed that the bill increases that power. That is where the concern comes in about the potential for ONS reclassification. As you know given your previous comments, there are certain criteria in relation to possible ONS reclassification. If section 8 increases ministerial power, the ONS will have to consider reclassifying universities as public bodies as a result. Do you accept that that is the reason for the concern and the reason for the letter that you received from Universities Scotland, which does not feel that the Government has taken evidence on the matter?

**Angela Constance:** I do not share the concerns that have been articulated by Universities Scotland and others. Nevertheless, the Government and I are willing to consider in detail concerns that are articulated by others and to attempt to address them. The bill seeks to provide a governance framework. It is worth bearing in mind that, for the ancient universities, membership of the court is set out in legislation that goes back to 1966. We are not seeking to do anything that is out of the ordinary or unusual.

Stephen White might want to add something from a policy perspective.

**Stephen White:** Some of my comments are in the *Official Report* of that meeting. The indicators of control and the guidance focus clearly on the appointment, removal and approval of individuals—I think that that point came up during that meeting. Whether there is a power is a slightly different point. Section 8 concerns a power—that is the word that is used in the bill. However, the issue is to do with whether that power advances control—it is about process: the why, not the who.

The idea that the provision contains a power and that it provides something new to Scottish ministers cannot be denied.

**Liz Smith:** That is my point, Mr White. The cabinet secretary has just confirmed that the Scottish Government did not consult on sections 8 and 13. You argue that you do not accept the concerns of Universities Scotland, but I am not sure how you can argue that if you do not have the evidence to rebut those concerns. Universities Scotland is extremely clear about the fact that it has gone to a great deal of trouble to ensure that it is well briefed on the matter, and I believe that it has consulted officials. Where is the evidence that leads you to say that you do not accept its concerns?

**Stephen White:** The evidence is contained in the letter that the cabinet secretary sent to the Finance Committee. She said earlier that we will consider the request from the Finance Committee for additional analysis before the stage 1 debate. That analysis was the evidence, and there will be more.

On sections 8 and 13, it has been said many times that they are future-proofing and housekeeping sections. That was very much the intention behind the sections. Of course I respect Universities Scotland's view that the sections do substantially more than that. Further, the cabinet secretary has been clear that the Government is listening closely to all the evidence that is presented specifically on these matters.

**Liz Smith:** When there was a possibility that the ONS might reclassify the Aberdeen western peripheral route project, Mr Swinney took five different pieces of evidence into account. Why has the Scottish Government not done something similar in relation to this huge issue that concerns our universities, which, as has been said this morning, are a most successful part of our education system?

**Angela Constance:** This is a statistical classification issue as opposed to a legal issue. I hope that I have been clear with the committee that officials have examined carefully all the guidance that is available from the ONS and the Treasury on the area. In considering that, we have looked at all relevant areas of Government, not just education, and we have used the expertise of other parts of Government that have been exposed to such issues.

It is important to say that it would not be the norm to consult on routine housekeeping sections when we consult on the policy intent of our legislative proposals. The value of the stage 1 process in the Parliament is that people can scrutinise the absolute detail of the bill.

Sharon Fairweather wants to add to that.

**Sharon Fairweather:** The cabinet secretary is right. We have learned a lot about the subject as a result of the work that has been undertaken on the Aberdeen western peripheral route, and that learning has been applied to the bill.

**Liz Smith:** All stakeholders—students, staff, academics and business—are concerned about ministerial control and ONS reclassification, just as the Scottish Government claims it is. Would it not be sensible to remove sections 8 and 13 to take out any risk?

**Angela Constance:** We are actively considering whether to amend or remove those provisions. I was clear in Parliament that we were giving open-minded and careful consideration to those matters.

**George Adam (Paisley) (SNP):** Good morning, cabinet secretary. Correct me if I misquote you, but you said in your opening statement that you were open-minded about amendments and willing to look at sections 8 and 13. Is that to allay the fears of some of the sector?

**Angela Constance:** At risk of repeating myself—

**George Adam:** Sometimes it is good to say things more than once in the committee.

**Angela Constance:** I have already made it plain that we will consider amendment or removal.

**Colin Beattie (Midlothian North and Musselburgh) (SNP):** Cabinet secretary, I will ask about some comments that have been made about the appointment of the chair of the governing body. Several points have come out of the various discussions that we have had. One is that the universities are concerned that there should be a clear link between the governing body and the chair and that there would be real problems if the chair was appointed or elected by a group other than the governing body. Do you agree with that?

**Angela Constance:** No, I do not. When people are elected and appointed to positions, they have a responsibility that is based on the job that they are elected or appointed to do. As an MSP, I am elected by the good people of Almond Valley but, as a minister, I am subject to the ministerial code and have to respect the place and rights of Parliament.

I hope that I have not misunderstood your question, Mr Beattie. That is my instinctive response to it.

**Colin Beattie:** Who will the electorate for the chair be? The unions and some of the student groups argue for a wider electorate. How do you feel about that?

**Angela Constance:** The Scottish Government has a consistent position of being in favour the chairs of university courts being elected. The chair of the university court is the senior governor—they are sometimes called the vice-convener or convener—so we are clear that the position should be an elected one.

As I said in my opening remarks, we are still in close dialogue with stakeholders, individually and collectively, about the process of election. Mr Beattie is right to suggest that there is a range of views. On the one hand, some students and trade unions argue that the franchise should be every member of staff and every student, with no selection process about who is eligible to stand for election. On the other hand, other people within senior management in the sector argue that there needs to be a robust selection process and that the electorate should be the modernised university court.

As I said in my opening remarks, the Government remains open-minded. However, we are committed to the election of chairs, which would necessitate an election as opposed to an appointment. I am not closing down co-design with the sector, but bearing in mind that we are looking to elect the senior governor, it is important that that individual is able to take up the post. Sometimes, in rector elections, a student body might elect a rector who is not able to chair the court. It is the right of the student body to do so and I do not question that, but I am strongly of the

view that the senior governor needs to be able to take up their post as elected chair.

**Colin Beattie:** Another interesting point that was raised relates to the appointment process and the anticipation that it will be an open process, in which people will put their names forward before going through some sort of sifting or selection process. There was a feeling that that might dissuade some very competent candidates, particularly women, from standing.

**Angela Constance:** We have to be careful about lazy assumptions about women seeking promotion or standing for public office. The reasons why women do not necessarily put themselves forward are quite complex.

As it stands, the description in the bill is of regulations that will enable an open process that culminates in an election. As I said, I want to remove any ambiguity, work with the sector and co-design what should replace section 1 of the bill at stage 2. I am not pre-empting where we might get to in our discussions with the sector, but, for example, an open process could include an obligation to advertise the post in the press, some sort of criteria, as I suggested, about an individual being physically available to take up the post, and some sort of fit-and-proper-person test.

I want to ensure that we are able to consider a wide range of candidates and that we do not have an unduly narrow focus. There are various options in relation to advertising the position and encouraging a broader range of candidates to come forward.

**Colin Beattie:** Has the Scottish Government done any assessment of how many additional candidates might be expected to come forward, given that you have talked about hoping that a much wider range of candidates will present themselves?

**Angela Constance:** There are potential opportunities in relation to how any selection process might work and how positions are advertised or communicated to the wider world. However, it would be disingenuous of me to say that there is a piece of work that the Government can do to establish actuarially how many more candidates we will elicit by going through a particular process.

11:00

**Colin Beattie:** I would like you to comment on the remuneration of the board chair. There has been some criticism from Universities Scotland about the bill's provision on remuneration, the detail of which is also left to regulation. How does the Scottish Government react to those criticisms?

**Angela Constance:** The intent of having a section in the bill on remuneration very much flowed from the von Prondzynski review. One of the review's recommendations was that, if you seek to have a wider range of candidates, consideration has to be given to remuneration. In essence, the provision recognises that given the amount of time that an elected chair invests—chairs currently invest a substantial amount of time in the job that they do—remuneration is not unreasonable and, according to von Prondzynski, in many ways it is desirable if you are looking for a wide range of people.

As I have said with regard to other aspects of the bill in relation to regulation, we look very closely at what is in the bill, whether it is actually required and whether it is expressed in the best possible way.

**Colin Beattie:** I have one final, quick question. If the statute is to provide for remuneration of the chair, should that principle be extended to other members of the governing body or of relevant committees?

**Angela Constance:** I think that there is a distinction between the chair and other roles or people involved in the governing body or committees, given that it is a substantial role to chair a university court. It does not involve just chairing. People might chair a university court five or six times a year, but they will have many other duties as the senior governor with overall responsibility for good governance. For example, they are responsible for the performance appraisal of the principal.

The time that a chair has to invest is probably a day a week. I think that there is therefore a particular case to be made for the remuneration of the chair as opposed to other members of court or of committees. However, as I said earlier, Mr Beattie, we will look to see whether we have the detail right in the bill.

**The Convener:** The institutions already have the power to remunerate a chair if they so wish. Why did you feel it is necessary to put on the face of the bill, or even via regulations, that the Government will decide on the matter?

**Angela Constance:** The recommendation came from von Prondzynski in the context of considering what was good governance, but I am intimating to the committee that I remain open-minded about it. The principle that remuneration should be available is important. Whether it needs to be in legislation and whether it is articulated in the right way is another matter.

**The Convener:** Okay. We will have questions from Chic Brodie.

**Chic Brodie:** On the issue of electing a chair, it is already the situation that the rector is elected by the staff, students and wider electorate. On the basis of the conversations that you say that you have had with principals, would it not be sensible, rather than looking at the personalities in the election of a chair, to look at the whole operation of the university court and to consider the rector—this would have to apply to all universities—as the chair of the court for policy matters while a co-chair would be appointed by the governing body?

In my experience, external chairmen—or chairpersons—have great difficulties unless they can take the governing body with them on decisions. Would it be appropriate to change the bill so that the rector is the appointed chair of the court and there is a co-chair to deal with operational issues and oversee the role of the committees? Has that been, or will it be, considered? You have said that you are open to suggestions, cabinet secretary.

**Angela Constance:** I think that I understand what Mr Brodie is driving at, but we must be clear: the role of rector is quite different in parts from the role of the senior governor/convener.

We are seeking to introduce elected chairs across all 18 institutions. The role exists just now where rectors are elected in the ancient universities, as those rectors have a right to chair court, whereas the rectors at the University of the Highlands and Islands and the University of Dundee do not have the same right.

As I have consistently indicated, the Government believes that there is value in having an elected chair in all institutions. I stress, however, that the role of rector is quite different from that of senior governor. A rector is ambassadorial and is of huge value in raising the sector's profile. They can represent the views of staff and students—at the University of Edinburgh and other ancients, rectors are elected just by students, although they can be a point of contact for staff and students. A rector can be elected for broader symbolic political reasons or to act more as a working rector.

We should not forget that senior governor is a very powerful position. The senior governor has overall responsibility for leadership and good governance of the court, and for ensuring—as I intimated—that members work together. The senior governor is a critical friend of the principal and the senior team without getting involved in operational matters, and they ensure that the institution is well connected to other networks. They will often have an ex officio role on policy and resources committees and will make a significant contribution in areas such as remuneration. As I said earlier, senior governors are involved in performance appraisals for principals. Rectors do not have a role in overseeing governance.

**Chic Brodie:** I am not suggesting for one minute that they do—

**Angela Constance:** I know you are not, but—

**Chic Brodie:** The rectors should cover policy and chair the court on matters of policy, and there should be a co-chair who is not elected by the governing body.

Can you give me an example of where the chairman of a large association has been elected and that has been successful?

**Angela Constance:** I do not believe that universities should necessarily be compared with businesses. They—

**Chic Brodie:** I said "association".

**Angela Constance:** Universities have many business-like considerations, but a university is an academic institution that is there for the good of its students. Universities are indeed a pillar of our economy and of wider society. Although there are some parallels with the world of business, I am not sure that a direct comparison is necessary.

**Chic Brodie:** I did not say that; I said "association".

**Angela Constance:** It is important to recognise, in accordance with the von Prondzynski review, that the senior governor/convener and chair of court is a hugely powerful and influential position. The Government believes that it should be an elected position in order to reflect every voice on campus and the wider view of university life.

**The Convener:** Do you have a question on this issue, Mr Pentland?

**John Pentland:** Yes.

**The Convener:** Quickly, please.

**John Pentland:** Cabinet secretary, you will appreciate that the committee is trying to understand the role of the rector as opposed to that of the appointed chair. Scottish Government officials were previously unable to explain that point when the committee was trying to understand what the role should be. Perhaps the committee should ask the rectors along to talk about that at an evidence session.

**The Convener:** Sorry, John, but I have to interrupt you there. Excuse me, cabinet secretary. The committee discussed the matter and took a view on who it wanted to come along as witnesses. We decided that collectively.

**John Pentland:** Yes, but without going into detail, convener, I am of the opinion that we might

have missed an opportunity to fully understand the view of the rectors.

Cabinet secretary, to go back to some of your answers to Chic Brodie, can you confirm that the relationship will come together and they will be able to deliver a service? Past rectors who have expressed concerns to the committee have said that they feel that their role might be diminished, and I have a concern—along with others, I am sure—that it will take quite a while for such a relationship to come together.

**Angela Constance:** I am on record in the press, in correspondence to the committee and in Parliament as saying that we have no intention of abolishing the role of rector and that I will seek to minimise or remove any impact on the traditional and valuable role of rector as it stands.

The first thing that we have to do, and we will have to do it in tandem, is the on-going work with all interested parties in the sector on the process of electing chairs. As part of that, we will consider the detail around rectors. There is, however, no desire to change the role of rector.

There are complexities to consider. Rectors in the ancients have a statutory right to chair court, and I have no desire to change that, but we need to look at how that function interacts with those of elected chairs across the sector. That is the sort of detail that we are in the midst of working out with all parties. As I have said, we are not abolishing rectors, and I wish to minimise or remove any unintended impact on their existing role.

**Liz Smith:** Cabinet secretary, you are on record as saying that you believe that diversity within the sector is one of the greatest assets of our universities. In relation to the point that we are just discussing and as a result of the bill, what might the governance model be in, for example, the Royal Conservatoire of Scotland, which is a small, highly specialist and very effective institution? At the committee's round-table meeting, the conservatoire made the point that it fears that some aspects of the bill will mean a single model of governance that does not suit that kind of institution. Could you comment on that?

**Angela Constance:** I am conscious that the sector is diverse. As Ms Smith says, the Royal Conservatoire of Scotland is a very small and specialist institution compare with a larger ancient university.

Yes, the bill seeks to introduce a level of consistency in some discrete areas of governance. How we balance that level of consistency in the context of a diverse sector is indeed subject to the on-going discussions that we are having about the process of electing a chair. It is not unreasonable to expect some level of consistency.

**Liz Smith:** The point that the conservatoire is making, along with other institutions, is that, under section 4, a situation could arise in which existing members of governing councils would, in effect, have to demit office to allow the new proposals to take shape. Given the expertise that they have, are you comfortable with that, particularly for a small institution?

11:15

**Angela Constance:** To be clear, the code states that the size of the university court is 25 members. My understanding is that that is not fixed; indeed, the chairs of court have begun to lay out some of their thoughts about how in the fullness of time they will review the code. University courts currently have 25 members, and section 4 looks to prescribe eight of those members: two trade unionists, two members of staff, two students and two alumni. That is eight out of 25. The majority of institutions probably already have four of those eight roles—

**Liz Smith:** Yes, but my point is that the full impact of section 4 will be that existing members have to come off the governing councils. Are you comfortable with that?

**Angela Constance:** Yes, but we have said that the bill will be implemented over a period of four years. We are not in the business of cack-handedly removing existing members.

**Liz Smith:** I go back to the original issue, which is that the Government is insisting on having specific categories of people involved in the governance. It does not matter which side of the debate one is on, that is the aspect that is causing concern. There is a particular concern for institutions such as the Glasgow School of Art, Scotland's Rural College and the Royal Conservatoire of Scotland, which are much smaller and require much more specialised input. The issue is whether one type of governance will meet the diversity of our institutions.

**Angela Constance:** Section 4 deals with eight members out of the 25 members in a university court, and the bill will be implemented over a period of time.

**George Adam:** On the back of those questions, I would like to ask about governing body representation. We have recently had a debate in the chamber on the issue and evidence has been given to the committee. One point that came through strongly from the NUS was that it feels that where it has representation currently, many of the decisions about remuneration and capital plans are made before its representatives get an opportunity to engage on those issues. How will opening up governance to more democratic representation and involving the NUS and trade

unions such as the UCU lead to better governance?

**Angela Constance:** I believe that members of staff, trade unionists and students are well capable of taking part and making a contribution to the big strategic decisions that a university governing body has to make. As with other parts of the bill, we are talking here about greater participation of a wider range of voices in the decision making that takes place in institutions. On the point about better governance, by definition and outcome, that broader and more inclusive approach that includes all the voices on the campus can be only a good thing that is positive in helping the sector to move forward.

**George Adam:** To give what is purely my personal view, one positive that I see from the bill is that a diverse group who have the interests of the institution that they are part of at heart will be involved. Some institutions are almost saying that trade union groups might not have those interests at heart, but I do not believe that that is the case. Personally, I believe that it is about collective responsibility and everybody working together to ensure that their institutions are the modern and inclusive institutions that we all want.

You said in your opening statement that you wanted a more modern and transparent form of governance. What is proposed might make the situation more difficult for universities to manage, but is not taking that next step a more modern way for us work and to show that our universities can make the leap into the 21st century?

**Angela Constance:** I do not see diversity and the inclusion of representatives of staff, trade unions and students as being counterproductive to collective responsibility. The Government commissioned a body of work that I am familiar with from my previous portfolio involvement in the working together review, led by Jim Mather, the former Minister for Enterprise, Energy and Tourism, and Grahame Smith of the Scottish Trades Union Congress. It looked at the value of social partnership and of including voices in the context of the world of work, as we understand it.

Part of that body of evidence looked at examples such as NHS Lothian, whose board has a director of employee relations, who is the most senior person in the trade union in NHS Lothian. That person obviously has a role and a responsibility to represent the interests of the union's members, but as director of employee relations he or she sits on the board of NHS Lothian and quite clearly has a responsibility for good governance and for the overall collegiality and collective responsibility of the board.

**George Adam:** Liz Smith mentioned the Royal Conservatoire of Scotland as an example of an institution that is small compared with the rest of the universities, as we all agree. The conservatoire does not have trade union representation on its board as such, so that is part of the difficulty for it if trade unions must be represented on boards. I do not know the inner workings of the Royal Conservatoire, but it seems to me that there might be a case for being more flexible about certain institutions that have a different make-up.

**Angela Constance:** That certainly sounds like an unusual situation, which we will examine closely. There are all sorts of differences and diversity from institution to institution; we do not demur from that fact, but we need to get the balance correct so that there is a level of consistency in some discrete areas of governance that we believe are fundamental, while recognising that the different institutions have different complexities in their make-up.

**The Convener:** I want to cover a couple of points. You said in response to George Adam's first question that one of the reasons for the bill was to have a wider range of voices on the governing bodies of higher education institutions, but I am sure that you accept that all of the governing bodies currently have staff representatives on them and approximately 70 per cent of governing bodies currently have student representatives. I just wonder how you would define that wider range of voices, given that all the bodies have staff representatives and 70 per cent of them currently have student representatives.

**Angela Constance:** As I said in an earlier answer to either Mr Adam or Ms Smith, the majority of institutions would already have four out of the eight places that the bill seeks to implement, so we are not saying that institutions have not made progress or are not halfway there or, in some cases, almost there. However, it is important that the rights of staff, students and trade unions should be reflected in the bill and in the work that flowed from the von Prondzynski review.

**The Convener:** You have made clear your desire also to have union representatives on the governing bodies and, again following on from Mr Adam's question, I want to ask about that. If a trade union or trade unions represent a relatively small number—less than half, perhaps, or a small minority—of staff, is it reasonable for the staff representative to be a trade union representative, or would it be more reasonable to have some other staff representative rather than somebody from a trade union?

**Angela Constance:** As it stands, the bill provides for both staff representation and trade union representation. We recognise that in different institutions a different proportion of the workforce will be unionised. We are talking about

two places for trade union members in a court of 25, representing both academic and non-academic staff.

**Liz Smith:** I have here a letter from a union representative at the Royal Conservatoire of Scotland, speaking on behalf of his members. He makes the point that one change that section 4 would make, by insisting on union representation on the board, is that other members of the board—who, I may say, are elected by staff—would no longer be on it. He points out that the expertise of those members is essential for the way in which the Royal Conservatoire operates. He is very clear that there is a very good relationship and that unions are very much involved in what goes on, and he makes the point that it would be preferable if there was not only one model of governance. The Royal Conservatoire's model is working and unions are fully involved in the process; indeed, the principal made that comment when he came to the round table. As we come to the stage 1 debate, will you consider having different options and models of governance?

**Angela Constance:** There will be broader consideration of all the details as we move towards the stage 1 debate and stage 2 proceedings. Liz Smith makes the point that there are shades of opinion among all stakeholders. I can point to shades of opinion among senior managers and principals. Similarly, there are shades of opinion among trade union representatives and students. The Government is working hard to bring as much of that at times diverse range of opinions together, in an effort to co-design things and reach a position of consensus on a range of issues.

As I said, the bill will not be passed in Parliament one day and then be implemented the following day; there is a lengthy period of transition.

**Mark Griffin:** Why does the Government believe that the size of academic boards is a matter for Government intervention?

**Angela Constance:** It flows from the recommendation in the von Prondzynski review, which was that academic boards should be no larger than 120 people. The review recommended that students should make up a substantial proportion of academic boards, and we considered 10 per cent to be a substantial and reasonable proportion. Other people may have views on whether 10 per cent is exactly the right figure.

**Mark Griffin:** The committee asked the Government before why students were included specifically—you mentioned the 10 per cent figure—whereas staff and trade unions were not. The Government said that the effects of having an inclusive and fair governing body would permeate throughout the institution and that therefore

"there is no need to stipulate that there must be union or alumni representation on the academic board".

Why was 10 per cent student representation specified, given that statement and the fact that alumni and staff were not included?

**Angela Constance:** The quote that Mark Griffin read out would be our current position regarding academic boards on which, largely, academics are represented, but on which we have opted to include 10 per cent student representation in line with von Prondzynski. We did not feel that it was necessary to stipulate that trade unions or alumni should be represented on the academic boards, given that the university court is the main governing body where everybody is represented and that the range of voices that are included in the university court will flow through into other areas of university life, and we have not changed our position on that. Students, trade unions, alumni and staff are represented on the university court, but our position is still that the academic board is for academics and students.

11:30

**Mark Griffin:** We have heard concerns about the fact that the provisions relating to governing bodies cover a diverse range of institutions and about academic boards, in particular the 120-member threshold. How do you respond to concerns about the threshold, given the highly diverse nature of the sector? I am thinking in particular about the University of Edinburgh.

**Angela Constance:** Most institutions have an academic board of around 120. There are large institutions that have much larger academic boards. I think that the number on the University of Edinburgh's board is bigger than the number of MPs in the House of Commons; it certainly has many more representatives than the Scottish Parliament.

The threshold flows from the von Prondzynski review, which received evidence on the size of academic boards and how, if a body was too large, it could lead to less-than-satisfactory arrangements. I cannot remember whether it was in the review's report or in evidence that the committee received, but concerns were expressed about boards being dysfunctional due to their size.

**Mark Griffin:** How will the changes that the bill proposes ensure that academic boards perform effectively and are representative in their decision making? Where are the deficiencies that we seek to address?

**Angela Constance:** The implementation of all aspects of good governance will be for universities

in the sector to pursue. Overall, the bill aims to set a framework and to make some changes in discrete areas of university governance. As I said, we will undertake with all stakeholders in the sector detailed work on how that approach is implemented, monitored and evaluated and how we reflect on progress that is made post the bill.

**The Convener:** When officials came before the committee and talked about the size of academic boards, they said:

"The figure of 120 comes from the review"—

that is the von Prondzynski review—

"which is the substantive evidence base that largely inspired all the provisions in the bill."

They also said:

"It would not have been arrived at willy-nilly; I imagine that it was subject to lots of cross-sectoral dialogue and that many opinions were taken."—[*Official Report*, *Education and Culture Committee*, 6 October 2015; c 54.]

I cannot find the figure in the von Prondzynski report. It might be in an annex or some other evidence—let us call it unspecified evidence. Will you give us some detail on how we got from what the von Prondzynski report said—as I say, I do not know what the evidence is because I could not find it—to the provision in the bill that there should be a maximum of 120?

**Angela Constance:** My understanding of the von Prondzynski report is that the recommendation was that

"Overall, academic boards should not normally have more than 120 members."

I can look to see whether that is in the body of the report, is in an annex or is, in fact, a recommendation, but perhaps Stephen White can cast some light on that just now.

**Stephen White:** I am certain that it is a recommendation. However, I do not think that the report contains a supporting rationale.

**The Convener:** That is what we are asking for.

**Stephen White:** The report, as published, does not feature all the workings for all the recommendations, but we can certainly take that up in detail and with the author.

**The Convener:** It is clear that the report did say that—I accept that—but I do not know why it said it. It is a statement without evidence. There may well be some evidence, but it would be helpful if we could find out what that is.

**Stephen White:** We can follow that up.

**The Convener:** Thank you.

**Liz Smith:** The von Prondzynski review also said that it heard unspecified evidence that

"points towards dysfunctionality where the membership of the board is too large."

Where is the evidence for that dysfunctionality?

**Angela Constance:** We will pursue that as well, convener.

**The Convener:** I am grateful for that.

I turn your attention to a section of the bill that, because of other matters, has not received much attention yet, although it relates to the important issue of academic freedom. I asked questions on that in the recent debate in the Parliament and when officials came before the committee. I want to cover some general and specific points on the matter. A range of evidence was submitted to us about the redefinition of academic freedom. Will you talk us through why you thought that that was necessary?

**Angela Constance:** It is fair to say that the adjustments to the current definition of academic freedom are modest. It is only right and proper that we acknowledge that this is not a huge or radical change. The modest adjustments are that, instead of institutions being required to "have regard to" academic freedom, they will have to "aim to uphold" academic freedom and the definition will include the specific freedom to develop and advance new ideas, whereas currently that is only implied.

**The Convener:** Given that we have just been speaking about the fact that much of the bill comes from the von Prondzynski review, I say again that, as far as I can see, the review did not highlight any particular problems with the current definition of academic freedom, which is set out in the 2005 act. I accept that it comes from the von Prondzynski review, but where is the evidence of a problem with the current definition that requires the change that is laid out in the bill?

**Angela Constance:** The Government is not coming from the premise of deficiency. In looking at the recommendations of the von Prondzynski review, we saw an opportunity to make modest adjustments or improvements to the definition of academic freedom. I appreciate that, again, there is a range of views about the value of those modest changes.

**The Convener:** I am interested in your comments on how modest the changes are. Given that they are so modest, are they required?

I will move on to a more specific question that was submitted to us, which is that the alteration to the definition of academic freedom might change the nature of some internal disputes within higher education institutions. The specific question comes from the Scottish Council of Jewish Communities submission to the committee, which was very detailed on this area of the bill. Last

week, I met representatives of SCoJeC to discuss their concerns about what might be called the imbalance of freedoms.

They were keen to point out that the higher education code of governance talks specifically about academic freedom for staff and lecturers but balances that with the rights of students and other members of staff in institutions, whereas the proposal in the bill includes no balancing rights. What is your view on the evidence from SCoJeC? I am sure that you have had an opportunity to look at it. Why is there no balancing of rights in the bill, when that is the position in the code of governance?

**Angela Constance:** We will look in detail at SCoJeC's concerns. Ministers have given you, convener, a commitment to meet to explain matters or to resolve concerns. I am alive to the issues that SCoJeC has raised. My official Stephen White has met SCoJeC, so it might help if he talked about the meeting.

**Stephen White:** I met Mr Ephraim Borowski and colleagues from SCoJeC, who talked me through their evidence, and I emailed the clerks about that. The main action point was on the question of balance that the convener has raised. I said that I would investigate the construction of the standing definition in the 2005 act and establish what consideration, if any, was given to the student side of the equation. We are going through that process. The code of governance has a broader role than one of setting the legal definition of academic freedom, but I want to establish why the 2005 act was drafted in the way that it was drafted and what the debate was at the time. I have undertaken to get back to colleagues in SCoJeC on that.

**The Convener:** That is welcome, but there will be a modest change to say that bodies "must ... uphold" academic freedom. Given that there have been a number of incidents around the country, which I will not describe in public session but which involved Jewish students in particular—I am sure that you are aware of those incidents, cabinet secretary—SCoJeC and others are concerned, and I share their concerns, that academic freedom has been used as a cover for actions against individual students.

Such things have happened under the current definition of academic freedom, and a move to say that bodies "must ... uphold" academic freedom might strengthen the hand of individuals who behave outwith the norms of what we expect from academic staff.

**Angela Constance:** I will give a careful response, given that we are in public session. It is clear that, whether the current definition or the modest proposed change to the definition applies, people are not excused from the requirement to operate within the law. There is a wide range of legislation on, for example, incitement and discrimination, and nothing in the current or proposed definitions excuses people from their obligations to comply with that legislation. I can ask Ailsa Heine to give you the legal perspective, if that would be helpful.

**The Convener:** That would be helpful. I completely accept what you said about the law, but there is an issue about strengthening the wording to include the word "uphold", which has led to concern about the risks that I think that we both understand.

**Angela Constance:** It is those concerns that we seek to allay.

**Ailsa Heine:** First, the strengthened provision will say "must aim to uphold", which is slightly weaker than "must uphold"—

**The Convener:** But it is a change from the current wording.

**Ailsa Heine:** I agree that it is a change but, as the cabinet secretary said, academic freedom is not unlimited and does not excuse people from their obligation to comply with other provisions of the law, whether that is the criminal law, defamation law, obscenity law or whatever. Academic freedom is not unlimited, and that will not change.

**The Convener:** I accept that. Thank you.

11:45

**Mary Scanlon:** As we all know, it is the small words here and there that make all the difference to the way in which legislation is understood and implemented. The Parliament has passed plenty of legislation that, when it was implemented, was certainly not what we understood it would be.

What new responsibilities would this "modest" change, as it is described, impose on governing bodies? I ask that because of the concern that Dame Jocelyn Bell Burnell raised that the bill could lead to a suppression of critical thought. Can you be precise about what responsibilities the bill will and will not impose on governing bodies?

**Angela Constance:** I do not think that anything in the bill, or anything in and around the modest adjustments to academic freedom in it, will suppress thought.

Regarding new responsibilities related to academic freedom, institutions already have to uphold existing responsibilities, so it would be disingenuous of me to suggest that I could produce a list of new responsibilities—or any onerous new responsibilities—that the legislation will place on institutions. It is part of their day-to-

day business to refine what they do in response to their understanding of academic freedom. I stress that the changes are modest and, I think, quite subtle.

**Mary Scanlon:** On another point, the University of St Andrews has asked how the wording "must aim to uphold" would accord with separate statutory duties that are placed on universities. For example, section 26(1) of the Counter-Terrorism and Security Act 2015 imposes a statutory duty on higher education bodies to

"have due regard to the need to prevent people from being drawn into terrorism."

Have you looked at the proposed legislation in light of legislation that is already in place, and are they joined together?

**Angela Constance:** Yes, but I will ask Ailsa Heine to respond on specific points about counter-terrorism legislation and how that coexists with the definition of academic freedom. If there are outstanding issues on that detailed area, we will get back to the committee.

**Ailsa Heine:** I will attempt to answer the question. The section that is referred to in the 2015 act applies to specified bodies, and my understanding is that it does not specify any Scottish bodies at the moment. However, Scottish bodies can be added to the list, so it may apply in the future.

Specific provision is made for English universities in section 31 of that act, under which, in carrying out their duty to prevent people being drawn into terrorism, they must

"have ... regard to the importance of academic freedom".

So there is specific provision already in that act that balances the two duties.

At the moment, my understanding is that the act does not apply to Scottish universities, as none of them is listed as a specified authority that is subject to the duty. If they were to be listed, some provision on academic freedom would probably have to be made that was similar to the one that applies to the English universities, because that act makes specific reference to the definition of academic freedom as it applies in England.

**Mary Scanlon:** Given that the University of St Andrews has raised the issue, I ask the bill team whether they might like to discuss it with St Andrews prior to the bill going forward.

**Angela Constance:** Of course.

**Liz Smith:** I have one question, cabinet secretary. The bill says that there will be

"freedom within the law to ... develop and advance new ideas or innovative proposals".

Is there something wrong in the present structure such that universities do not have new ideas and innovative proposals?

**Angela Constance:** No, but I refer to my earlier answer. They are modest changes, and people will be—

**Liz Smith:** Why do we need them?

**Angela Constance:** That will be a point that people are very free to debate.

**Mark Griffin:** I have a couple of questions on the financial memorandum, which have been raised by the Finance Committee. Standing orders require the Government to set out

"the best estimates of the administrative, compliance and other costs to which the provisions of the Bill would give rise".

Why is there nothing in the financial memorandum about the estimated costs to higher education institutes of amending their governing instruments?

**Angela Constance:** That is because it is part of the core business of a university and its court to amend existing instruments and arrangements. The committee will be familiar with the process in and around the Privy Council whereby universities make their proposals through the Scottish universities committee. The views of the First Minister, the Lord Advocate and the Lord President are consulted before matters involving change to articles go to the Privy Council. I say that by way of demonstrating that universities do that sort of work all the time. I do not anticipate significant new costs related to what Mr Griffin referred to in the bill.

**Mark Griffin:** I realise that universities may do that on a regular basis, but that is on the basis of decisions that they take. Under the bill, they would incur those costs as a result of action taken by the Government. The Finance Committee's report asked why the costs have not been included in the financial memorandum given that they would be incurred as a result of a Government decision.

**Angela Constance:** To add to what I have already said, in response to the issues that the Finance Committee raised, we have said that we will consider providing an updated financial memorandum at stage 2. We are of course looking at the detail of the Finance Committee's constructive comments, but that does not change our current view that we do not see substantial costs arising as a result of the bill. We will look at the detail that the Finance Committee has submitted to the Government and, if we need to refine our thinking or the information in the financial memorandum, we certainly will.

**Mark Griffin:** I take on board your comments that you will look to refine the financial memorandum.

Another area of concern for the Finance Committee was the discrepancy in the evidence that it received from the Government and from higher education institutions and Universities Scotland concerning the financial costs of recruiting a chair of a governing body. The discrepancy related to the estimates of the time commitment that is required by university chairs and how that would impact on the costs. I would be grateful if the cabinet secretary would again commit to looking at the evidence and including that in any review of the financial memorandum.

**Angela Constance:** I have said that we will refine the financial memorandum at stage 2 if required.

Understandably, where there are differences of opinion with regard to the impact of the bill, that will lead to differences of opinion about the financial repercussions. In that spirit of openness and collegiality, we are looking at all the detail to ensure that our position reflects the reality on the ground.

**The Convener:** On behalf of the committee, I thank the cabinet secretary and her officials for coming along to give evidence on the bill. I say for everybody's information that we intend to publish our stage 1 report on the bill towards the end of the year. I am sure that that will be an exciting discussion for us all.

11:54

*Meeting suspended.*

11:57

*On resuming—*

# Subordinate Legislation

## Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (SSI 2015/330)

**The Convener:** Our next item is evidence on subordinate legislation, as listed on the agenda. I welcome Diane Machin from Disclosure Scotland and Ailsa Heine from the Scottish Government. I invite Diane Machin to make brief opening remarks.

**Diane Machin (Disclosure Scotland):** Good morning—only just. Thank you for inviting me and my colleague from the Scottish Government legal directorate to attend the meeting to answer the committee's questions about the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015, which amends the system of higher-level disclosures. With your agreement, I will provide you with a brief background to higher-level disclosures and why the amendments to the disclosure system were needed.

The phrase "higher-level disclosure" is used to describe the overall system that allows for additional scrutiny of a person's criminal convictions. It includes the protection of vulnerable groups scheme—known as the PVG scheme—as well as enhanced disclosures and standard disclosures. Those measures are used when an individual wants to work with vulnerable groups, such as in a nursery, in the medical profession or in a school, or to work in a sensitive area, such as in providing financial advice. The changes that were made on 10 September affect only the regime of higher-level disclosure and have no impact on basic disclosures.

In June 2014, the UK Supreme Court found that the system of higher-level disclosures as it operated in England and Wales breached a person's rights under article 8 of the European convention on human rights. The court fully accepted the need for additional scrutiny of a person's background if they wanted to work with vulnerable groups or in other sensitive roles, but it held that the automatic indiscriminate requirement to disclose all spent convictions was not proportionate, as no assessment of the relevance of the information to the need for the disclosure was undertaken. The court suggested that a proportionate system of disclosure should take into account factors such as the age of the conviction, the nature of the offence, the age of the offender and the relevance of the conviction to the role that was sought.

12:00

The amended system of higher-level disclosure takes account of those factors. It restricts the requirement for disclosure so that not all spent convictions require to be routinely disclosed. Under the amended system, certain spent convictions become protected convictions. Protected convictions, along with spent cautions, are not required to be disclosed by an individual, nor are they disclosed by the state on a higher-level certificate. Such convictions are deemed to be of a minor nature for which disclosure once the conviction is spent would be disproportionate.

To strike the right balance between protecting privacy and safeguarding, the remedial order contains a list of prescribed offences that are deemed to be so serious that they must always be disclosed, even when spent. Murder is not included on that list because a conviction for murder can never become spent and so will always be subject to disclosure.

The order specifies a further list of convictions that are eligible for disclosure on higher-level disclosures if prescribed rules are satisfied. The rules cover pertinent factors that determine whether disclosure should take place, such as the length of time since conviction, the age of the offender at the time of conviction and the sentence received. Those rules are clear cut and set out in statute. There is no discretion for officials.

Ministers intend the focus to remain on enabling a system of robust disclosure checking for roles that involve access to vulnerable groups. They recognise that the safeguarding purpose must be balanced with the appropriate protection of rights to privacy and with permitting ex-offenders to move on from a past criminal background. The amended system of higher-level disclosure that the remedial order brought into effect strikes that balance. We are happy to answer any questions that the committee has.

**Mary Scanlon:** I was surprised to read that it is not possible for an individual to obtain their own disclosure certificate in advance of applying for employment or volunteering. Does anything in the order make that easier? It might discourage many people from volunteering if they thought that people would know about convictions from 10 or 20 years ago. Does anything enable an individual to obtain their own disclosure information?

**Diane Machin:** The PVG scheme, under which disclosures are sought, is a scheme for employers to seek disclosures. No rules in that scheme allow an individual to apply for their own disclosure. If they did that, we would be disclosing to them information that they already knew.

**Mary Scanlon:** However, given the changes, people might not know their position. A conviction might be from so long ago that they are eligible to apply to do volunteering work. It could be embarrassing for an individual that the only way in which they can find out whether they have a clean disclosure is for an employer to find out for them. It might be helpful for an individual to be able to apply. Has that been discussed in the past or might you consider adding it to the legislation?

**Ailsa Heine:** Perhaps I can add to what has been said to explain the situation. There are two systems of disclosure. The first is part of the Rehabilitation of Offenders Act 1974, which is about self-disclosure and requires people to disclose their unspent convictions and, in certain circumstances, their spent convictions. Below that sits the disclosure legislation—the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007—which was put in place to verify the information that people give under the 1974 act.

Under the 1974 act, a person is expected to know what convictions they have and to disclose those to an employer. That has been slightly modified by the order, in that people are not required to disclose an offence that is on the rules list, which will be disclosed only for 15 years, until the disclosure is given to the employer. For all other convictions, the 1974 act requires people to self-disclose and to know their own convictions.

As Diane Machin said, the system is not about telling people what their convictions are—they have to know that already—but about giving employers the opportunity to verify information and to seek a disclosure of that information from an official source. The process is not about helping people to access their own information.

**Mary Scanlon:** I understand all that, but perhaps you do not understand the point that I am making. If I were an ex-criminal, I might be too embarrassed to apply for volunteering or other jobs, because that would mean that other people might know something about me that I did not want them to know. It is difficult to get volunteers across Scotland. I am looking at this from the individual's point of view.

We have a paper from an organisation called Unlock, which represents people with convictions. I was slightly surprised that the periods in England and Wales for a conviction to become protected are 11 years for adults and five and a half years for people under 18. I understand that in Scotland, instead of 11 years, the period will be 15 years for adults and, instead of five and a half years for under-18s, it will be seven and a half years. Unlock says that it is unclear how those disclosure periods have been arrived at. Will you explain or clarify that?

**Diane Machin:** The disclosure periods of 15 and seven and a half years were derived within the context of the current rehabilitation periods under the 1974 act and the period for which Police Scotland retains criminal history information on the criminal history system. The periods aim to strike an appropriate balance between the rights of individuals and the rights of the people who those individuals seek to work with.

Under the 1974 act, the longest period that must pass before a person can become rehabilitated is 10 years. There is therefore no point in selecting a disclosure period of 10 years or less, because that would render the provision that relates to spent convictions for offences that are on the rules list meaningless. We had to select a period that was more than 10 years.

We then looked at the criminal history system weeding rules. Police Scotland applies a 30-70 rule, which requires a conviction to have been on a person's criminal record for 30 years and requires the person to have attained 70 years of age before the conviction will be weeded from their criminal record. In recognising that disclosure under the Protection of Vulnerable Groups (Scotland) Act 2007 and the Police Act 1997 is for the more limited purpose of employment, we opted for disclosure periods of 15 years for adults and seven and a half years for young people.

**Mary Scanlon:** I understand that. The only thing that I do not understand is why there is a difference between Scotland and England.

**Diane Machin:** We recognise that we have opted for a different period from that specified in England and Wales, but there are a number of differences between the scheme in Scotland and the one in England and Wales. In particular, we in Scotland have taken the approach that, when someone has multiple convictions on their record, each conviction will be considered on its own merits, and the fact that a person has a conviction does not attach to other convictions. In England and Wales, if a person has more than one conviction, everything is disclosed, regardless of how old those convictions are.

Likewise, in England and Wales, if a person has any conviction that attracts a prison sentence, everything on the record will be disclosed. In Scotland, we have not adopted that approach. If someone has a conviction that is more than 15 years old, it is considered to be spent, even if it attracted a period of imprisonment—it would have to have been a short period—and it will not be disclosed if it is on the rules list. There are other differences between Scotland and England and Wales.

**Ailsa Heine:** As well as the difference in the disclosure periods, there is a difference between the rehabilitation periods in Scotland and those in England and Wales. It is not the case that, in England and Wales, the rehabilitation period is 10 years and only one and a half years have been added on, as the maximum rehabilitation period there is less than 10 years. Those differences derive from policy choices made by the UK Government and the Scottish Government about what they think is an appropriate rehabilitation period. In England, a conviction is disclosed for some time after it is spent, because of the disclosure period of 11 years.

**Chic Brodie:** Good afternoon. I am not sure whether this is relevant to the legal aspects of the order, but disclosure depends on databases, and I could not find any mention of how we track—and can therefore disclose—international convictions of people who have come to live here. How are those captured? I know that the suggestion should be that the convictions are on the database, but I do not find anything in the remedial order that mentions how we cope with international convictions.

**Diane Machin:** The primary sources of information for criminal record checks are the Scottish criminal history system and the police national computer, which covers the whole UK. Disclosure Scotland provides disclosures for people with an address in Scotland. We can access information on overseas convictions via police forces.

**Ailsa Heine:** There are ways of accessing information about convictions abroad. Sometimes that information is added to the police databases that are used—particularly the police national computer. Regulations specify which databases Disclosure Scotland can use to access that information.

Some foreign convictions are added to those databases; otherwise, there are possibilities to make requests to other countries. In general, the information is based on those databases.

**Chic Brodie:** And we hope that they are right.

**The Convener:** I presume that there are differences between a request that needs to be made to another European Union country and a request to a country that is outwith the EU.

**Ailsa Heine:** I am aware of such arrangements within the EU.

**The Convener:** If a national of another European Union country came to Scotland to live and work, would the disclosure process be relatively straightforward?

**Ailsa Heine:** The central authority for the EU system is the police authority in England and Wales, so Disclosure Scotland would have to liaise with it.

**The Convener:** There is a process for people from the EU.

**Ailsa Heine:** Yes—there is a process.

**The Convener:** If somebody came from outwith the EU, a direct request would have to be made to the country that they came from.

**Ailsa Heine:** I am not sure. In those circumstances, we would not make a direct request for the disclosure. The way in which the legislation is set up means that we can access only the information—

**The Convener:** Who asks for the information, then?

**Ailsa Heine:** Nobody asks for foreign conviction information.

**The Convener:** Let me just go through this. If somebody who is resident in Scotland but who previously resided in a country that is outwith the EU applies for a job that requires a disclosure process to be undertaken, how do you get the information? Are you saying that you do not get the information?

**Ailsa Heine:** Disclosure Scotland does not request that information. It is not part of the information that is required to be on the certificate.

**The Convener:** I want to be absolutely clear that we are not making a mistake here. If somebody comes from a non-EU country—perhaps a country in eastern Europe, the United States, Canada, Australia or New Zealand—and they live and work here and apply for a job that falls under one of the categories where, for a Scotland-born resident, an employer would ask for a disclosure check, does that person not get the job or is there no check?

**Ailsa Heine:** The employer can request a check from Disclosure Scotland. The only information that can be provided on the certificate, under the legislation, is information that appears on the UK databases.

**The Convener:** I understand that. I am trying to ascertain whether any other action is taken to figure out whether an individual is a risk to members of the community in Scotland.

12:15

**Ailsa Heine:** That would be a matter for employers to consider.

**The Convener:** How would an employer find out whether somebody from Belarus had a conviction for serious sexual assault?

**Ailsa Heine:** If the employer is aware that a person was resident in another country for a long period, it can request police disclosure from that country.

**Chic Brodie:** How would an employer be aware of that?

**The Convener:** Hold on a second.

**Ailsa Heine:** Under the 1974 act, the person is obliged to disclose their conviction.

**The Convener:** We are clear that there is no official process by which checks would be made for someone from outwith the EU in the way that they are for someone from within the EU and in particular for someone from the UK. It would be up to employers to write to—well, who would they write to in Belarus?

**Ailsa Heine:** That would be for the applicant to say. The employer can ask the job applicant to provide a disclosure from the police authority, or however it is done in the country involved.

**The Convener:** The employer would ask the applicant to provide a similar sort of disclosure statement from their country.

**Ailsa Heine:** It could do. The information is not accessible—

**The Convener:** I understand that it is not accessible; I am just seeking clarification. If the employer did that and the individual did not supply the disclosure, or if the employer did not do that, would the individual be barred from employment or would they be employed anyway? What does the law say—could an employer decide not to employ someone on the basis that it did not have the information?

**Ailsa Heine:** That would be up to the employer.

**The Convener:** I am asking what the legal position is. What is the legal position if somebody fails to provide the information that an employer requests about whether they have relevant convictions that should be disclosed from a country outside the EU?

**Ailsa Heine:** Under the 1974 act, the person is required to disclose that information.

**The Convener:** I understand that.

**Ailsa Heine:** If the individual fails to do that and the employer employs them, the employer could have redress against them if it became aware of the conviction at a later date. [*Interruption*.]

**The Convener:** I will bring in Chic Brodie in a second.

We are not talking about upsetting the employer.

**Ailsa Heine:** No.

**The Convener:** Surely the issue is the safety of the community that the person works with, whether that is children, vulnerable adults or whoever it happens to be. That is what we are talking about.

Let us say that I have come to this country from Canada and that, when I am asked to fill in the form, I say nothing on it and sign it. Who is liable if I go on to carry out an offence against a child, a vulnerable adult or someone else in the employer's premises? Is the employer liable? Has the employer done its job by accepting the form? What is the position?

**Ailsa Heine:** Under the 1974 act, the person remains liable for not having disclosed their offences to the employer. That is a criminal offence, so they would be dealt with under criminal law.

**The Convener:** I understand that.

**Chic Brodie:** You just asked the question that I wanted to ask. There will be offenders from elsewhere—in some cases they will be serious offenders—who will not meet the requirements that are stipulated. It is very unlikely that they will tell the employer about their conviction. The relevant question is whether the employer will have liability under what you are trying to do with the remedial order. Surely they will.

**Ailsa Heine:** The remedial order will not affect the existing position on foreign convictions, which has existed since the Police Act 1997 was passed.

**Chic Brodie:** Do you think that it should?

**Ailsa Heine:** In practical terms would be difficult for Disclosure Scotland or whatever body to access conviction information for the whole world. There are reciprocal provisions within the EU so that convictions can be added to databases. Also, if people are, similarly to how the PVG scheme works in Scotland, barred from working with children in other countries, Disclosure Scotland is able to make requests for that information for its consideration. Systems are evolving in the EU to try that.

**Chic Brodie:** We will go round and round if we go on this way. The convener made the point that when an EU country has no records, we face circumstances in which someone might not meet their disclosure requirements, and so we are vulnerable, are we not?

**Ailsa Heine:** We are to an extent vulnerable in that way. That is an existing problem.

**Chic Brodie:** Is it not a change?

**Ailsa Heine:** It is not a change.

**The Convener:** We accept that, and I am sure that it is something that the committee will discuss later.

I want to go back to the order. Am I correct in understanding that an individual can, prior to the 15-year period elapsing, apply to a sheriff for dispensation—if that is the right word—to have conviction information removed, so that they do not have to disclose it?

**Diane Machin:** That is correct for an offence that is on the list of offences that are disclosed subject to rules.

**The Convener:** I am talking about schedule 8B.

**Diane Machin:** Yes.

**The Convener:** When can the offender apply before the 15 years are up? Can they do so at any time or just close to the 15 years? Can they do it if it is only seven years since the offence—or 10 years or 12 years or 14.5 years? Is there a point before which they cannot apply to have the conviction removed?

**Diane Machin:** No.

**The Convener:** The offender can apply at any time.

**Diane Machin:** If someone receives a certificate on which there is a spent conviction for an offence on the list in schedule 8B, they can apply to the sheriff to have that removed, regardless of whether it is 11 or 14 years old.

**The Convener:** So there is no restriction on that, and the offender can apply to a sheriff at any point within that 15-year period.

**Diane Machin:** That is correct, but they must be able to show a good reason why that information should be removed.

**The Convener:** Okay. I understand that. How did you come up with the lists in schedules 8A and 8B? Where and how is the line drawn? I looked in the notes for examples of serious offences that will always be disclosed: they include rape. Schedule 8A's list includes the statutory offence of rape, assault with intent to rape or ravish, and bestiality. What about other serious sexual assaults and offences? I am asking about sexual offences as an example. Where is the line drawn that puts one offence in schedule 8A and another in schedule 8B?

**Diane Machin:** Almost all sexual offences are covered by schedule 8A.

**The Convener:** Almost all?

**Diane Machin:** Yes, because as well as the common-law offences that are specified at the beginning of schedule 8A—assaults with intent to rape or ravish and so on—there are also statutory

offences, which are covered in paragraph 37 of the schedule. I do not know whether you have the order in front of you, but in schedule 8A, under the heading of "Sexual Offences", it says:

"A sexual offence within the meaning given by section 210A(10) of the Criminal Procedure (Scotland) Act 1995",

which is an extensive list of sexual offences. All of those specified sexual offences are covered by paragraph 37 of schedule 8A, with the exception of sexual offences that involve two older children, which we have included in the rules list to allow for scenarios in which there may, for example, be two consenting 17-year-olds.

**The Convener:** I understand that provision, which seems to be reasonable. However, I want to understand the difference between the extensive list that you have mentioned, which would fall under schedule 8A, and the list in schedule 8B, which includes, for example, at point 18, the offence of "public indecency". Public indecency covers quite a wide spectrum of activity.

**Diane Machin:** Yes. In considering the offence lists, we looked at a range of criteria that would determine what would go on which list. We considered, for example, whether an offence resulted in serious harm, or represented a significant breach of trust, or dishonesty.

Many offences cover a broad spectrum of behaviour; public indecency is one. We have taken the view that public indecency offences tend predominantly to be offences at the lower end of the spectrum of seriousness, and that more serious sexual offences tend to be covered under charges of lewd and libidinous practices, which are covered in schedule 8A.

We had to draw a line somewhere. In doing so, we have recognised that we have to take account of the sentence that was imposed by the court when it convicted the person. For any of the offences on either list, the severity of the sentence is a reflection of the seriousness of the offence. If the nature of the specific act for which a person had been convicted of a public indecency offence was very serious, the person would have received a serious sentence that would remove them from the realm of the conviction's ever becoming spent. Even though the offence of public indecency is on the list in schedule 8B, a conviction for that might always be disclosed if the severity of the sentence determines that that should be the case.

**The Convener:** Would the same argument apply to other offences in schedule 8B—things such as fraud and embezzlement?

**Diane Machin:** Yes.

**The Convener:** Would the same logic apply if the job that was being applied for was in the financial sector?

**Diane Machin:** Yes. The offence of extortion is on schedule 8A and fraud is on schedule 8B. Again, that was because fraud can cover an extremely wide range of offending behaviour from very small to massive frauds. There is an example in the media today of somebody who was convicted of an £8 million fraud for which a sentence of four and a half years was imposed. That conviction will always be disclosed because the sentence determines that it will never be spent.

**The Convener:** As nobody has any other questions, I thank you for attending this morning. I am sure that members will have a number of issues that they want to raise. Given the evidence that we have just received, do members wish to have a further discussion or to write to the Scottish Government with questions?

**Mary Scanlon:** My understanding is that there will be another opportunity to look at the issue in January.

**The Convener:** Yes. We will be dealing with the order in the normal fashion, probably early in the new year. I am asking members, given what we have heard today and what we have received in writing, whether we wish to write to the Scottish Government or take any other action that we feel is appropriate to find out further information.

**Chic Brodie:** There was the concern that we discussed regarding international convictions. I think that it might be as well to highlight to the Government the fact that we questioned the circumstances. It may have to go back to Police Scotland or what have you, but I think that it is worth asking the question.

**Gordon MacDonald:** I agree with Chic.

**Mary Scanlon:** I appreciate that the legislation is for employers who are deciding whom to recruit. However, as we have the opportunity, can we ask the Government whether any consideration has been given to volunteers and employees having access to what is on their records?

**The Convener:** Okay. I suggest that the clerks draft a letter to the Scottish Government and bring it to the committee for us to discuss in private, if members agree to that. We can decide whether to amend the letter and then send it. Do members agree?

**Members** *indicated agreement.*

**The Convener:** Once again, I thank the witnesses for coming this morning.

## Education (Scotland) Bill

12:29

**The Convener:** The next item is consideration of a motion on the order of consideration of the Education (Scotland) Bill at stage 2.

I move,

That the Education and Culture Committee considers the Education (Scotland) Bill at Stage 2 in the following order: sections 5 to 17, the schedule, sections 1 to 4, sections 18 to 28 and the long title.

*Motion agreed to.*

**The Convener:** The committee has agreed to hold the item in private, so I now close the meeting to the public.

12:29

*Meeting continued in private until 13:06.*

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