OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 27 September 2016

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 27 September 2016

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DELEGATED POWERS AND LAW REFORM COMMITTEE

6th Meeting 2016, Session 5

CONVENER

*John Scott (Ayr) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Rachael Hamilton (South Scotland) (Con)
*Monica Lennon (Central Scotland) (Lab)
David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

George Adam (Paisley) (SNP) (Committee Substitute)
Afson Barekat (Scottish Government)
Leia Fitzgerald (Scottish Government)
John Paterson (Scottish Government)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 27 September 2016

[The Convener opened the meeting at 10:00]

Interests

The Convener (John Scott): Good morning and welcome to the sixth meeting in this parliamentary session of the Delegated Powers and Law Reform Committee. I invite members to turn off their mobile phones. We have received apologies from David Torrance, who is unable to attend the meeting, and I welcome George Adam to the committee as his substitute. In accordance with section 3 of the code of conduct, I invite Mr Adam to declare any relevant interests.

George Adam (Paisley) (SNP): I have no relevant interests, convener, but I refer members to the interests that I have declared on the Parliament's website.

The Convener: Thanks very much.

Decision on Taking Business in Private

10:01

The Convener: Item 2 is a decision on taking business in private. Do members agree to take in private item 7, which is our discussion of the evidence that the committee is about to hear from Scottish Government officials on the Education (Student Loans) (Scotland) Amendment Regulations 2016?

Members *indicated agreement.*

Education (Student Loans) (Scotland) Amendment Regulations 2016 (SSI 2016/261)

10:01

The Convener: Item 3 is consideration of the Education (Student Loans) (Scotland) Amendment Regulations 2016. I welcome to the committee John Paterson, divisional solicitor, and Afson Barekat, solicitor, food, children, education, health and social care, Scottish Government legal directorate; and Leia Fitzgerald, policy manager, student support and participation team, directorate for advanced learning and science, Scottish Government. They are here to answer our questions on the amendment regulations, and I thank them for taking the time to come to the committee and—I hope—provide us with the information that we are seeking.

I will ask the first question. Can you explain to the committee the chronology of the events that have led you to introduce these regulations?

Afson Barekat (Scottish Government): The regulations have their beginning in a letter that we received from the Equality and Human Rights Commission in November 2014, which asked whether the Scottish Government had considered its policy in this area, particularly in light of the Equality Act 2010 and the public sector equality duty. On the back of that letter, policy colleagues undertook a policy review, which began with an equality impact assessment. Leia Fitzgerald might be able to say some more about the timescales for that assessment.

Leia Fitzgerald (Scottish Government): The first part of the review was the equality impact assessment, from which we took a number of options that we put to ministers. While our review was on-going, we were notified of a judicial review, which, for part of the review process, ran in parallel with our own review. We came up with recommendations for ministers, but the judicial review affected the timing of the public announcement of our review. However, our review concluded at the end of 2015, and the judicial review was carried out in May 2016.

The Convener: Would you like to say something about the Court of Session's judgment or ruling?

John Paterson (Scottish Government): I might be better placed to answer that question.

The judgment relates to a particular case of a person over 55 who was seeking a maintenance loan. The finding of the court in that judgment is that the regulations as they stand are not compatible with the European convention on human rights in so far as they set a cut-off date—an age limit of 55. We have considered that judgment and accept the finding; that said, there are some aspects of the reasoning in the judgment in relation to which we reserve our position. An example of that might be helpful. The test to be applied in this type of case was recently considered by the Supreme Court. Two of the justices felt that one test should be applied, two that another test should be applied, and the final justice did not express a view on which test. It is an aspect of the law that, it is fair to say, is still open to debate, given that the Supreme Court itself has not definitively ruled on it.

The Convener: However, the judgment stands because the Scottish Government has chosen not to challenge it, so we are where we are.

John Paterson: Absolutely.

The Convener: We move forward from that position. That is very helpful as a starting point.

Monica Lennon (Central Scotland) (Lab): As I understand it, these regulations are subject to the negative procedure and are made under powers conferred by the Education (Scotland) Act 1980. It is in your written response to the legal adviser's questions that the regulations are not a direct response to the court's judgment in the case of Elizabeth Hunter v The Student Awards Agency for Scotland and the Scottish ministers, but the existence of that judgment gives rise to a need for remedial action to address the issue of incompatibility with the ECHR that has been identified. Accordingly, was any consideration given to using the remedial order process under the Convention Rights Compliance (Scotland) Act 2001?

John Paterson: It would always be the Scottish Government's practice to use the legislation that is appropriate to a particular subject matter where that is possible and to rely on a convention rights compliance order only where that is necessary. In the circumstances here, we were able within the time limits to make legislation under the Education (Scotland) Act 1980; that is preferable to using the procedure under the Convention Rights Compliance (Scotland) Act 2001. Given that we had the power to make the necessary changes by using the 1980 act, we did not give specific consideration to using a convention rights compliance order, because our first consideration would always be to use the legislation that is designed to deal with a particular subject policy area—in this case, the 1980 act. Does that make sense?

Monica Lennon: To clarify, was using a convention rights compliance order considered?

John Paterson: That would be a second stage of consideration if the 1980 act did not allow us to

make legislation within the necessary timeframe. It is fair to say that it was considered as a back-up in the event that the court had not given us time to make an order; in that case, we would have had to use a convention rights compliance order using the urgent procedure, but that was not necessary. Initial consideration was given to it, but not detailed consideration, because we did not get to a stage at which it was something that we were likely to have to do.

The Convener: So it is still an option that is open to you.

John Paterson: Yes.

Monica Lennon: In your first response, you said that it was not necessary. Could you expand on that?

John Paterson: Of course. When approaching any piece of secondary legislation, we consider the powers that we have. Depending on the particular policy that is to be delivered, there might be more than one option in terms of the powers open to the Scottish ministers. In this case, one option was to make regulations under the Education (Scotland) Act 1980, which is what we have done, and another option was to use a convention rights compliance order. In the early consideration of such a decision, we would consider the advantages and disadvantages of each approach. As well as whether we have legislation that is open to us in a particular subject area, we would consider issues such as how long it would take for the process to be completed and whether there are any likely barriers or risks to one approach or the other.

As I said before, the first step would usually be to find out whether there was a legislative option within the policy area—that is, whether we could use the act that relates to the particular policy area. Usually, it would only be in circumstances in which that was not the case that we would be in the territory of considering another approach. For example, with regard to European law, if we did not have something in our domestic legislation that related to, say, food, we would use the European Communities Act 1972 to make the legislation, because it gives us a general power to make legislation in that area. Likewise here, where we are talking about human rights, if we concluded that we did not have a suitable power in the Education (Scotland) Act 1980, we would have looked more closely at using the Convention Rights Compliance (Scotland) Act 2001 as a vehicle for making the necessary legislation.

The Convener: That leads nicely to the next question. The judgment indicates that decisions about how the incompatibility that is identified ought to be corrected must be left to the Scottish Parliament, to be guided by the Scottish ministers. Can you explain why it is considered that bringing forward regulations that are subject to the negative procedure affords the Parliament sufficient opportunity to be fully involved in the correction of the defect, as required by the court? Why was the Parliament not consulted in advance of these regulations being laid, given the existence of the judgment? I do not have the judgment in front of me, but it is quite specific that the Government should deal with the matter through Parliament. However, of all the instruments that are available, the negative instrument is the one that is least likely to involve Parliament.

10:15

John Paterson: Our intended approach was disclosed to the court, and the court made no adverse comments in relation to it. The choice of procedure was made some time ago when the relevant section of the Education (Scotland) Act 1980 was enacted. The procedure for that provision was set out at that point. We have alighted not on a particular procedure but on a particular power for ministers to make statutory provision, and it so happens that the particular power in section 73F of the 1980 act is subject to the negative procedure.

The Convener: Thank you very much.

Stuart McMillan (Greenock and Inverclyde) (SNP): Good morning, panel. When a measure has a capacity to interfere with convention rights, it must be established that it pursues a legitimate aim in the public interest. What legitimate aims do the regulations pursue?

John Paterson: The equality impact assessment states:

> "The aim of this policy is part of a wider policy to prioritise support, in the form of tuition fee grants, bursaries and living-cost loans, for students entering the labour market, and ensuring that students taking out a loan have a reasonable chance to repay some or all of that loan prior to retirement."

That is the legitimate aim in this case.

Stuart McMillan: Paragraphs 23 to 26 of the Government's written response to the legal adviser's questions set out the "objective basis" for choosing an age limit of 60. Would you expand on those paragraphs? Why was the age of 60, over any other age considered, chosen to strike a proportionate balance between the various interests involved?

John Paterson: I will pass that question to my colleague Leia Fitzgerald in a moment. From a legal perspective, the case law is clear that bright-line rules, such as an age limit of 80 or 40, are legitimate and can be justified. In that context, it is recognised that the Government has to set a limit at some point when establishing systems.

Although, on the face of it, it might appear that somebody who is 60 can obtain a maintenance loan and somebody who is 61 cannot—and maybe there is only a short time period between their birthdays—that approach has been afforded legitimacy by the courts. With that preliminary comment, I will pass the question to Leia.

Leia Fitzgerald: When we undertook the review, we looked at a number of options including keeping the age cap at 55 or increasing it, and we looked at the evidence. Student loans are paid back only when the person is in employment and, to have a reasonable chance of the loan being paid back, we have to be satisfied that people will be in employment for a period of time. If we look at the labour market statistics, for example, we see that only 8.2 per cent of people over the age of 65 are in employment, but 68.6 per cent of people in the age bracket below that—people aged 50 to 64—are in employment.

We looked at the labour statistics and the change in the landscape, acknowledging that the increase in the state pension age and the retirement age meant that people were working longer. We had to balance it out because, if you take out a student loan when you are 18, you will be paying it back for 35 years; whereas, the older you are when you take the loan out, the less time you have to pay it back. It has to be fair for everybody.

Issues about the interaction between the state pension and student loans were raised when the policy was looked at a few years ago. Concerns were raised by the Department for Work and Pensions that the situation of people being in receipt of student loans and state pensions would be double funding. We also looked at the position in the rest of the United Kingdom. A number of factors informed each of the options that we put to ministers. The age of 60 was the one that was decided on.

Stuart McMillan: To play devil's advocate, I go back to your point regarding the length of time to repay. To increase the age cut-off to 60 would cut down the opportunity for somebody to get into the labour market and repay. Why was 55 considered to be no longer acceptable?

Leia Fitzgerald: When 55 was set, back in 1999, there was a very different landscape. The state pension age is increasing, it is due to continue to increase and it will be reviewed every five years. Labour market statistics over the years are showing that more and more people are remaining in employment. Sixty was seen as an appropriate age to increase the cut-off to in order to acknowledge those factors.

However, that increase was made with the proviso that the policy would continue to be reviewed. A commitment has been made that it will be looked at again as part of a student support review that will be starting shortly. The equality impact statement said that the age would have to continue to be reviewed to ensure that it is still appropriate.

Stuart McMillan: We are told that Lady Scott, in her judgment, contended that she was

"not satisfied that there was no less intrusive measure than a blanket cut-off available."

The approach you have taken in the regulations again applies a blanket cut-off date by reference to a person's age. Why do you believe that that approach does not unjustifiably discriminate in terms of a right to education? Were alternative approaches to the one set out in the regulations considered?

John Paterson: It is worth noting that both Wales and Northern Ireland have an age limit of 60, which implies that they could not identify a suitable alternative. England has a markedly different system, with means-tested bursaries for full-time students over 60—but, again, that system has a change at 60.

In Lady Scott's judgment, she also said that she recognised the legitimacy of having a cut-off. In paragraph 55, she said:

"a cut off or a blanket rule which interferes with Convention rights may well be reasonable, for example where an objective basis is shown that it will reduce the overall impact on resources. But the cut off chosen which gives rise to the discriminatory effect on the petitioner must be rationally connected to the aim or objective and be a proportionate way of achieving it ... Lines drawn still require to be examined as to whether they are proportionate and such examination is not to substitute the courts drawing of the line, but to assess where it has been drawn is justified. A cut off on the basis of age is not justifiable unless it can be shown to be rationally connected to the legitimate aim of the decision maker or regulations involved."

If we were to reverse that final sentence, it would say, "A cut-off on the basis of age is justifiable if it can be shown to be rationally connected to the legitimate aim of the decision maker or regulations involved."

The Convener: That is the point: how is it rationally justifiable, when also in Lady Scott's judgment she said that the age of 55 was "manifestly without reasonable foundation"? Those are pretty strong words. How then is the age of 60 with foundation?

John Paterson: The age of 60 is with foundation because when you look at the aim, it is not simply to provide student support at any cost; it is to provide student support in a sustainable way. One of the considerations in relation to the provision of a maintenance loan is: will that loan, or part of it, ever be repaid?

For a person who is younger, there is a longer period for repayment. For a person who is over 60, there is a short period of repayment up until state pension age. The state pension age need not necessarily be the point at which somebody stops working; nevertheless, as I think Leia Fitzgerald explained, as people get older, fewer of them work and, of the people who do work, fewer of them earn more than £17,355, which is the point at which people start to repay a maintenance loan.

Afson Barekat: In understanding how the outer house could reach its conclusion in relation to an age limit of 55 and how the Scottish Government could reach a different conclusion in relation to an age limit of 60, it is probably relevant to point out that the outer house did not have before it all of the material that the Scottish Government considered in assessing the age limit of 60.

The outer house commented in its judgment that

"there is no evidence available as to the intention behind that particular cut off"

—that was the cut-off of 55. It did not have the equality impact assessment before it that the Scottish Government has considered—

The Convener: One second there—the equality impact assessment is with regard to 55-year-olds rather than 60-year-olds, is it not?

Afson Barekat: That is correct. The equality impact assessment was—

The Convener: How is that relevant, then?

Afson Barekat: The Scottish Government considers that the equality impact assessment was relevant because it—

The Convener: They were made for two different ages but have been rolled into one.

Afson Barekat: The equality impact assessment was looking at the equality implications of having an age limit. Throughout, it refers to an upper age limit of 55 or above, so some of the conclusions that it comes to are capable of encapsulating a higher age limit. Indeed, the equality implications of a higher age limit are lesser, we would consider, because that in fact increases access—

The Convener: As someone who is well over 60, I would say that my rights in terms of equalities are just as important to me as I get older as they were when I was younger.

Afson Barekat: Indeed, and the Scottish Government would agree with that view.

The Convener: I did not mean to stop you in mid flow of explaining how this equality impact assessment, which was carried out specifically for 55-year-olds, is relevant to the evidence that you are now providing for a cut-off age of 60.

Afson Barekat: It is connected to the point about the outer house not having before it all the evidence that the Scottish Government had before it. Part of the reason for that is that the outer house was specifically considering the legitimacy of the age limit of 55 in the context of a particular petitioner's circumstances. Indeed, the outer house stated that it did not find it helpful to consider a document containing financial modelling that was carried out after the petitioner herself was denied a student loan.

Therefore, there was analysis done that the outer house did not find relevant to its conclusions but that the Scottish Government did consider in order to be thorough in its view of the proportionality of and the justification for an age limit of 60.

The Convener: Was the Scottish Government prevented from giving evidence to the Court of Session that might have changed its view or allowed it to come to a different view? It does sound a little to me as if you are in denial—

Afson Barekat: That is not the case; I do not mean to imply that the court prevented the Scottish Government from offering its evidence. It simply did not find that evidence to be relevant.

The Convener: That is what courts do—so why is it relevant now?

John Paterson: Perhaps I can clarify; the court did not find the financial modelling relevant to that particular case. While I cannot say definitively why it did not find it relevant, it noted that it did not find to be helpful financial modelling that had been prepared after the determination in relation to Ms Hunter had been made. It might be implied that the court was saying that the Government was not entitled to rely on information that it had prepared after the event in relation to that particular person.

The EqIA was not available to the courts at all, but both pieces of information were available to the Government when it was reaching its decision on the regulations, and both were taken into account.

10:30

The Convener: Yes. I suppose that our major concern is that if human rights have been breached at the age of 55, before we proceed to welcome this piece of legislation as a committee, we need to get a real understanding and hear a real justification of how you feel the proposed new instrument is ECHR compatible. At the moment, I am struggling to see how or if you have demonstrated that the cut-off age of 60 will be acceptable if subject to a further court challenge.

You have cited the fact that in England, Wales and Northern Ireland, the age of 60 is as it is, but it

has not been subject to legal challenge. As I am sure you understand, we are seeking to avoid another petition to the Court of Session where, notwithstanding the cut-off age having been changed to 60, that age is also found not to be compliant. I am not yet happy with the explanation that you have given us.

John Paterson: Okay. Perhaps I can take us back a little bit and explore the relevant test. There are two potential tests. The first is whether the measure taken by the Scottish Government and passed through the Parliament is manifestly without reasonable foundation. The other test is whether, weighing up all the relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest and the other interests involved.

As I mentioned earlier, the Supreme Court has considered which of those two tests would apply in this kind of case, and it has not reached a conclusion. We submit that the test of whether the measure is manifestly without reasonable foundation is the appropriate one. Nevertheless, I will take you through the other, closer test on the basis that that gives closer scrutiny.

The first question for the second test is whether the Education (Student Loans) (Scotland) Amendment Regulations 2016 have a legitimate aim. As I described, the aim of the regulations is

"to prioritise support, in the form of tuition fee grants, bursaries and living-cost loans, for students entering the labour market, and ensuring that students taking out a loan have a reasonable chance to repay some or all of that loan prior to retirement."

The latter part of that is very much about the sustainability of the scheme. Is that a legitimate aim? Well, we submit that it is a legitimate aim to have a scheme that is sustainable—one that can carry on from year to year.

The next question is whether the measure is rationally connected to the objective of prioritising support for students entering the labour market and ensuring that students who take out a loan have a reasonable chance to repay it prior to stopping work. Again, we submit that it is rationally connected to that objective; because the measure sets a cap on eligibility for student maintenance loans at the age of 60, it has a rational connection with ensuring that the system is sustainable by helping to ensure that loans are repaid in whole or in part. As I mentioned before, once people stop being part of the pay as you earn system—once they stop being employed—the maintenance loan repayments are no longer collected.

The next question would be, could a less intrusive measure have been used without unacceptably compromising the achievement of the objective? As I mentioned before, Wales and Northern Ireland have apparently found no suitable alternative. I understand that we have identified no alternative that was suitable and which would not unacceptably compromise achievement of the objective of having a sustainable system.

On the question of whether the measure strikes a fair balance, we would submit that it does. Given the wider considerations about the affordability of the student finance system and the decision of the Government to focus on providing free tuition for first-degree students, which benefits people of all ages, having an age cap is proportionate and justifiable.

A balance has to be achieved. If we consider the alternatives, one would be to have no age limit. However, that would clearly cost more and it would also put someone who is 25 years old when they enter college in a different repayment position from someone who is 75. That might be thought not to strike a fair balance between the position of the person who is 25, who will have to pay for the system, and that of the person who is 75, who will not. I hope that that further explanation is useful to you.

The Convener: It is.

Monica Lennon: I want to pick up on one point. We must be able to make a connection to the legitimate aim of the decision maker, in this case the Scottish Government. We have heard a couple of times today that the test is that it delivers student support in a sustainable way. The word "sustainable" can mean different things to different people. Given that the definition of that is key to what we are considering today, can you say more about what exactly the Scottish Government means when it talks about delivering student support in a sustainable way?

John Paterson: Yes, but I think that the question is more for my colleague than for me.

Leia Fitzgerald: What we mean by "sustainable" is that it has to be fair and affordable in the medium to long term. Student loans are subject to what is known as the resource accounting and budgeting—RAB—charge. At the moment, that charge is about 31 per cent, which means that every £100 of student loan costs the Government about £31. We do not ever get the full amount of money back from those loans, but when we loan money we have to ensure that we get a reasonable amount back so that we can carry on with the system year after year.

When we consider the issue of sustainability in the long term, we think about whether we are going to get a sufficient amount of loan back. The lower the amount of the loan that students pay back, the higher the cost to the Government of loaning the money out initially.

Monica Lennon: Is the test that is applied to gauge whether someone has the ability to pay back the loan based purely on the number of years that they might have in the labour market?

Leia Fitzgerald: Student loans are deducted from income, so students have to earn more than a certain amount of money to be eligible to pay them back. Because we are using a PAYE system, we have to be satisfied that someone will be working not only for a reasonable number of years but also at a reasonable income level to be able to pay some of that money back.

Monica Lennon: We heard earlier that no suitable alternatives were identified, or that there were alternatives but they were considered to be unsuitable. What were those alternatives?

Leia Fitzgerald: There have been other models of student loan before. Prior to 1999, there was a mortgage-style loan that was paid back based on people paying fixed amounts of money. We moved to the current system because it was believed to be a fairer system for students. The system is one in which all students pay. If we wanted to do something different for older people, there would have to be two systems running in parallel, which could potentially raise equality issues if people of a certain age were paying back loans in a certain way and older people were doing it differently.

We want a system that is fair to all people and is sustainable and not too onerous to administer—student loans are repaid by students and are collected by the Student Loans Company and by Her Majesty's Revenue and Customs, so any change in the system would have implications for HMRC and the Student Loans Company.

It is also fair to say that student loans are not the only part of the support package. A person who is over 60 will not be eligible for a student loan, but they can still get free tuition and bursaries, discretionary funds and additional living cost grants. Loans are only a part of the student support package; the rest of the package must also be considered. There is other support out there for people of that age.

Rachael Hamilton (South Scotland) (Con): You have explained to some extent the process of consideration that led you to conclude that the cut-off for eligibility to apply for student loans should be set at 60. It is noted that there was no consultation to inform the regulations. Was any consultation undertaken as part of the equality impact assessment?

Leia Fitzgerald: Yes—we consulted a number of stakeholders, including Age Scotland, the National Union of Students Scotland and charities that are concerned with older people.

Rachael Hamilton: Was that satisfactory for coming to the conclusion about the cut-off age?

Leia Fitzgerald: Yes. The EqIA showed that, following discussions with those groups, there was little to no evidence to suggest that the policy had been an issue. Age Scotland and NUS Scotland said that it had never been raised as a concern by any of their members; they did not have it on their radar as an issue.

George Adam: You said that the equality impact assessment was done in tandem with the Court of Session ruling—is that correct? Was it the same timeline?

Leia Fitzgerald: The equality impact assessment was carried out before the judicial review. The assessment was the first part of the review of the age cap, and then that review was carried out in tandem with the judicial review—they overlapped.

George Adam: Is it right that the review was of the previous policy, which was based on the cut-off age of 55 that the Court of Session found to be discriminatory?

Leia Fitzgerald: The age of 55 was taken as a starting point in asking whether it was legitimate to have an age cap. As the age cap at that time was 55, that was what was looked at. However, the consideration went wider than the age cap of 55 and referred throughout to the fact that a higher age cap would help with equalities. From reading through, we can see that what applies to 55 also applies as we go up through the age cap.

George Adam: You said that the equality impact assessment came just before the court's ruling, so is it not the fact that there was no way that the court could access that information?

John Paterson: The assessment was not before the court; that is correct.

George Adam: Could the assessment have had any impact on the Court of Session's ruling? Who knows what it will say?

John Paterson: Absolutely.

George Adam: What are the impacts of the court's ruling on the equality impact assessment?

Leia Fitzgerald: The Court of Session made it clear that it did not feel that there was a strong evidential basis for an age limit of 55. There were no equality impact assessments when the age limit of 55 was brought in and no assessment had been carried out since. The equality impact assessment has now been carried out and we have up-to-date evidence, so we have answered that part. The assessment did not pick up any particular issues with having an age cap; on that basis, we think that an age cap of 60 is a fair reflection of the assessment.

10:45

George Adam: I have a practical question. In the real world, it is difficult for someone who is aged 55 or 60 to get a 25-year mortgage. Is the situation with student loans similar, in that you are looking to ensure that loans can be repaid?

Leia Fitzgerald: Yes. That will be monitored as we go along to check the impact of the change, the cost and how much we are getting repaid.

The Convener: That is the nub of the issue. You have talked about the importance of sustainability for the Scottish Government, which relates to repayment. As a layperson, I am not sure how important the sustainability element is. It is obviously important to any Government to have the ability to continue a scheme, but how important is it to people if such a focus on sustainability prevents them from applying for a loan or a grant and in that way denies them their human rights? How interested would the courts be in whether the scheme was sustainable if people's human rights were still being denied?

John Paterson: A court would be likely to accept that the legitimate aim is to provide a sustainable system, so we would not get to the stage of denying somebody their human rights, because those rights would be respected, although a person might not necessarily be eligible for a maintenance loan.

Let us take an example that goes in the other direction. The free bus pass scheme applies to over-60s, but it is not an infringement of my human rights that I am not eligible for it—my human rights do not extend to the right to that provision.

Stuart McMillan: You might not have an answer to this but, on sustainability, what is the financial difference for the Student Loans Company and the Scottish Government between an age cap of 55 and one of 60?

Leia Fitzgerald: That is hard to predict. We know the number of students who are in full-time education who fall within that age group, but we do not know what their household incomes are, and the loan is to some extent means tested. We also do not know how many part-time students might decide to go full time or how many people who are not currently considering it might decide to go into education if additional support was made available.

We can model only a rough prediction that is based on what we know at the moment. We look at the overall student population and say what the figures would be if there was no difference in the number of students in the higher age group and how much they could be if a lot more people in that age band decided to enter education.

The modelling that we did suggested that raising the age cap could cost between £700,000 and £16.5 million. The difference in those figures takes into account the students' possible household incomes and the number of students who could enter full-time education.

The Convener: Given that you have said that there is a decline in demand as people get older, have you considered having no age cap at all, although the liability would still remain, or is that not sensible?

Leia Fitzgerald: If we had no age cap at all, we would lend money to people whom we knew would not be in a position to pay it back, which speaks to equalities for younger people—equalities are an issue across all ages, not just for older people. There would be a risk that people who entered education at 18 in the knowledge that they had to pay back their loans would say, "Well, that person who is 80 is getting a de facto bursary, which isn't fair, because they are being treated differently from me in practice."

The Convener: It is an interesting point. I can see why people have found it difficult to come to terms with.

If there are no further questions, I thank the witnesses for taking the time and trouble to come and talk to us. We are grateful for your information and your help.

10:51

Meeting suspended.

10:52

On resuming—

Instruments subject to Affirmative Procedure

The Convener: We move to item 4. No points have been raised by our legal advisers on the following three draft orders that are subject to the affirmative procedure.

Scottish Local Government Elections Amendment (No 2) Order 2016 [Draft]

Maximum Number of Judges (Scotland) Order 2016 [Draft]

Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 [Draft]

The Convener: Are committee members content with the draft orders?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Acquisition of Land (Rate of Interest after Entry) (Scotland) Amendment Regulations 2016 (SSI 2016/258)

10:53

The Convener: We move on to an instrument that is subject to the negative procedure. The amendment regulations were laid before the Parliament on 8 September and come into force on 30 September, so they do not respect the requirement that at least 28 days should elapse between the laying of an instrument that is subject to the negative procedure and its coming into force.

As regards its interest in the Scottish Government's decision to proceed in such a manner, the committee might want to consider whether the Government's failure to comply with the requirement was acceptable in the circumstances. The Scottish Government's planning and architecture division set out the reasons for the failure in its letter to the Presiding Officer of 8 September, which was supplemented by a written response to the committee.

Does the committee want to draw the amendment regulations to the Parliament's attention on reporting ground (g), as the instrument fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

The Convener: The clerk is pointing out that I should also have asked whether the committee agreed that the Government's failure to comply was acceptable in the circumstances—of course, that is what we were doing. Thank you to the committee for your agreement and to the clerk for pointing out the error of my ways.

Instruments subject to Negative Procedure

10:54

The Convener: We move to the other instruments that are subject to the negative procedure. No points have been raised by our legal advisers on the following three instruments.

Food Hygiene (Scotland) Amendment Regulations 2016 (SSI 2016/260)

Smoke Control Areas (Exempted Fireplaces) (Scotland) Revocation Order 2016 (SSI 2016/292)

Smoke Control Areas (Authorised Fuels) (Scotland) Revocation Regulations 2016 (SSI 2016/293)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

10:55

The Convener: We move on to item 6. A number of instruments are before us to give effect to proposals by the Local Government Boundary Commission for Scotland in 25 local government areas. No points have been raised by our legal advisers on the following 25 instruments.

Aberdeen City (Electoral Arrangements) Order 2016 (SSI 2016/265)

Aberdeenshire (Electoral Arrangements) Order 2016 (SSI 2016/266)

Angus (Electoral Arrangements) Order 2016 (SSI 2016/267)

Clackmannanshire (Electoral Arrangements) Order 2016 (SSI 2016/268)

Dumfries and Galloway (Electoral Arrangements) Order 2016 (SSI 2016/269)

City of Edinburgh (Electoral Arrangements) Order 2016 (SSI 2016/270)

East Ayrshire (Electoral Arrangements) Order 2016 (SSI 2016/271)

East Dunbartonshire (Electoral Arrangements) Order 2016 (SSI 2016/272)

East Lothian (Electoral Arrangements) Order 2016 (SSI 2016/273)

East Renfrewshire (Electoral Arrangements) Order 2016 (SSI 2016/274)

Falkirk (Electoral Arrangements) Order 2016 (SSI 2016/275)

Fife (Electoral Arrangements) Order 2016 (SSI 2016/276)

Glasgow City (Electoral Arrangements) Order 2016 (SSI 2016/277)

Highland (Electoral Arrangements) Order 2016 (SSI 2016/278)

Inverclyde (Electoral Arrangements) Order 2016 (SSI 2016/279)

Midlothian (Electoral Arrangements) Order 2016 (SSI 2016/280)

Moray (Electoral Arrangements) Order 2016 (SSI 2016/281)

North Ayrshire (Electoral Arrangements) Order 2016 (SSI 2016/282)

North Lanarkshire (Electoral Arrangements) Order 2016 (SSI 2016/283)

Perth and Kinross (Electoral Arrangements) Order 2016 (SSI 2016/284)

Renfrewshire (Electoral Arrangements) Order 2016 (SSI 2016/285)

South Ayrshire (Electoral Arrangements) Order 2016 (SSI 2016/286)

South Lanarkshire (Electoral Arrangements) Order 2016 (SSI 2016/287)

Stirling (Electoral Arrangements) Order 2016 (SSI 2016/288)

West Dunbartonshire (Electoral Arrangements) Order 2016 (SSI 2016/289)

The Convener: Is the committee content with the orders?

Members *indicated agreement.*

Courts Reform (Scotland) Act 2014 (Commencement No 7, Transitional and Saving Provisions) Order 2016 (SSI 2016/291 (C 26))

The Convener: No legal points have been raised by our legal advisers on the order. Is the committee content with the order?

Members *indicated agreement.*

The Convener: Thank you. That concludes the public business for today.

10:57

Meeting continued in private until 11:21.

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