JUSTICE 1 COMMITTEE

Tuesday 17 December 2002
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
43rd Meeting 2002, Session 1

CONVENER

*Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Maureen Macmillan (Highlands and Islands) (Lab)

COMMITTEE MEMBERS

*Ms Wendy Alexander (Paisley North) (Lab)
*Lord James Douglas-Hamilton (Lothians) (Con)
*Donald Gorrie (Central Scotland) (LD)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Kate Maclean (Dundee West) (Lab)
Mrs Margaret Smith (Edinburgh West) (LD)
Kay Ullrich (West of Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Brian Adam (North-East Scotland) (SNP)
Colin Boyd QC (Lord Advocate)
Mr Kenneth Macintosh (Eastwood) (Lab)

CLERK TO THE COMMITTEE

Alison Taylor

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Hub

Scottish Parliament

Justice 1 Committee

Tuesday 17 December 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:38*]

The Convener (Christine Grahame): I convene the 43rd meeting in 2002 of the Justice 1 Committee and remind members and everyone else who is present to turn off mobile phones and pagers. I have received an apology from Wendy Alexander, who hopes to attend the meeting later—she is involved with an urgent constituency matter.

I welcome Brian Adam and Kenneth Macintosh, who will speak to amendments to the Title Conditions (Scotland) Bill.

Item in Private

The Convener: Agenda item 1 is consideration of whether to discuss in private item 5, which is on an options paper on the committee's inquiry into legal aid. The paper will enable the committee to consider a detailed approach to future work on that inquiry. Any decisions that we take will be made available publicly in the official committee minute. Does the committee agree to discuss item 5 in private?

Members *indicated agreement*.

Convener's Report

The Convener: Agenda item 2 is the convener's report. I refer members to paper J1/02/43/1, which is a response from the Standards Committee on the unauthorised disclosure of this committee's report on our inquiry into the regulation of the legal profession.

The Standards Committee notes that the Justice 1 Committee has not identified a member in relation to the complaint—what a surprise. The Standards Committee's procedure in such instances is to invite the relevant committee to give its views on the matter, which allows the Standards Committee to decide whether the circumstances of the leak warrant a stage 2 investigation and referral to the Standards Committee adviser.

I invite members to give their views on the issues that are raised on the second page of the Standards Committee's letter. There are three bullet points.

Maureen Macmillan (Highlands and Islands) (Lab): It does not seem to me that we can take the matter much further forward. We do not have a suspect, although this is the second time that a committee report has been leaked. The last bullet point in the letter from Mike Rumbles says that it is necessary to assess whether it was lucky guesswork or whether the language that was used indicates that there was definitely a leak. I would say that the second incident was definitely a leak because the language that was used was so close—in fact it was identical—to that which was used in the report. I do not know whether we can take the matter much further if we do not have a suspect.

Michael Matheson (Central Scotland) (SNP): We have been here before with the previous leak. The Standards Committee was unable to progress the matter because we could not identify a suspect. Like Maureen Macmillan, I am not sure whether we can take the matter further and whether the commissioner or the Standards Committee will be able to pursue the matter further. It is similar to the previous situation, when nothing could be done.

Donald Gorrie (Central Scotland) (LD): There is a difference from the last time—I think that this was a leak. In retrospect, I do not honestly think that the first incident was a leak because in that incident information was stitched together. I agree that we cannot pursue the matter further because we do not know who was responsible and because whoever did it will deny it. We should confirm to the Standards Committee that a leak has taken place, so that they can get their records up to date, and we should leave it at that.

Lord James Douglas-Hamilton (Lothians) (Con): I am on the Standards Committee, so I do not think that it is appropriate for me to say anything at this stage. Obviously, I deplore what has happened—[*Interruption.*]

The Convener: Excuse me. It is very difficult to hear Lord James over the tiptoeing of feet on the hard floor. Wait until everyone is settled, Lord James, then we will hear what you have to say.

Lord James Douglas-Hamilton: I deplore what has happened. The unauthorised leaking of information that is contained in a committee report that is due for publication is contrary to the interests of the committee and the Parliament. If there is evidence against a specific member, the matter should be pursued. As I mentioned, I am on the Standards Committee and to the best of my knowledge there is no obvious suspect in this case.

The Convener: I endorse what Lord James and others have said. The matter is very disappointing; if one person does it we could all do it. The committee works only because it has a degree of integrity in such matters when it is preparing its drafts and reports. It would be a waste of our time to pursue the matter, but that does not mean that the committee does not deplore the action. I hope that such incidents do not become a habit when committees start up in the new session, otherwise the committee procedures will not work at their best. I am sorry that that is the position—we must now move on.

Before we move on to the next item, I say that some of us visited Cornton Vale and it might be appropriate for us to comment on that at the next meeting. We had a meeting with the governor, which I found very helpful. Meeting people is different from writing to them or speaking to them on the telephone. It was helpful that Lord James Douglas-Hamilton, Donald Gorrie and I went there. I now know my way to the prison, but we will say no more about that, because it took rather a long time to get there. The sad thing is that I had been there before.

Title Conditions (Scotland) Bill: Stage 2

13:45

The Convener: Item 3 is the continuation of our stage 2 consideration of the Title Conditions (Scotland) Bill. I welcome to the committee Colin Boyd QC, who is here in place of the Minister for Justice. I have already welcomed other members who will speak to their amendments. I think that today's experience will be more pleasant for Mr Boyd than some of the hostile encounters that we have had—we are very gentle about the Title Conditions (Scotland) Bill.

All members should have a copy of the bill, the marshalled list of amendments and the list of groupings. We have been set a target for today's proceedings. I hope that we will finish stage 2 consideration today, but if we do not, we will in the new year pick up where we leave off. We rattled through proceedings at our most recent meeting and I hope that we can continue that progress. Tea and coffee will be available at 3 o'clock in order to sustain everyone.

We will run through the sections in numerical order, as indicated on the front page of the marshalled list. Once we have dealt with the relevant amendments, we will decide whether to agree to each section. Later on, there will be a tricky bit involving lots of amendments in one group. When we reach that point, I will say something about the special way in which we will handle matters.

Section 50—Sheltered housing

The Convener: Although the first group of amendments appears to be tricky, it is not the tricky part of proceedings to which I referred—there are trickier things ahead. Amendment 227 is grouped with amendments 7, 228, 21, 118, 115 and 12. I point out that members will probably not wish to agree to both amendments 7 and 228, although there is no pre-emption. After Kenneth Macintosh has moved amendment 227, I will invite Michael Matheson to speak to amendment 7 and to any other amendments in the group. Sylvia Jackson is not here, so Kenneth Macintosh will speak to amendment 228. Brian Adam will speak to amendment 21 and to any other amendments in the group. The Lord Advocate will speak to amendment 115 and to any other amendments in the group. If everyone is prepared and ready to go, we will begin.

Mr Kenneth Macintosh (Eastwood) (Lab): I hope that I am successful in juggling the paperwork. I thank the convener and the

committee for their patience in allowing me to move my amendments this week. I know that the committee made rapid progress last week and could have moved on further had I been present. The members of the Sheltered and Retirement Housing Owners Confederation—who are here today—and I are grateful. My amendments, which reflect the views of SHOC, are cross-party amendments. I will support the amendments in the names of Brian Adam and Michael Matheson.

I welcome the bill, because it will give more control to owners and residents in managing their affairs. I will outline some of the rationale behind my amendments. SHOC and I welcome the fact that the Executive has adopted a core burdens approach to protecting residents' and sheltered housing owners' interests. However, we believe that the manner in which the bill frames that protection could be modified or improved. The Executive has accepted that the bill's definition of sheltered housing includes retirement housing and Michael Matheson and I will argue that there is therefore no good reason why that should not be made explicit in the bill.

It is important to note that, although the definition of sheltered housing includes retirement housing, there is a distinction between the two. Retirement housing is for older people, whereas sheltered housing could be for older people, but might also be for younger people who are disabled, infirm or vulnerable. That distinction is important because older people who live in retirement complexes want extra security and protection, but do not need to be protected against themselves. As members will know, retirement-home owners might be older, but they are not feeble minded. They welcome the security that the core burdens approach offers, but they wish that power to be exercised by the owners. As the bill is worded, it could be argued that the high voting threshold protects the manager of a complex rather than the core burdens or the owners.

Experience shows that although older people move into retirement flats with high expectations that complexes will be run with their needs in mind, they find that managers, who have been appointed by developers, put the developers' interests first. That is manifested in many ways, but usually through cutting services to save costs. Of course, not all those services will be core burdens.

The principle that underpins the amendments that I wish to move and support is that, although retirement-home owners want extra protection, they do not need a guardian or intermediary to exercise that protection on their behalf. They wish to be consulted on changes to the way in which the complex is run and they wish to hold the manager to account without necessarily exercising their prerogative to get rid of the manager and to employ a new one, which would be drastic action.

Those were my introductory remarks; I will speak now to amendment 227, which is to insert after the word "way" in section 50 on page 24, line 9:

"(including as a warden's flat or a visitor's flat)".

The meaning of the phrase "special way" in section 50(1) is not clear and the bill gives no definition of the phrase. In order to find the meaning of the phrase, one must refer to the explanatory notes, which spell out that the phrase includes such things as wardens' flats. Amendment 227 attempts to translate the explanation in the explanatory notes and to include it in the bill, because the bill is not clear. It is important to establish that a warden's flat, a visitor's flat or other flats that are owned, but sublet, by the developer are not used by the developer to maintain control, which has been done in the past. That point is important for retirement-home owners.

I would like to insert the clarification that I mentioned and I would welcome the Executive's or other members' views.

The Convener: Have you moved amendment 227?

Mr Macintosh: Do you want me to move it now?

The Convener: You are required to move it.

Mr Macintosh: Will we then debate it?

The Convener: After we have heard the minister's reply, you may, if you wish, seek the committee's leave to withdraw the amendment.

Mr Macintosh: In that case, I move amendment 227.

Michael Matheson: The principal reason behind amendment 7 is similar to the concerns that Ken Macintosh expressed about the bill's definition of sheltered housing. The Lord Advocate will be aware that, in the evidence that the committee received at stage 1, concern was expressed about the fact that the bill uses the word "sheltered" but makes no reference to other types of retirement accommodation. There is concern that unscrupulous managers might use that as a loophole. If we include a provision that relates to retirement accommodation, we will be sure that a loophole does not exist and that unscrupulous providers or management companies will not be able to get out of some of the bill's conditions.

Amendment 12 is the result of concerns that were expressed during stage 1 about the bill's use of the word "manager". It is commonly thought that the word "manager" means management company or association, but the term might be

misinterpreted. The word "manager" could be viewed as applying also to the caretaker or the warden, who very often do not have managerial roles. The purpose behind the amendment is to ensure clarification of that and to ensure that when we refer to a manager we mean management companies or associations. Amendment 12 and amendment 7 are intended to provide in the bill clarification on matters of concern that were highlighted during stage 1.

Sylvia Jackson's amendment 228 would extend my definition by using the words

"and includes retirement housing and retirement accommodation".

I am sympathetic to the amendment and would like to hear whether the minister would support extending the definition further by including the words "and retirement accommodation".

Brian Adam (North-East Scotland) (SNP): As Kenneth Macintosh said at the beginning, the amendments in the group—except obviously the Executive ones—are the result of extensive discussions with those who will be affected directly by the bill. The amendments have not been drafted in a partisan way, other than perhaps to protect the interests of the owners, rather than the interests of developers or management companies.

There is always debate about what should appear in a bill and what should be covered in regulations. Given the concerns that owners have expressed about the potential for abuse by unscrupulous developers or managers, there is a need to spell out exactly what is meant by "sheltered housing" or "retirement housing". To some extent, that is the purpose of the bulk of the amendments in the group.

On amendment 21, I would like the phrase, "(including a warden service)" to be spelled out specifically in the bill. In sheltered housing there is normally some sort of protective service that will act as a backstop for owners, and as a means of contact and support. There is a distinction between sheltered housing and other developments that try to attract the elderly or vulnerable into accommodation where no such service may be provided. I would be concerned if we did not include "(including a warden service)" in the bill. Such a service might be removed almost at a stroke of a pen, without the wishes of the owners being taken into account. If we do not include that phrase in the bill, there is potential down the line for clever lawyers—

The Convener: Heaven forfend, Mr Adam.

Brian Adam: The potential would exist even for unclever lawyers or developers to remove a warden service as a burden if they did not see the service as being in their interests. That is perhaps more appropriate for management companies. Developers tend not to retain the interest, but to pass it on to development companies. Development companies might choose to make a change. If the phrase, "(including a warden service)" is in the bill, there will be much greater protection for owners.

14:00

Mr Macintosh: I would like to move amendment 118, to which I did not speak earlier.

The Convener: That should be amendment 228 and you do not move it now.

Mr Macintosh: I do not think that I have spoken to amendment 228 or to amendment 118.

The Convener: What normally happens is that when I call an amendment, you would speak to it and to the other amendments in the group. However, you may speak to amendment 228 and the other amendments before we hear from the Lord Advocate.

Mr Macintosh: Amendment 228 is in the name of Sylvia Jackson. I apologise that she is unable to be here. The amendment is in the same spirit as Michael Matheson's amendment 7 and would merely add the term "retirement accommodation" to the term "retirement housing" and would put it in a different section.

Properties are rarely sold as sheltered housing; they are more commonly referred to as retirement accommodation or retirement housing. Judging by the responses that the minister and the Minister for Justice gave in the chamber earlier, the Executive accepts that "sheltered housing development" includes retirement housing. There is therefore no reason not to include it in the bill.

It is important that the matter be clarified for the purposes of the bill because the definition in section 50(4) is vague and involves the provision of

"(i) a facility; or

(ii) a service,

which is one of those which make a sheltered housing development particularly suitable for such occupation".

Brian Adam's amendment is intended to highlight the fact that the section is vague: inclusion in the section of warden services would make it more specific. One can imagine a situation in which a developer framed a deed which—although it would provide some services—did not provide all the services that one might expect in a sheltered housing development; for example, a lift or fire doors. It would state specifically in the title that the property was being sold as retirement accommodation rather than as sheltered housing

accommodation under the terms of the Title Conditions (Scotland) Bill and therefore the residents of that complex would not enjoy the protection of the bill. If an errant developer proceeded along those lines, it would be difficult to argue that the intention was anything other than to exclude the provisions of the bill. That is why I support amendment 228.

Amendment 118 would insert in section 50 the words:

"no real burden may impose a minimum age on the ownership of units in the development which is less than sixty years."

That was accepted in principle at stage 1, but the committee was tempted to include an element of "flexibility"—as it was called in the committee report—and to reduce that limit to 55 years.

Amendment 118 is intended to deter those who wish to acquire property at a reduced market value because it is in a sheltered housing development. Those who live in retirement housing complexes do so because such accommodation is suitable for their interests and age. The flexibility might suit the developer because it would increase the size of the market; however, it is in the interests of those who live in retirement accommodation for everyone who lives in their complex to be above the age of 60.

I give the example of a developer who was able to move into such housing a young man in his mid-30s who was in a wheelchair. The man undoubtedly needed sheltered accommodation, but his behaviour was more defined by his age than by the fact that he was in a wheelchair—he was inappropriately housed in that development. The age of 60 should be the appropriate threshold and it should be the key for buying a flat in retirement accommodation.

The Convener: However, as you say, those who are 60 or near 60, can be chipper. They were the Elvis Presley people, you know. The Lord Advocate is far too young to be an Elvis man. I ask the Lord Advocate please to speak to amendment 115 and the other amendments in the group and to address members' remarks.

The Lord Advocate (Colin Boyd): Amendment 115 is a technical amendment that will ensure that the new rights that are created by the bill will not include a right of pre-emption. Such a right—to have the first chance to buy a property when it goes on the market—could not be used by each owner in the complex.

I want to deal with points that have been made in support of the other amendments in the group. The Executive views amendment 227 as unnecessary, because the idea of

"a warden's flat or a visitor's flat"

is included in the phrase in section 50(1),

"a unit which is used in some special way".

That phrase was included in the bill to ensure that a unit that is not used in the same way as the others and which might not be subject to the burdens is included within the community for the purposes of part 2 of the bill. That would prevent a developer from retaining an independent right to enforce burdens and voting rights—once all other units have been sold off—by retaining ownership of a unit that is used in some special way, such as a warden's flat or a visitor's flat. The term might also cover other types of unit. The Abolition of Feudal Tenure etc (Scotland) Act 2000 contains provisions that prevent developers from attempting to reallocate their right of enforcement of feudal burdens to the ownership of a warden's flat.

I submit that it is unnecessary to include a reference to "a warden's flat" on the face of the bill. The phrase "in some special way" encompasses units that are used as wardens' flats, as visitors' flats or for people who are ill. Paragraph 204 of the explanatory notes to the bill states:

"The only point of distinction from section 49 is that an allowance is made for units used in 'some special way' (typically as a warden's flat)."

The explanatory notes can be used to support the definition of

"a unit which is used in some special way",

if there is any doubt about the way in which a unit is used. I invite Kenneth Macintosh to consider withdrawing amendment 227.

I will deal next with amendment 7. I am not sure about the status of amendment 228.

The Convener: Amendment 228 has not yet been moved, as it relates to another section. It may be moved later.

The Lord Advocate: There has been anxiety about the definition of sheltered housing and a worry that the definition might exclude what is termed "retirement housing". The issue was raised before the Executive issued its consultation paper in May 2001. That paper made clear that the term "sheltered housing" includes retirement complexes. The Deputy First Minister has made the same point in statements to Parliament. The committee considered the point, and concluded in its stage 1 report that it was not necessary to change the definition.

In view of the continuing interest in the matter, it might be worth my taking a moment to examine the definition, which reads:

"'sheltered housing development' means a group of dwelling-houses which, having regard to their design, size and other features, are particularly suitable for occupation

by elderly people (or by people who are disabled or infirm or in some other way vulnerable) and which, for the purposes of such occupation, are provided with facilities substantially different from those of ordinary dwelling-houses."

That definition concentrates on the characteristics of the housing, rather than on the characteristics of owners. In so far as the definition touches on owners, it refers to them in precise terms—as the elderly and the disabled. Reference to "the retired" is much more ambiguous. What is meant by "the retired"? I presume that they are people who no longer work. Many people might be partially retired or have part-time work. If they are disabled, they might not be capable of full-time employment. What about those who give up work for a period but who subsequently get a job? What about a married couple, only one of whom has stopped working? Retirement housing could not be defined as housing that is suitable for retired people, because that definition does not describe the physical properties of the accommodation. The definition of sheltered housing emphasises special facilities and features.

A retirement complex would not fit into that particular definition and it is not entirely clear whether there are additional characteristics of retirement housing that are not included in the definition. If there are no additional features—I submit that there are not—amending the bill will not make any legal difference. Indeed, my worry is that if we were to amend the bill to include "retirement housing", a court would start looking for its own definition and mischief might then occur. Accordingly, I submit that the definition is sufficient.

I will make one more point. I understand that elderly people who are in sheltered housing sometimes feel that the term is seen as being in some way demeaning. Examination of that term might provide a way forward. However, as far as the definition is concerned, I would have thought that including in the bill some reference to retirement housing would cause real problems.

The Convener: What do mean when you talk about redefining? Are you talking about changing at stage 3 the definition of sheltered housing?

The Lord Advocate: I would be open to discussing that with Ken Macintosh. I have difficulties with including retirement housing in the definition, but we might be able to discuss the naming of what we are talking about.

The Convener: Other committee members are concerned about the definition. I open the discussion to committee members, who might wish to make comments in the light of what the Lord Advocate said.

Donald Gorrie: I think that I understand what the Lord Advocate said about the difficulty with the definition. I wish to mention another difficulty with the definition in section 50(3), which states that sheltered housing developments

"are provided with facilities substantially different from those of ordinary dwelling-houses."

I could envisage a retirement housing complex that did not have any facilities that were

"substantially different from those of ordinary dwelling-houses"

and which might be excluded. It is important that we cover everything we intend to cover. If the definition of retirement housing is difficult, perhaps we should pursue it to define it properly.

The issue goes back, as I can testify, to the days before the Scottish Parliament. People who have had problems with the management of their retirement housing have pursued the matter. In a democracy, we must try to respond to that sort of persistent and well-argued case. If there is a problem with defining retirement housing, perhaps we should include it, and then work out the definition at stage 3.

I am also not quite clear about the difference between "retirement housing" and "retirement accommodation", which impacts on whether I should support amendment 7 or amendment 228. The issue of whether to include a warden's flat is relatively minor and it might well be that the Lord Advocate's argument is sound on that point.

Michael Matheson: I return to what the Lord Advocate said about the possibility of revisiting the use of the phrase "sheltered housing". If we consider rephrasing the bill and using the term "retirement accommodation" or "retirement housing", would not that have implications for other legislation in which "sheltered housing" is mentioned? What would be the wider implications on other legislation of introducing such a term in the bill?

The Convener: Do you wish to address those questions now, Lord Advocate, or do you want to hear other points?

The Lord Advocate: As this is my first time dealing with amendments at stage 2, I am in the convener's hands.

The Convener: How tempting. If you will deal just now with the points that have been made by Donald Gorrie and Michael Matheson, I will ensure that you can respond to points that are made by other members.

14:15

The Lord Advocate: I am not entirely clear whether Donald Gorrie agreed with me about the

definition of retirement or whether he was saying that we should simply insert the word just now and sort out the definition later. I suspect that it is easier or better to do things the other way. If there is a problem with the definition, we should take the issue away and think about it. I am not offering to do that, but that could be another way around the problem.

I accept Michael Matheson's point that the phrase "sheltered housing" might be included in other legislation. Off the top of my head, I am not aware of any such legislation, but before I agree to make any change to the heading of section 50 and to the name of what we are talking about, I want to ensure that such a change would not have unintended consequences elsewhere. Michael Matheson's point is well made.

The Convener: If you have anything further to say on the other amendments, you should do so now so that we can move on.

If there are difficulties about amendments to particular sections, it usually assists members to be given a firm undertaking that the Executive will revisit the issue. If you take the opportunity to clarify your position, members will know whether they should press or not move amendments at this stage. My advice is that it would be helpful if you could come to a view on the definition of sheltered housing in section 50, so that members know where they stand.

The Lord Advocate: Amendment 21 concerns a warden service. I suggest that a warden service is already covered by section 50(4)(a), because it is clear that a warden service is

"one of those which make a sheltered housing development particularly suitable for such occupation".

Although I would be interested to hear other views, I cannot imagine how a warden service would be excluded from section 50(4)(a).

I turn to amendment 118. The bill currently provides that no burden relating to a restriction in relation to any person's age may be varied or discharged by deed executed under section 32(2)(a). That means that, unless the constitutive deed setting out the burden stated otherwise, such a burden could be varied or discharged only by application to the Lands Tribunal for Scotland or by a deed signed by all the owners of the sheltered housing complex.

We believe that that is the correct approach. As Jim Wallace noted during the stage 1 debate, people can buy into different types of owner-occupied sheltered housing and they are free to choose the particular kind of development that suits their needs. They may well choose a complex that has provided in the titles an age limit for occupation, but they will be aware of that when they buy into the complex. If the complex does not have such an age limit provided in the titles, people will know that the age limit cannot be imposed without all owners' agreement.

Amendment 118 would not prevent the occupation of a property by someone under 60; rather, it would prevent only the ownership by such a person. That would mean that a spouse under the age of 60 could not be a joint owner. However, the amendment would not prevent a young family from moving into a property as long as that property was owned by someone over 60. I presume that that is not the amendment's intended effect.

Amendment 118 has been lodged with the best of intentions. It aims to prevent sheltered housing from being taken over by younger people, possibly with children. As the bill stands, where there are age restrictions on occupancy in the title and the title makes no provision to change that restriction, it will not be possible for the owners to vary the restriction unless all the owners agree. We consider it most unlikely that that will happen.

We think that it would be best if developers and the owners of sheltered housing developments were left to impose the age limits and other criteria for their residents, because that would suit local circumstances and needs. For those reasons, I ask Mr Macintosh to consider withdrawing amendment 118.

I understand that the intention behind amendment 12 is to remove any possible confusion between the manager of a sheltered housing complex and the warden or caretaker who might be referred to as the "manager". The manager of a sheltered housing complex will usually be the management company or association that might be authorised to act generally or empowered by the residents to, for example, carry out maintenance or enforce or vary community burdens under section 27 of the bill.

The manager might, however, be an individual; that is why the definition in section 110 does not refer to a management company or association. On the other hand, the warden or caretaker who assists and tends to the needs of residents day to day will usually be an employee of the management company or association. The warden might be a full-time resident within the sheltered housing development.

I sympathise with the view that it could be confusing, particularly to elderly and frail residents, if the warden or caretaker who is referred to as the "manager" is not the manager, but merely an employee of the management company or association. It is, however, necessary to distinguish between terms that are used in a non-technical way in ordinary life and terms that

feature in laws and therefore have a precise legal meaning.

If amendment 12 were agreed to, the bill would read, "a manager is a person so authorised, but does not include the warden unless the warden is so authorised". If we are to have clear and well-drafted laws, we must be a bit more precise in our use of language. I hope that Michael Matheson accepts that argument and agrees not to move amendment 12.

Given the convener's strictures for me to be precise in my dealings with the Justice 1 Committee, I undertake to look at the "Sheltered housing" heading of section 50 to see whether it could be expanded to include "retirement complex". I will do so without examining the definition because we have some real difficulties with that aspect.

The Convener: That is helpful. When will we hear whether the Executive will lodge amendments? Members will use that information to decide whether to lodge their own amendments, so it would be useful to have it.

The Lord Advocate: I could write to the committee early in the new year to intimate our decision.

The Convener: That would be helpful. I would pass that information to members who have lodged amendments but who are not on the committee. Before I call Brian Adam, I ask Kenneth Macintosh whether he wishes to come back in.

Mr Macintosh: Do I come back in—

The Convener: Yes, you wind up on amendment 227.

Brian Adam: It was interesting to hear the Lord Advocate's views on the range of amendments in the group. Over the past three and a bit years, it has been interesting to see the legislative process in action. It is normal at this stage to get the kind of rebuttal of amendments that we have heard today. We heard the Lord Advocate reject the idea of including variations on the phrase "and includes retirement housing" on the ground that we should be trying to define either the kind of people who might occupy such housing or the kind of housing that they might occupy.

The amendments in the group have been lodged because members are worried about the nature of developers and managers and have lodged amendments in order to protect the owners. I did not find the Lord Advocate's argument particularly convincing, but I accept that he has made a concession. A change in the section heading, which might not influence the definition, might be adequate and could offer the comfort that those who have lobbied us seek.

On my amendment 21, I heard again today the typical rebuttal, in which we are told that the matter has been covered and that we should refer to some other section. However, the Lord Advocate did not say at any point that amendment 21 would cause a problem. He did not outline any difficulties that would be consequences of adding to the bill the phrase

"(including a warden service)".

He implied that amendment 21 is redundant, but to my mind, that is not necessarily a good reason for rejecting it.

If we are offering comfort to those who seek the law's protection, and if those people consider that the addition to the bill of specific phrases—rather than their appearance in the explanatory notes or by reference to the matter elsewhere—to be a protection, and if such an addition would cause no problem, I see no good reason why amendment 21 should be rejected. The Lord Advocate suggested that amendment 21 is redundant because warden services are covered elsewhere in the bill. Only once—in relation to the word "retirement"—did he suggest that the committee's agreement to some of the amendments in the group might pose problems in the future. However, he offered us a way out on that, which was worth while.

I suggest that the committee reject the arguments on redundancy. The purpose of legislation is to protect our citizens. If our citizens seek particular protections and if we are taking a belt-and-braces approach to legislating, I do not see a problem. What is wrong with taking a belt-and-braces approach to the bill if such an approach can offer further comfort? If the problem is that that is not normally the way in which we legislate, I suggest that the way in which we normally legislate—or have legislated in the past—might not be the best approach. If we are developing new legislative processes, we should be willing to explore and accept a belt-and-braces approach.

Mr Macintosh: I welcome the Lord Advocate's comments, particularly on amendment 227, which would insert

"(including as a warden's flat or a visitor's flat)"

after "special way" in section 50(1). The Lord Advocate argued that the phrase's inclusion is unnecessary. I still have doubts about the clarity of the opening paragraph, but my main interest in moving amendment 227 was to ensure that a warden would not have a vote in the matters that are referred to in section 50. I will move amendments to that effect later; I therefore seek to withdraw amendment 227.

Amendment 227, by agreement, withdrawn.

Mr Macintosh: On amendment—

The Convener: I will go through your other amendments in a minute. I am in charge—temporarily and with the committee's leave, which is not always easily given.

Amendment 7 not moved.

Amendment 228 moved—[Mr Kenneth Macintosh].

Lord James Douglas-Hamilton: Could we have an undertaking from the Lord Advocate on whether he is prepared to consider the definition? That could affect the way we vote.

The Convener: I thought that we had already had such an undertaking.

Lord James Douglas-Hamilton: I thought that the Lord Advocate said that he would not give an undertaking at this stage.

The Convener: No. The Lord Advocate has undertaken to consider the definition and would come back timeously with proposed amendments and views on the section so that committee members could decide whether or not to proceed. Is that correct, Lord Advocate?

The Lord Advocate: My undertaking was in relation to the section heading. I gather from listening to Ken Macintosh that he is still insisting on his reference to the definition. If that is the view, I would be prepared to consider the definition in a global way, but I can give no undertaking that we will not end up in the same situation, because I still have concerns about the definition. However, given the views of Donald Gorrie and Ken Macintosh, I undertake to expand the undertaking to consider the definition as well.

The Convener: The clerk has advised me that I must not reopen the debate but I would like you to clarify your position. Are you suggesting some sort of overhaul of section 50 rather than just the section heading?

14:30

The Lord Advocate: I will examine the definition and the section heading.

The Convener: Does Ken Macintosh still intend to press amendment 228?

Mr Macintosh: I welcome the Lord Advocate's comments, but I still think that my amendment 228 would add to the bill.

The Convener: The question is, that amendment 228 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Matheson, Michael (Central Scotland) (SNP)

ABSTENTIONS

Douglas-Hamilton, Lord James (Lothians) (Con)

The Convener: The result of the division is: For 5, Against 0, Abstentions 1.

Amendment 228 agreed to.

Amendment 21 moved—[Brian Adam]—and disagreed to.

The Convener: Amendment 22 is grouped with amendments 113, 23, 4, 114, 24, 25, 8, 229 and 9. If amendment 22 is agreed to, I cannot call amendments 113 and 23 because they will have been pre-empted. To complicate matters further, if amendment 4 is agreed to, I cannot call amendment 114 because it will also be pre-empted.

Mr Macintosh: Amendment 22 would remove the high hurdle of needing 75 per cent or three quarters of the units in a development to vote to apply the provisions in section 27, which deals with the power of a majority to appoint a manager. The amendment would have the effect of requiring only a simple majority.

On the core burdens, which are dealt with in the next section, I will support the notion of having a high voting threshold. However, this section does not protect the core burdens or the owners; it protects the manager or the powers exercised by the manager. The manager is not the guarantor of the owners' interests. Indeed, we know of many cases where the manager has worked against or opposed the owners' interests.

Owners tend to be conservative—with a small "c"—and will not be rushing to change the manager or grant them more or fewer powers every time anything goes wrong. A simple majority in this case would be consistent with the rest of the bill.

Should I also speak to amendments 23, 114, 24 and 229?

The Convener: Yes. You can speak to all the other amendments in that group if you wish. That is the pattern. You move your amendment and speak to all the other amendments in the group. Other parties who have amendments in their name can also speak to other amendments in the group if they wish.

Mr Macintosh: Amendment 23 follows on from amendment 22 although I believe that it will be pre-empted if amendment 22 is accepted.

Amendment 23 seeks to add the words,

"excluding units owned by the developer, superior or manager of the development or their representatives".

The purpose of adding those words is to eliminate the possibility of a developer or manager exercising some form of control by the back door. The warden has a property, but the warden is there to serve the owners' interests, not those of the developer. From practical experience, we know that that often happens.

Amendment 114 is about the protection offered to core burdens. We have debated the issue and the committee agreed the principle that a 75 per cent threshold was too high. The Minister for Justice, Jim Wallace, agreed in debate to reduce that threshold to two thirds, or 66 per cent. Amendment 114 would reduce the percentage to three fifths, or 60 per cent.

A balance has to be struck. As I argued earlier, owners of retirement flats tend to be naturally conservative and will not be seeking radical change. A threshold of 75 per cent is unrealistic. It is difficult to get 75 per cent in any vote. The issue would have to be absolutely clear cut.

Although a threshold of 66 per cent is more realistic, it is still a formidable hurdle. I would argue that 60 per cent would be more appropriate. It is important to note that we are giving core burdens a special place and we are saying that they should have a higher threshold. However, 60 per cent is still a sufficiently high threshold to have to pass.

I do not know of any example where residents have undermined their rights or have weakened services. Only the developer or the manager would tend to take advantage of such measures. Those who do not attend a meeting—unless they are given a proxy vote, which is the subject of another amendment that I have lodged—count as being against, which makes 60 per cent an even more formidable threshold.

Amendment 229 says:

"In section 50, page 25, line 3, after <development;> insert—

<( ) section 32(2) of this Act, in relation to community burdens (including core burdens), applies as if there were inserted after the word 'granted' where it first appears the words ', following consultation with all the owners of units in the development'".

The crucial point about amendment 229 is that what the owners of retirement homes are seeking is already in the bill, except for two particular words—"consultation" and "accountability". We are looking to see what the model development plan says about accountability and consultation because that is crucial to the owners' interests. Services are often not core burdens. For example, I do not believe that the wardens' hours, the meals served or even grass cutting will ever be covered as core burdens, but they are often cut back by the manager of a property.

The owners of the property justifiably feel that they should be consulted on any of those changes. There are examples of developments where meals have been cut back to a ridiculous level and where decisions have been taken that the owners are annoyed about because they feel that their quality of life has suffered. They want to be consulted and the point of amendment 229 is that it would make consultation statutory. The amendment would give owners the guarantee that they are seeking.

I move amendment 22.

The Lord Advocate: I will speak to amendment 113, but I will begin by making a general point about the role of developers and managers in sheltered housing because I am concerned that there may be some misunderstanding about that role in future. A lot of concern has been expressed about that role, not only at today's meeting but during the consultation period and previously. Given that many of the amendments deal with that essential role, I would like the committee to take a step back for a moment and consider what their general effect would be.

In the past, developers would often be the feudal superiors and using that position they would regularly reserve the power to manage sheltered housing complexes. The residents would not be able to remove them. In future, of course, that will not be the position. Developers will be able to appoint themselves or others as managers, but only for a strictly limited period which, if the amendment to which I will speak later were approved, would be five years at most.

In many cases, all the flats will have been sold before that time. When the last one is sold, the developers' powers to appoint managers will have gone—

Brian Adam: May I intervene?

The Convener: No, you may not. Please allow the Lord Advocate to finish. I will allow members to comment later.

The Lord Advocate: For many existing complexes, the flats will have been sold, and the developers' role will disappear on the appointed day. Therefore, concerns about developers are backwards looking. Their role will be strictly time limited.

In the future, owners will take control. It will be up to them to appoint managers and to establish the regime under which they live. They will have to decide which powers to delegate to managers, but it will not be up to managers to rule complexes. Managers will be able to take decisions only if the owners have given them the authority to do so. It

will be up to owners to change their burdens and, in most instances, they will be able to do so by a majority decision.

In the case of the core burdens, a majority of more than half will be needed, but that is not an attempt to impose an external protection in favour of managers. It will be up to owners to make the moves; the role of the managers will be to manage the complex, not the owners.

Many of the amendments are, understandably, based on suspicions about what happened in the past and on an understanding of sheltered complexes that is largely no longer relevant. In the light of my comments about the new regime for sheltered housing, I hope that members will feel reassured about the purpose of the bill and the way in which amendments are structured.

Amendment 22 removes a protection for residents in sheltered housing by raising the threshold for the majority required to allow that majority to confer powers on a manager under section 27.

The policy behind the bill is that some aspects of sheltered housing are so fundamental to the operation of such housing that they should not be removed or varied by a simple majority. That view received overwhelming support from respondents to consultation.

Representations were received that expressed concern that a simple majority could decide to regulate the operation and management of the complex so as to remove some of the most important aspects of and protections in sheltered housing. Such changes might be instigated by younger, more active owners in the complex, and a bare majority might be assembled against the wishes of a minority of older, frailer owners who want the full range of services to be maintained and who rely on those services, which were the reason why many of them entered sheltered housing.

For that reason, a higher majority—we suggest two thirds—is required when conferring powers under section 27 on a manager in a sheltered housing complex. I hope that, with those explanations, Kenneth Macintosh will consider withdrawing amendment 22.

14:45

Amendment 113 is closely bound up with that. It takes up a recommendation in the committee's stage 1 report and deals with the size of the majority that is required to vary or discharge core burdens in sheltered accommodation. During the committee's evidence taking, it became clear that the 75 per cent threshold was regarded as too high. The committee suggested that two thirds would be more appropriate. As the Deputy First Minister said in the stage 1 debate, the Executive is happy to accept that recommendation, and amendment 113 will make that change.

Amendment 4 was lodged by Michael Matheson and I think that Jim Wallace's name appears as a supporter of it. Obviously, we are happy with that amendment, which would make the threshold two thirds. It follows that the Executive considers that 60 per cent is too low and that we are happy to go with the committee's view as expressed in its stage 1 report.

Amendment 9 also deals with majorities, but its aim is rather different. It appears to introduce a requirement for only a simple majority to sign a deed to vary burdens other than core burdens in a sheltered housing development. However, the amendment would not have that effect. It would overrule any provision in a deed that set out the burdens for a sheltered housing development that required more than half the owners to sign a deed of variation. A deed could not therefore provide a special higher majority for varying core burdens. However, strangely, it could provide for the core burdens to be varied by fewer than half the owners.

The most important conditions in relation to sheltered housing, other than core burdens, will be provisions on the appointment or dismissal of a manager. Section 59 deals with a developer attempting to retain control of a development by imposing a high threshold majority—possibly even 100 per cent—for dismissing a manager. Irrespective of whether the titles require a higher majority, section 59 will require a majority of only two thirds.

The Executive does not believe that many other sheltered housing circumstances are likely to be subject to a requirement for a majority higher than 51 per cent. Except in the special circumstances of core burdens and the appointment or dismissal of a manager, there seems no good reason for the bill to interfere in arrangements that have been drawn up between private individuals who are contracting freely. I therefore ask the member to consider not moving amendment 9.

Amendment 8 also concerns majorities. It would replace the required majority for using section 32 to vary or discharge a burden, other than a core burden, in a sheltered housing scheme. In those circumstances, section 32 currently requires the agreement of the owners of a simple majority of the units that are affected. Under amendment 8, the decision would be made and the deeds signed only by a majority of those who responded when asked about a proposed variation or discharge.

The amendment seems to throw up a large number of problems. It is not clear how the inquiry

is to be made, or by whom. There seems to be no check against improper notification or what happens when only a few owners are consulted. It also means that a small number of people could vary or remove conditions applying to the entire community. If everybody in a community of 100 were informed of a proposal, and only 10 people replied, six in favour and four against, the decision of six people would affect the whole community. Admittedly, there would be an opportunity for the others to apply to the Lands Tribunal, but that would be an ineffective safeguard.

Section 32 allows the burdens to be discharged, reworked and replaced with new obligations. It is equitable to require the owners of a majority of the properties affected to agree to the change, and for them to be fully aware of the implications. That principle was supported on consultation. The amendment could allow a minority to take advantage of their neighbours' apathy by imposing conditions in the interests of themselves rather than those of the community. I invite the member not to move amendment 8.

Amendment 229 attempts to introduce a requirement to consult all owners in a sheltered housing development when a majority of owners are attempting to vary or discharge community burdens. The amendment is unnecessary. A majority of the owners, and in the case of core burdens a two-thirds majority, will be required to sign the deed of variation or discharge or give authorisation to sign to a manager where that is permitted. Clearly, they will have been consulted.

Section 33 requires any minority not signed up to the proposal to be informed. They will have an opportunity to prevent the discharge or variation at the Lands Tribunal. Another statutory round of consultation would just add to the delay and expense of the process without necessarily settling any issue of contention. It is important to provide information to the minority who have not signed up to the proposal and an opportunity for them ultimately to prevent the change if it is unfairly prejudicial to them. The bill does that. The consequences of the amendment would be that every single person would have to be consulted. For example, somebody living in sheltered housing might visit his or her son or daughter in Australia for six months and therefore be away from the complex. The obligation to consult would require that person to be informed of the proposal, which would hold up a proposal that might very well have widespread support. Because of the obligation to consult everybody, it becomes impossible to see through changes. Equally, if somebody is frail, there may be difficulties about deciding whether that person should actually be consulted.

Amendments 23, 24 and 25 deal with the position of developers or managers. Amendment 23 is prompted by concerns in some sheltered housing complexes that developers, who may be the feudal superior of the complex, or their representatives, may still own some flats or may have reacquired units with a view to continuing to exercise some element of control over the complex, through voting rights that are conferred by ownership.

I do not want to belittle the difficulties that I know some residents of sheltered housing have experienced with unsympathetic developers and managers. The overall effect of the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions Bill will be to remove control from feudal superiors and to place it in the hands of owners.

I should add that the Executive believes that the owner of a unit in a complex should have a vote for each unit that he owns, even if he happens to have been the developer at the start of the process. Of course, by that time, he will simply be a co-owner with the other people in the complex. Otherwise, we would be interfering unfairly with ordinary rights of ownership.

As amendment 24 is similar to amendment 23, I ask the member to consider not moving it. In theory, it would mean that, where burdens have been imposed on—say—20 units in a housing complex and a housing association has sold five and retained the rest, the owners of only three units could vary the terms of the burden for all 20 units. Clearly, that would not be appropriate.

Amendment 25 aims to oblige a manager who is authorised to vary or discharge units in a sheltered housing complex to consult all owners in the complex and to obtain the agreement of the majority of them before varying core burdens by a deed executed under section 32(2)(b). As that possibility is unlikely to arise, the amendment is unnecessary. The changes made by section 50(5)(a) to the operation of section 27 in relation to sheltered housing mean that, unless the deed setting out the burdens provides otherwise, the owners cannot delegate by simple or even three-quarter majority their power to vary a core burden. For sheltered housing, section 32(2)(b) applies only to non-core burdens. I therefore invite Michael Matheson not to move amendment 25.

The Convener: Before I ask Michael Matheson to speak to amendment 4 and the other amendments in the group, I want to confirm whether you said that you were willing to accept amendment 4.

The Lord Advocate: That is right.

Michael Matheson: I am delighted that the Lord Advocate is minded to accept amendment 4,

which is in line with the Executive's amendment 113 and the committee's recommendation in its stage 1 report. The Lord Advocate has probably had an opportunity to reflect on that report, which contains a very good example of the difficulties faced in trying to reach a 75 per cent majority. In one vote, a complex managed to reach a 74 per cent majority in favour of change; if this legislation had been in force when that vote was taken, those people would have been thwarted in their aim to make the changes they desired. We all recognise that core burdens play a fundamental part in the services that a sheltered housing or retirement accommodation complex provides; as a result, any votes on such burdens should not be subject to a simple majority. Although I am sympathetic to Ken Macintosh's view about a 60 per cent majority in votes, I believe that a two-thirds majority is the most appropriate level.

I will not rehearse the arguments to my other amendments in this group, and will say only that I will reflect on the Lord Advocate's points. I will probably choose to keep my powder dry and return to the issues at stage 3.

The Convener: Does any other member wish to make any comments on this group of amendments?

Donald Gorrie: It is all hideously complex.

The Convener: Is that your comment, Donald? I think that we would all agree with you.

Donald Gorrie: I might be wrong, but I do not share the Lord Advocate's rosy view that the developers will disappear. I am perhaps more cynical about the matter. Some of these people are very skilled in getting round the law, if it is in their interests to do so.

If a developer succeeds in selling some, but not all, of his sheltered housing or retirement flats and rents out the flats that he has not sold, who gets the votes for the flats that have been rented out? I would have thought that the tenants have as much right as the owners to vote on whether the grass gets cut or on whether dogs should be forbidden, for example. I seek some clarification of that issue.

I support the two-thirds majority. We should be consistent. If my memory serves me correctly, the bill has figures of 75 per cent, 66 per cent and 60 per cent, which is silly and confusing. Although I am happy with the proposals for a two-thirds majority, I would like someone to clarify my confused mind on some of the other points.

15:00

The Convener: I, too, am slightly confused. Enforcement rights are contained elsewhere in the bill. We have already been down that road with tenants and spouses. I think that the position is that such rights for tenants cannot be created.

The Lord Advocate: The position in relation to tenants is that the owner of the property will have the vote. The owner could be the original developer or anyone else who bought the flat and let it out. The answer to Donald Gorrie's question is that the owner will have the vote.

The Convener: They will have the vote on what the rights are.

The Lord Advocate: Yes.

The Convener: We should separate rights of enforcement—which the bill gives to tenants—from rights of creation. Donald Gorrie is right about the difference. It is important to make that point.

Paul Martin (Glasgow Springburn) (Lab): I, too, support the 75 per cent rule. Although I take on board some of Ken Macintosh's concerns, 75 per cent—

The Convener: The proportion is two thirds now.

Paul Martin: A two-thirds majority will give clarity in relation to the owner's intentions.

I want to address two points. There is the famous story about those who go to visit Australia, which comes up on a regular basis. What happens if the owner decides to visit their relatives in Australia for six months? To accommodate Ken Macintosh, perhaps that scenario could be dealt with by communication with the owners rather than by consultation with them. Consulting does not necessarily mean asking whether the work can be carried out; it involves advising the owners of the kind of work that will take place.

Secondly, there is the concern about owners having a vote in their capacity as owners. In my opinion, the main issue is to ensure that the residents are given priority. That is an important issue in relation to the upkeep of the development. The developer who owns the development will have different priorities from those of a resident. The resident is in the privileged position of having absolute authority over what they are aware of locally. The developer, on the other hand, is interested in the business aspects. What parallels are there in relation to the two differences? I am as confused as Donald Gorrie is in relation to some of the other amendments.

The Convener: I will ask the Lord Advocate to respond. Issues to do with mixed ownership, in which tenancies and proprietors are involved, have been raised before. Those issues arise in the specific context of the type of accommodation that we are considering. Brian Adam has been very patient. Kenneth Macintosh will be winding up.

Mr Macintosh: Will I be able to ask questions?

The Convener: I will let you ask questions. How could I refuse? You are so charming.

Brian Adam: I support amendment 23. There are developments in which managers have bought some of the units and it seems that such managers will have undue influence. Although they might exercise their influence in the interests of some of the owners, they will not necessarily do so in the interests of all of them. It would be difficult to design a scheme that gave a weighting to a resident owner, as opposed to a non-resident owner. Those are the difficulties that have to be dealt with in drawing up legislation.

Developers, superiors or managers who also own units have some rights, but they may get disproportionate rights if we do not accept amendment 23. It has been alleged that in certain cases rights have been exercised inappropriately. It may be that, as the Lord Advocate spelled out, changing the manager will be much easier in future developments and the initial appointment will be for only five years, but that will apply only to new developments. There are problems in existing developments, some of which relate to the rights of managers who are also owners. Those rights may not be exercised in the interests of residents.

The Lord Advocate gave an example concerning a housing association. The housing association has 20 units in a development and sells five of them. Three of the five residents want a change and the other two do not. The housing association does not want the change, because the change clashes with its policy on the other 750 units that it has elsewhere and it wants a uniform policy. However, that uniform policy runs contrary to the rights of residential owners. I can see circumstances where even organisations such as housing associations may end up exercising their ownership rights in ways that are not in the best interests of a development or of the people who live there, because they have some other overriding interest in behaving uniformly across the board. We need to examine that.

I am also concerned about the thresholds that people are being asked to reach to achieve change. Even if the threshold is 60 per cent, it is 60 per cent of all the owners, not just those who vote. In Scotland, we have already had the infamous case of the Cunningham amendment to the Scotland Act 1978, which made it virtually impossible to reach the threshold. If there is a threshold of 60 per cent, particularly when many of the people concerned are old and frail and do not necessarily want to make a change, it can automatically be assumed that a no vote is built in.

A threshold of 75 per cent is untenable. I am delighted that the Executive accepts that. Two thirds will be difficult to reach. Others have lobbied for a threshold of 50 per cent, although that option is not before us today. It could be argued that that option might hit at the idea of core burdens and non-core burdens. To my mind it does not, because of the in-built no vote in relation to those who do not take the trouble to exercise their vote.

The Convener: Kenneth, if you want to make your point, that is absolutely fine. The issue is important and I am quite happy to let the discussion run. You may make your points to the Lord Advocate, he will respond, you can sum up and then we will move on.

Mr Macintosh: I have two questions. The first relates to amendment 22, which would remove section 50(5)(a)(i). Does the Lord Advocate accept that there is a difference between core burdens and management? In other words, is there a difference between accepting that there should be a high threshold for protecting core burdens, but that the management of a complex does not require the protection of the bill? In fact, it could be argued that the management could do with gingering up and—[*Interruption.*]

The Convener: Excuse me a moment, Kenneth. I am sorry to interrupt you, but a mobile phone is causing some feedback—I hope that it is not mine. I ask people to check their various electronic devices. No one has gone red. Go on, Kenneth.

Mr Macintosh: I accept totally that an argument can be made to protect the core burdens, but surely there is no need to set a high voting threshold to protect the manager of a complex. Does the Lord Advocate accept that point?

Secondly, can the Lord Advocate offer an assurance that the issue of consultation and accountability will be addressed under the development management scheme? I know that that issue relates to a later section, but it would be useful to hear the Lord Advocate's view.

The Convener: I am sorry, Kenneth, but we still have a problem with feedback. It would appear that someone in the public gallery has a phone that is switched on. People are indicating that that is not the case. Will the engineer look into the problem? Please continue, Kenneth. I am sorry to have interrupted your flow.

Mr Macintosh: I had finished the point. Will the Lord Advocate indicate whether the development management scheme offers an assurance on the issues of consultation and accountability?

The Convener: I hope that the interruptions do not prevent the Lord Advocate from responding to those questions. Lord James, you wanted to come in before the Lord Advocate responded.

Lord James Douglas-Hamilton: We were not asked at the outset to make a declaration of interests. My interests are as I have stated previously and are listed in the register of members' interests. I am a non-practising Queen's counsel. I am not the only member present today

who is a lawyer—I include the Lord Advocate in that remark.

Is it possible for an owner who goes away to vote by proxy? That would reduce the problem to an absolute minimum. Concern has been expressed that a developer could exercise a disproportionate influence if, let us say, he owned 20 or 30 houses in a complex and had a vote for every one of those houses. How could that situation be changed in order to avoid the owner having a disproportionate influence?

The Convener: After the Lord Advocate has responded to those questions, I will call Kenneth Macintosh to wind up. I do not wish to be rude, but I ask him to be brief.

The Lord Advocate: On amendment 22, Kenneth Macintosh asked whether I accept that there is a difference between core burdens and management. If I may say so, the question is based on a misconception about the purpose of paragraphs (b) and (c) of section 27(1). Amendment 22 seeks to remove section 50(5)(a)(i), which refers to paragraphs (b) and (c) of section 27(1). Section 27(1) relates to the conferral on a manager of such of the powers of the owners of the majority of the units as they may specify and the revoking or varying of the right to exercise such of the powers that are conferred under paragraph (b).

The provision refers not to the status of the individual but to the powers that that individual exercises as a manager and how that may be amended. In that context, given that the powers that managers exercise are included in the protection that is given to individual members of sheltered housing complexes, there is no difference between those powers and the core burdens. The rationale for a higher threshold for core burdens also applies to the powers of managers. I emphasise that the provision applies to the powers of managers, not to an individual who is in post.

15:15

I was asked whether I could offer assurances on consultation and accountability in relation to a development management scheme. Such a scheme is optional and was not included in the consultation. However, Paul Martin's point about the notification of proposals is relevant because the bill provides for notification to other owners after the event. The argument so far has been that, provided that the majority is achieved, that provision is sufficient.

I am prepared to reconsider the issue, but there might be cases in which owners who knew that other owners were opposed to a proposal might decide not to sign up to it, thus affecting the majority. Therefore, it seems that there is room to consider whether a notification procedure ought to be adhered to before owners sign a deed of variation. I will look into that. I hope that that goes some way towards answering Kenneth Macintosh's point about consultation.

Lord James Douglas-Hamilton was right to say that arrangements can be made for proxy votes. The difficulty is that sometimes people go away without considering that they might have to cast a vote by proxy. Equally, the people who notify owners of the votes may either not know that an owner has arranged a proxy vote or not know how to contact them. Therefore, although I understand the rationale behind Lord James's question, I am not sure that it meets the point.

Lord James's second point was that a developer could exercise disproportionate control, which picks up a point made by Brian Adam. We must move away from the term "developer" and refer to people who own units. Regardless of whether they were the developer initially, they will be in the same position as others who own a unit in a complex. Of course, that is to assume that the manager's burdens are exhausted, which, in most cases, will have happened.

Provided that the deeds allow for it, anyone may attempt to purchase a unit. If someone starts to buy up flats, he or she will be granted a vote for each flat. For example, if a son or daughter were to buy a flat for his or her parents, he or she would have a vote by virtue of that ownership, as would any company or developer.

Lord James Douglas-Hamilton: In practice, could a developer or company buy 30 flats in a complex, thus controlling the majority of the votes?

The Lord Advocate: That can happen, provided that there is no impediment in the title deeds. The protection would be that if somebody with a majority of 66 per cent pushed a proposal through, the minority might go to the Lands Tribunal. I understand the concerns that Lord James and others have expressed, but I cannot see how we can legislate to deprive legitimate property owners in a complex from exercising their rights of ownership and votes within that complex.

Lord James Douglas-Hamilton: I have one final question.

The Convener: I appreciate that, but we have not concluded one section today. Kenneth Macintosh can pick up your points. We have aired the difficulties. To be quite straight, we will finish section 50 come hell or high water, as my granny would have said. We must then complete the other business on the agenda. We have highlighted the fact that there are problems. I ask Kenneth Macintosh to be concise.

Mr Macintosh: Amendment 114 would reduce the voting threshold on core burdens from 75 per cent to 60 per cent. I accept that the Executive has agreed to change the threshold to 66 per cent. I also concede that the committee feels that two thirds is a suitable majority, which is a matter of judgment. Therefore, I will not move amendment 114.

The Lord Advocate argues that amendment 229 is unnecessary. He said that owners would have to be informed but that consultation would still be optional under the development management scheme. That worries me slightly, but I am reassured that the Lord Advocate has agreed to examine the notification procedure. I am more concerned about consultation over services. Although the notification procedure will apply only to the core burden, it is really a matter not for legislation, but for good practice. We could consider that in the development management scheme. I will not move amendment 229.

Amendment 23 is consequential to amendment 22. On amendment 24, it is important to insert the explicit protection that developers, or their representatives, should not have a vote. In the past, they have had a vote, so I will move amendment 24. It is important to make it explicit in the bill that developers will not be allowed to engage in such bad practice.

I am an optimist but, like Donald Gorrie, I thought that the Lord Advocate was painting a rather rosy picture of what the future may hold. I certainly share the Executive's desire to protect owners' interests but, much as I would like to share the Lord Advocate's view, I do not believe that the bill as currently worded will protect owners' interests.

I especially feel that managers do not need the protection that is being offered. I listened to what the Lord Advocate said about section 50(5)(a)(i), which refers back to section 27. As he said, the provision applies not to the individual, but to powers granted to the manager. The point is that owners do not want to hire and fire managers or take drastic action. They want managers to be responsive to their needs. There would still be a 50 per cent threshold—it is not as if that is an easy target to reach. Fifty per cent of owners would have to agree to confer on any manager the right to exercise, revoke or vary their powers. There is a clear distinction to be made between the protection of the core burdens and the protection of a manager, which is unnecessary. I will press amendment 22.

Amendment 22 disagreed to.

Amendment 113 moved—[Lord Advocate]—and agreed to.

The Convener: Does Kenneth Macintosh wish to move amendment 23?

Mr Macintosh: As amendment 22 has been defeated, I move amendment 23.

The Convener: The question is, that amendment 23 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Alexander, Ms Wendy (Paisley North) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Martin, Paul (Glasgow Springburn) (Lab)
Matheson, Michael (Central Scotland) (SNP)

ABSTENTIONS

Macmillan, Maureen (Highlands and Islands) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 23 agreed to.

Amendment 4 moved—[Michael Matheson]—and agreed to.

The Convener: Amendment 114 has been pre-empted.

Amendment 24 moved—[Mr Kenneth Macintosh]—and agreed to.

Amendments 25, 8 and 229 not moved.

The Convener: Does Kenneth Macintosh wish to move amendment 118?

Mr Macintosh: In the light of the Lord Advocate's comments, the existing protections and the example that showed how flexibility might be to older residents' advantage, I will not move amendment 118.

Amendment 118 not moved.

Amendment 115 moved—[Lord Advocate]—and agreed to.

Amendment 9 not moved.

The Convener: I suggest that we take a short break of about five to seven minutes. When we return, we will complete consideration of section 50, which means that we will deal with the group of amendments on persons who are entitled to act on behalf of an owner in sheltered housing and the group on the development management scheme, which looks like a whopper, but contains many technical amendments. After we conclude consideration of section 50, we will proceed to the rest of the meeting's agenda.

15:28

Meeting suspended.

15:41

On resuming—

The Convener: I reconvene the meeting. My intention is to get to the end of section 52 so that we can discuss the other items that are on the agenda for today's meeting.

I call Michael Matheson to speak to and move amendment 10, which is grouped with amendment 230. I will then call Kenneth Macintosh to speak to both amendments, and then bring in other members. I appeal to members for concision—or is it conciseness? What is the word that I am looking for?

Mr Macintosh: Brevity.

The Convener: I will go for brevity, because at the moment I cannot remember the noun that comes from "concise".

Michael Matheson: I will be brief. Amendment 10 aims to allow the owner's nearest relative or, in the absence of such a person, the owner's guardian, continuing attorney or welfare attorney to take decisions under the bill that an owner would be able to take if they were not an adult with incapacity.

I move amendment 10.

The Convener: Do you wish to speak to amendment 230?

Michael Matheson: I will leave Ken Macintosh to do that.

Mr Macintosh: Amendment 230 would simply establish the right for owners in retirement complexes to be able to vote by proxy. We all know from experience that it is very easy for developers or managers to call a meeting at the last moment when some of the owners are on holiday or are ill. In some complexes, the owners of flats and the developer or manager are almost at war—certainly, they are at loggerheads—and the owners' only weapon in defending their rights is the right to have proxy votes.

Paul Martin: In modern democracies, people are allowed to have postal or proxy votes—that certainly happens with this Parliament. I see no reason why such a measure cannot be considered in this case. Indeed, there would have to be specific reasons why one would not be willing to modernise the system by having democratic votes in such a way.

The Lord Advocate: Amendment 10 deals with adults with incapacity. Under the Adults with Incapacity (Scotland) Act 2000, an adult with incapacity may have their property dealings managed by another to the extent of any powers granted under that act. Amendment 10 is therefore unnecessary in circumstances in which the procedures of that act have been followed—in certain circumstances, it could result in a relaxation of the act's requirements. The bill is not an appropriate place to tinker with the law on adults with incapacity. The existing law is sufficient to cover a situation in which somebody is incapable of dealing with their property by themselves. With that assurance, I ask Michael Matheson to withdraw amendment 10.

Amendment 230 deals with proxy votes. The measure in the amendment is already possible under the existing law for all owners of property, not just for those who are in sheltered accommodation. On that basis, I invite Kenneth Macintosh not to move amendment 230.

15:45

Michael Matheson: I take on board what the Lord Advocate said. To all intents and purposes, amendment 10 is a probing amendment to find out how the measures would apply in the circumstances that I described. I am sure that the Lord Advocate understands the concerns about how the provisions will operate, given the client group of people in sheltered housing accommodation with whom we could be dealing. I am somewhat reassured by the Lord Advocate's comments.

Amendment 10, by agreement, withdrawn.

The Convener: I ask Ken Macintosh whether he wishes to move amendment 230.

Mr Macintosh: No. I welcome the Lord Advocate's assurance.

Amendment 230 not moved.

The Convener: The next grouping is substantial, so I suggest that the amendments be debated in sub-groups. The lead amendment is amendment 231. Committee members will see that the grouping is divided into sub-groups on sheltered housing, development management scheme, powers of the Lands Tribunal, extinction of real burden, amendment of acquisition of land procedures, minor and consequential amendments, and commencement. We will discuss the amendments in those batches.

Amendment 231 is grouped with amendments 127, 128, 129, 130, 151, 153, 155, 157, 158, 159, 160, 171, 172, 240, 173, 186, 191, 195, 196, 197, 198, 199, 200, 201, 202, 203, 29, 204, 30—I feel like a bingo caller—31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 234, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 236, 82, 218, 219, 220 and, you will be pleased to know, 221.

Mr Macintosh: One of the most welcome developments in the stage 1 debate was the

minister's commitment to introduce a development management scheme. The purpose of amendment 231 is to write such a scheme into the bill. As I argued earlier, the most important securities that owners in retirement accommodation are looking for are a statutory right to consultation and accountability. The owners would like to question certain decisions that are taken on their behalf and to scrutinise contracts, such as contracts that are signed by the manager on their behalf for grass cutting or for any other service in a complex.

I welcome the Executive's commitment to the introduction of a development management scheme, but amendment 231 seeks to ensure that that becomes part of the legislation. I would welcome any information from the minister on what the development management scheme will include, particularly as far as consultation and accountability are concerned.

I move amendment 231.

The Convener: As no other members wish to contribute, I ask the minister—sorry, the Lord Advocate—to speak.

The Lord Advocate: That is all right. Under the Scotland Act 1998, I am also a minister.

The Convener: It is always the same when I have a choice. When it comes to car parking spaces, I never know which one to take.

The Lord Advocate: As long as you do not take up a whole section.

Amendment 231 attempts to establish a duty on a majority owner or manager to comply with the bill's development management scheme when it has been adopted for a sheltered housing complex. When the development management scheme is applied, it will bind all the properties in the development, and the terms of the scheme will, therefore, be binding on each of the owners, regardless of how many properties they own. A manager's responsibility will be outlined in his terms of appointment and the scheme will provide rules for his appointment and duties. I do not consider that amendment 231 is necessary, given that the scheme will bind all owners and will contain provisions on the manager's responsibility.

Ken Macintosh asked me about the rights of consultation, which will depend on the terms of the scheme. Perhaps we will consider them when we deal with other amendments in the group.

Mr Macintosh: I thank the Lord Advocate for his reassurance. The importance of the development management scheme to the owners cannot be overestimated. I am reassured that it will be binding on the owners and managers of a complex. I look forward to hearing more about the detail of the scheme, although I will probably withdraw amendment 231.

The Convener: That is fine. Is the committee content—[*Interruption.*] I am sorry. We are in the middle of a sub-group of amendments. Amendment 231 stands on the record as moved, and we will deal with it at the end of our debate on this group, which we have artificially divided because it contains so many amendments. I hope that that is clear to members, because it is not very clear to me.

We come to the sub-group on development management schemes. The Lord Advocate will speak to amendments 127, 128, 129 and 130.

The Lord Advocate: This is the first in a series of sub-groups of Executive amendments that would reintroduce the development management scheme. The scheme is an optional example of good practice, which developers or owners will be able to adopt or adapt. It was recommended originally by the Scottish Law Commission as a set of general principles and therefore it can be fine tuned to allow for the circumstances of particular developments. The scheme originally provided for financial matters, annual meetings of owners, an advisory committee and, above all, an owners association, which should be, ideally, a body corporate. Unfortunately, those provisions fell within the definition of business associations in schedule 5 to the Scotland Act 1998, which lists reserved matters. Therefore, the scheme was removed from the bill before its introduction.

The Executive has been involved in extensive consultations with the Scotland Office and the Department of Trade and Industry in an effort to deal with that problem. We did not wish to introduce provisions on the development management scheme unless the owners association would be a body corporate, which would give it legal personality. In other words, it would be able to own property in its own name; it could owe, and be owed, money; and it could sue, and be sued, in its own name. The corporate personality of the owners association represents the real innovation to the existing law.

Members will recall that the stage 1 report called for the scheme to be reintroduced in the bill as soon as the question whether it was a reserved matter had been resolved. I am pleased to tell members that a solution has been agreed with the Scotland Office and the DTI. The amendments that I will describe would reintroduce the scheme and pave the way for it to be delivered as recommended by the Scottish Law Commission.

Most of the aspects of the bill as introduced that relate to the regulation of the corporate body and which fall to be treated as reserved matters will be set out in an order under section 104 of the Scotland Act 1998, which will be laid before the Westminster Parliament after the bill has been enacted. A section 104 order would be made in

this case as it would be expedient to do so in consequence of provisions of an act of the Scottish Parliament. It is an inevitable consequence of the division of the provisions between the bill and the section 104 order that certain aspects of the scheme will rely for their content on the terms of the section 104 order.

The revised sections that would be inserted into the bill will deal with non-reserved matters. Amendments 127, 128, 129 and 130 would reinstate the sections that were in the Law Commission's draft bill and which provide for the development management scheme to be applied to land by a deed of application. They would also stipulate certain matters that must be included in the deed of application, such as identification of the development and the appointment of the first manager.

The deed of application would require that all the information in subsection (2) of the new section proposed by amendment 127 should be set out and that the name of the owners association should use those words so that a third party would know immediately that an owners association was involved. Substantive rules, such as restrictions on use and obligations to maintain property, would be set out in the deed of application.

The amendments would make provision for the legal content of the rules of the scheme by applying various sections of the bill to the rules as they apply to community burdens. They would provide a means to disapply the scheme by the registration of a deed of disapplication, as well as a procedure for objection to the disapplication of the scheme. The procedure for disapplication has been brought further into line with the provisions that relate to the variation and discharge of community burdens.

I would like to say something else about the section 104 order. I appreciate that it is not easy for members to consider the amendments that relate to the development management scheme when they do not have the full scheme before them. The section 104 order will deal with those aspects of the scheme that are reserved to Westminster. It will, of course, be up to Westminster to decide those matters.

I repeat that we have had extensive discussions with the DTI and the Scotland Office. I reassure members that when the scheme appears, we intend it to replicate as closely as possible the original version that was produced by the Scottish Law Commission. The distinctive characteristic of the scheme is the provision for the owners association to be a body corporate. As I indicated earlier, by being a body corporate, the owners association will have all the attributes of a legal personality.

The Convener: I will put in horrifically simple language what the Lord Advocate just said: in order for the scheme to proceed as a devolved issue, we have found a way around the fact that corporate law is reserved.

The Lord Advocate: I wish that I had put it as succinctly as the convener has just done.

The Convener: You have got to read the *Beano* for that.

Lord James Douglas-Hamilton: I thank the Lord Advocate for coming forward with the measure, which we welcome. It would be helpful if he could give us an indication of the appointed day on which the measure will come into effect. Will it be the same day as will apply to the rest of the act? Does the Lord Advocate envisage many circumstances in which disapplication might arise?

The Lord Advocate: The appointed day will be the same as for the rest of the act. The extent of disapplication will depend on owners and the extent to which they are content to take up the scheme. I am looking for support from my officials but no one is nodding.

The Convener: I think that it is a given, but people get less animated as the session goes on.

The next sub-group deals with the powers of the Lands Tribunal of Scotland. I ask the Lord Advocate to speak to amendments 151, 153, 155, 157, 158, 159, 160, 171, 172, 240, 173, 186 and 191. Now he knows why Mr Wallace was not available.

The Lord Advocate: As the convener indicated, this sub-group applies the jurisdiction of the Lands Tribunal to the rules of the development management scheme at least in so far as those rules are title conditions. A rule set out in a particular deed of application that prohibits the parking of commercial vehicles on the development would be such a rule, for example.

Amendment 153 allows the owner of a unit of a development that is subject to the development management scheme to apply to the tribunal for preservation of the scheme where a proposal has been intimated to register a deed of disapplication. The amendment also permits the owners association of a development to apply to the tribunal for preservation of the scheme where intimation has been given of a proposal to register a conveyance in implement of an agreement to acquire the land, where the land could have been acquired compulsorily.

16:00

Amendment 155 makes it clear that if an application under either rule in amendment 153 were unsuccessful, the tribunal would disapply the

development management scheme. Amendments 157, 158, 159, 160, 171, 172, 240, 173 and 191 are technical amendments and are consequential on amendment 153.

Amendment 186 provides that an unopposed application for the preservation of a development management scheme will be granted as of right. However, in granting such an unopposed application, the Lands Tribunal may order the owners association to pay the applicant such expenses as it thinks fit.

If the application is opposed, the tribunal will grant it only if it is satisfied that the disapplication of the development management scheme is not in the best interests of the owners of the development or is unfairly prejudicial to one or more of the owners. In circumstances where the land is being acquired, the tribunal will have regard to the purpose for which it is being acquired and will consider whether it is reasonable to grant the application.

The Convener: The next sub-grouping concerns the extension of real burdens, where land is bought compulsorily or by agreement. The Lord Advocate will speak to amendments 195, 196, 198, 199, 200, 201, 202, 203, 29, 204, 30, 31, 32, 33 and 34.

The Lord Advocate: This sub-grouping deals with the interaction of compulsory purchase and property where a development management scheme is in place. The policy intention of the bill is that compulsory purchase will extinguish burdens on land. The amendments will extend that to rules that have been put in place by a development management scheme. The rules are extremely technical and I shall not bother the committee with further explanation.

The Convener: You never know. We may have questions.

The Lord Advocate: I look forward to them with anticipation.

The Convener: That is a challenge. Does anyone have a question?

Maureen Macmillan: I am sorry to disappoint.

The Convener: I am not disappointed. I am quite pleased.

The next sub-grouping concerns procedures for the acquisition of land. The Lord Advocate will speak to amendments 197, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 234, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62 and 236.

The Lord Advocate: Again, this is a large group of technical amendments, which relate to the Acquisition of Land (Authorisation Procedures) (Scotland) Act 1947 and the Forestry Act 1967 and which apply the law on compulsory purchase as it applies to real burdens to the rules of development management schemes.

The Convener: I hope that someone has an in-depth question on the Forestry Act 1967. Does Lord James Douglas-Hamilton have one?

Lord James Douglas-Hamilton: I have no objection whatever to the amendments. Does the Lord Advocate envisage compulsory purchase orders being used much under the provisions? They have hardly been used at all over the past 30 years.

The Lord Advocate: No, I do not.

The Convener: I was expecting a little more fight.

We move on to minor and consequential amendments. The Lord Advocate will speak to amendment 82.

The Lord Advocate: The rules of a development management scheme are the equivalent of real burdens. Like real burdens, they should appear on the Land Register of Scotland. Amendment 82 is a technical, consequential amendment that makes it clear that the term "condition" in section 12(3)(g) of the Land Registration (Scotland) Act 1979 includes a rule of a development management scheme. That will mean that, for the purpose of the Keeper of the Registers of Scotland's indemnity, entries relating to a scheme's rules in the Land Register are treated in the same way as real burdens.

The Convener: Amendments 218 to 221 deal with commencement.

The Lord Advocate: Amendments 218, 219 and 221 change the commencement date for part 3, which is on conservation, maritime and economic development burdens, for sections 95 to 98, which are on compulsory purchase, and for the development management scheme, from the day after royal assent to a date that the Scottish ministers will appoint. That will allow greater flexibility, given the need for prior subordinate legislation.

Amendment 220 will mean that sections 112 and 114 come into effect on the day after royal assent. Section 112 concerns provisions for sending documentation under the bill. Such documentation will be required before the appointed day, so the section should come into force as soon as possible after royal assent. Section 114 deals with fees that are chargeable by the Lands Tribunal in relation to functions under the bill and should come into force on the day after royal assent for the purpose of making the required subordinate legislation.

Amendment 231, by agreement, withdrawn.

Section 50, as amended, agreed to.

The Convener: I almost feel that we should have a round of applause, because it has taken us all afternoon to deal with section 50.

Section 51 agreed to.

Section 52—Further provision as respects implied rights of enforcement

Amendment 119 moved—[Lord Advocate]—and agreed to.

Amendment 11 not moved.

Section 52, as amended, agreed to.

The Convener: I am pleased to say that that is the end of today's stage 2 consideration. I thank the committee and the Lord Advocate and his team. I also thank the ladies from sheltered housing and retirement complexes who sat through all the procedure.

Petitions

Children (Scotland) Act 1995 (PE124)

The Convener: The committee is not finished. We are just one hour late in reaching agenda item 4. Petition PE124, which is from Grandparents Apart Self Help, is on grandparents' right to contact with their grandchildren. I refer members to paper J1/02/43/2, which is the clerk's note on the petition. We have received several responses to the petition, from the Minister for Justice, the Sheriffs Association, Children 1st and NCH Scotland, which are attached to the note. All the correspondence has been intimated to the petitioners and the Public Petitions Committee.

In summary, all the respondents are content with the current legislation. They do not believe that the petitioners' request, which is to name grandparents in the Children (Scotland) Act 1995 as having an important role to play in the lives of their grandchildren, is the way forward. That is not to say that the respondents think that grandparents do not have an important role to play.

I ask the committee to consider the wider issues that have been raised and to consider the points that NCH Scotland made in its letter to the committee, which reads:

"we would not favour extending to grandparents the same rights and responsibilities that are accorded to parents under the Children Act. Grandparents and other family members can currently apply for contact orders and for parental responsibility and residence orders. We do appreciate the difficulties and expense that this can involve and believe that instead of a change in the law, the interests of grandparents should be more explicitly acknowledged and promoted in guidance to both Sheriffs and to social workers.

Firstly, grandparents should be notified of any applications in relation to a child/children, so that they can be represented. Secondly, guidance to social workers and others advising the courts should explicitly require that grandparents and other first degree members of the extended family should be notified of applications and their views and wishes sought and formally recorded."

Maureen Macmillan: I agree with the points that NCH Scotland has made. I am a grandmother and I am sure that others at the committee today are also grandparents. We appreciate the pain and anxiety that grandparents and other members of the extended family go through if they are deprived of the company of their grandchildren or do not hear about them, because they have been kept out of their grandchildren's lives.

The way forward is not to change the law, but to consider the extended family when relationships break down and the arrangements that are made for children. The concerns of the extended family

should be brought to the attention of the sheriff. If recognition is given to the role that grandparents, aunts, uncles and so on play in children's lives, the means exist for that role to be recognised. What is paramount at all times is what is best for the children.

Paul Martin: Guidelines could ensure that grandparents are considered throughout the process. If we were to consider the legislative route, I would be concerned about the confusion and emotional difficulty that could be caused to children in cases of parental separation. Legislation that ensures the rights of grandparents could make the situation even more difficult.

Petition PE124 is well meant; it was lodged as a result of genuine concern. I would like social services and other services that support children and young people during the separation process to give serious consideration to their guidelines on supporting children during what is a difficult and emotional time. I repeat that it would cause even more difficulties to add to the legislation that is already in place in relation to the direct parents.

The Convener: I suggest that we should consider a change to the sheriff court rules about the requirement to intimate actions. That would not mean that someone could be part of the proceedings, but I understand that there is no requirement at present for grandparents or first-degree relatives to receive formal intimation of a case, which means that a court case can proceed without grandparents or other first-degree relatives knowing about it until well into its run.

I suggest that we write to the Sheriff Court Rules Council and the British Association of Social Workers Scotland to suggest that a procedural rather than a substantive change to the rules be made.

Donald Gorrie: I agree with that suggestion and with the suggestion that we should write to the minister, who has promised that a family law bill will be introduced. The role of grandparents should be considered in that bill. We should pursue the Sheriff Court Rules Council, BASW Scotland and the Minister for Justice so that they are able to pursue the matter in their different ways.

16:15

Lord James Douglas-Hamilton: I support that approach. Mediation is extremely important and is of growing importance in some exceedingly complex cases—it can play an invaluable role. It would be a service to consider mediation in the context of the family law bill.

The Convener: Quite. Perhaps I should have declared an interest, as I was once a family law practitioner. It is better if cases are resolved by mediation that embraces as many people as possible who are involved in and who have a genuine commitment to the welfare of the child.

My experience is that things have changed. In my early years in practice, grandparents were not often involved, but that has changed over the years. I am pleased that the matter is being pursued further.

I do not think that the minister is considering changing the family law bill. The mediation process and more intervention rather than confrontation in the court process are far better ways forward.

Are members content that we write to the Sheriff Court Rules Council, BASW Scotland and the minister specifically about the mediation process?

Members *indicated agreement*.

The Convener: It is also incumbent on the committee to write to the petitioners. We will write to Grandparents Apart Self Help and the Public Petitions Committee's clerk to advise them of our progress. We have no intention of letting the matter go.

Scottish Legal Aid Board (PE200)

The Convener: Petition PE200 from Mr Andrew Watt calls on the Scottish Parliament to review the working methods of the Scottish Legal Aid Board, particularly in relation to the collection and disbursement of compensation moneys. I refer members to paper J1/02/43/3. The petition is supported by Patricia Ferguson.

We have received various items of correspondence. The committee may wish to consider whether the issuing of guidance to practitioners and the effect of senior counsel's opinion address the petitioner's concerns about delays in the disbursement of moneys. The committee may wish to write to SLAB to establish time scales for the production of guidance aimed at applicants on property recovered and preserved and may also wish to write to the Executive.

Options are contained in the paper and I do not want to trail through them. I am open to the committee's views on the matter. I should declare that I have also been a legal aid practitioner, so I have personal views on moneys preserved or recovered.

Maureen Macmillan: I think that I have a page missing.

The Convener: I am sorry. It will take a moment to pass papers to Maureen Macmillan. In the meantime, I will read out some options.

As I said, the committee could write to SLAB to establish time scales for the production of

guidance aimed at applicants on property recovered and preserved; it could write to the Executive to ask whether it has any proposals to change the law in the area in question to allow SLAB to disburse compensation moneys faster; it could take the opportunity to pursue SLAB procedures and possible changes in the law relating to property recovered or preserved in the context of the follow-up to its legal aid report, which we will discuss later; or it could write to the petitioner to inform him that SLAB has reviewed its procedures and taken steps to ensure that the regulations are understood and applied correctly and efficiently, and to advise him that the committee has concluded its consideration of the petition.

I invite members' views.

Lord Douglas-Hamilton: We should strongly support the petitioner. It is important that compensation be paid speedily—that is a matter of justice. We should support the options that have been outlined.

The Convener: But which of the four options?

Lord James Douglas-Hamilton: I do not think that they are mutually exclusive.

The Convener: That does not apply to the last of them, which is to

"write to the petitioner … advising that the Committee has concluded its consideration of the petition."

Lord James Douglas-Hamilton: I am sorry. I think that the first three out of the four options are acceptable.

The Convener: Are there any other views?

Maureen Macmillan: There are two conflicting principles. First, if the taxpayer has paid for legal aid, then the taxpayer has to be reimbursed before the person who received the legal aid gets any compensation. Am I right about that?

The Convener: Yes.

Maureen Macmillan: The other principle is that, if somebody is told by a sheriff that they will get £X of compensation, they will not wish to wait for five or six years, for example, before that money is paid over.

The Convener: I am guilty of saying this with judicial knowledge—as they used to say—but, if someone has received legal aid from the Scottish Legal Aid Board, the account is lodged by the solicitor and the money recovered goes straight to the board in the first instance. The board is entitled to take the costs of the case—not the expenses recovered, but the costs, which usually amount to more—first, from the judicial expenses awarded, secondly, from the individual's contributions and, if there is still a deficit, from the money recovered itself. There is a duty towards the public purse.

There are steps whereby a solicitor can release funds in stages. In other words, they indemnify the board. If a solicitor were to release funds and then find that there was not enough money left to pay the bill, they would have to write off the money or pay it themselves.

There is some awkwardness about cases such as that covered by the petition; each case will be different. There are various reasons for payments being paid in stages, in the case of a reparation action, for example. The note mentions

"the production of guidance on property recovered and preserved aimed at applicants".

As well as guidance to solicitors, it is important that applicants know where they are. Sometimes applicants do not understand why they leave the courtroom with an award of £5,000 but are not simply handed the cheque. That is understandable.

Maureen Macmillan: In reading the papers on the petition, I noted that the person who is supposed to pay the compensation might not in fact pay it, and might have to be pursued through the courts. That can cause complications. Often, people are not pursued terribly rigorously, perhaps because the cost of pursuing them would outweigh the amount of money that is being reclaimed.

The Convener: As I said, individual cases differ widely. The solicitor may not be sufficiently au fait with the procedures to ensure that money is paid in stages, and the money might never be recovered at all. This is a complex area, which individuals often do not understand. To be blunt, some solicitors do not understand how payments authorised by them can be made in stages.

I think that the first option, to

"write to SLAB to establish timescales for the production of guidance on property recovered and preserved aimed at applicants",

is fine. The second option is to

"write to the Executive asking if it has any proposals to change the law in this area to allow SLAB to disburse compensation monies faster".

I think that that is worth exploring.

As Donald Gorrie and James Douglas-Hamilton suggested, we could agree to the first three of the four options that are set out in the note. Shall we do that?

Members *indicated agreement*.

Maureen Macmillan: But we are not agreeing to the last of the four options.

The Convener: Okay.

16:22

Meeting continued in private until 16:38.

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