JUSTICE 2 COMMITTEE

Tuesday 22 February 2005

Session 2

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CONTENTS

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JUSTICE 2 COMMITTEE
5th Meeting 2005, Session 2

CONVENER

*Miss Annabel Goldie (West of Scotland) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
*Colin Fox (Lothians) (SSP)
Maureen Macmillan (Highlands and Islands) (Lab)
*Mr Stewart Maxwell (West of Scotland) (SNP)
*Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE SUBSTITUTES

Ms Rosemary Byrne (South of Scotland) (SSP)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Mr Kenny MacAskill (Lothians) (SNP)
Margaret Mitchell (Central Scotland) (Con)
Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Bob Leishman (Audit Scotland)

CLERKS TO THE COMMITTEE

Gillian Baxendine
Tracey Hawe

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION

Committee Room 6

Scottish Parliament

Justice 2 Committee

Tuesday 22 February 2005

[THE CONVENER *opened the meeting at 14:04*]

Item in Private

The Convener (Miss Annabel Goldie): I welcome everyone to the Justice 2 Committee's fifth meeting in 2005.

I am informed that Colin Fox will join us, but that will be nearer to 3 o'clock. I welcome Cathie Craigie, who is with us as a substitute for Maureen Macmillan, who is attending the Environment and Rural Development Committee this afternoon.

Item 1 is consideration of whether to take an item in private. I seek the committee's approval to take item 6 in private. Is that agreed?

Members *indicated agreement*.

Subordinate Legislation

Community Reparation Orders (Requirements for Consultation and Prescribed Activities) (Scotland) Regulations 2005 (SSI 2005/18)

14:05

The Convener: Item 2 is consideration of an item of subordinate legislation. Members will have received a copy of the regulations and a note from the clerk. The regulations are subject to the negative procedure, so they are in force unless a member lodges a motion to annul them. Is the committee content with the regulations?

Members *indicated agreement*.

Petition

Pornography (PE752)

14:06

The Convener: Item 3 on the agenda concerns petition PE752, by Catherine Harper on behalf of Scottish Women Against Pornography. The petition calls on the Scottish Parliament to define pornographic material as incitement to sexual hatred and to make such incitement an offence similar to that of incitement to racial hatred.

We have had a letter from Cathy Peattie, the convener of the Equal Opportunities Committee, which is considering the petition. Committee members will see from the accompanying papers that she is anxious to seek this committee's views.

There are basically two issues. First, the deliberations of the working group on hate crime, which the Scottish Executive established in the summer of 2003, would be relevant to discrimination against a particular social group, and the petition perhaps falls within that category. I think that there is an obligation on the Executive to review the criminal law on violence. The committee will see from Cathy Peattie's letter that she would like to know whether we have undertaken, or plan to undertake, any work of our own on the findings of the working group on hate crime.

Secondly, I draw the committee's attention to a previous petition—PE476—which came before the Justice 2 Committee in the previous session of the Parliament. The previous committee took no action on that petition, which was similar to PE752 because, at that time, the Executive was considering undertaking research on the links between violence against women and pornography.

Committee members should also have in their papers a copy of a letter from the previous Minister for Communities, Margaret Curran. The gist of the letter is that the minister confirms that the Executive does not propose to do further research on the links between violence against women and pornography but will keep the issue under review.

It is for the committee to decide what response it wants to make to the Equal Opportunities Committee. I am happy to invite members' comments.

Jackie Baillie (Dumbarton) (Lab): I do not want to comment on our forward work plan, but the previous Justice 2 Committee agreed not to take petition PE476 further, because the Executive gave assurances vis-à-vis research. I hope that

the Equal Opportunities Committee will ask whether the Executive intends to do anything with the recommendations of the working group on hate crime. If it does, it will have to consider further research evidence that would support the terms of the original petition. I do not think that that work on that is part of our work programme just now, but it would be helpful if that committee were to investigate it further.

The Convener: That is helpful. I suggest that the clerk draft a letter to the convener of the Equal Opportunities Committee confirming that we have not undertaken work in this respect and that we have no plans to do so at the moment and stating that we think that it would be helpful if that committee were to make inquiries as to whether the Executive is working on proposals arising from the work of the working group on hate crime in relation to the petition. The clerk is happy to do that. Is that satisfactory?

Members *indicated agreement*.

Sewel Convention (Procedures Committee Inquiry)

14:11

The Convener: Item 4 concerns the Procedures Committee's inquiry on the Sewel convention. Members should have received a note from the clerks, on the reverse side of which is a précis of the questions that the Procedures Committee is posing. I assume that the Procedures Committee is communicating with all the other committees. Is that right, or is it just communicating with us in the meantime?

Tracey Hawe (Clerk): It has issued an open call for evidence.

The Convener: Again, the issue is relevant and the questions posed seem relevant too. I am happy to hear members' views on the issue. I presume that the Procedures Committee would want some kind of response from us, probably in letter form. I do not know whether it is appropriate to try to go through the questions chronologically and allow members to express their views. The first question simply concerns the nature of devolved legislation and how important it is to have a convention of this type. Do members have a view?

Bill Butler (Glasgow Anniesland) (Lab): Perhaps we could all agree that it is very important that we have the convention, which we should state categorically. I say that for the sake of consensus at the start.

The Convener: I will try to give a fair wind to your not inconsiderable sails, Mr Butler. I have written down "very important".

Bill Butler: So have I, convener.

Jackie Baillie: They have been cribbing.

The Convener: Does that encapsulate the views of the committee in response to the Procedures Committee?

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): Let us ignore the other points and leave it there.

The Convener: Question 2 is slightly more specific. Again, I am happy to hear members' views.

Bill Butler: On question 2, it would be sensible for the agreement to be primarily between the two Governments. That way, when the Parliament comes to consider the matter, whether in committee or in plenary session, there is some hope of coincidence to progress it. If we were to include the two Parliaments, I do not know whether that would be possible. The agreement

should be between the two Governments, with the Parliament being involved in discussions in committee and plenary sessions.

14:15

Mr Stewart Maxwell (West of Scotland) (SNP): I understand what Bill Butler is saying about making the running of both Parliaments administratively smooth. My point is more of a question than a statement. As I recall, when the Sewel convention was laid down, it was intended that the agreement would be between the two Parliaments rather than between the two Governments. I may be wrong, but my recollection is that Lord Sewel made a statement to that effect. He envisaged the two Parliaments working together rather than the Government working with the Executive. It may be worth looking back at what was originally intended, rather than jumping in and saying that the agreement is between the two Governments.

I do not see why it would not be possible to involve the Parliament at an earlier stage. We may come on to that in other questions. Although I accept what Bill Butler has said, I am not entirely convinced that the Executive and the Westminster Government working together in isolation at the start is the best way in which to operate. It might be better to open it up.

The Convener: The legislative programme at Westminster will be predominantly determined by the Government of the day, which will be in control of the content and timing of that programme. However, although the Executive may be the filter through which the Sewel motion emerges, the Scottish Parliament has the final say. I think that what has been put before us is a correct encapsulation of the position, for reasons that I understand.

Aside from Stewart Maxwell's qualification, the rest of us—

Mr Maxwell: I would not overplay it; I am just making the point. There has been comment before about the Parliament being involved rather than just the Executive.

Bill Butler: Perhaps we could get the historical reference that Stewart Maxwell is searching for to set the issue in context.

The Convener: We can find that. That aside, the majority view seems to be that the convention should operate primarily by agreement between the United Kingdom Government and the Scottish Executive.

We now get down to the nitty-gritty, in the form of question 3, which begins to touch on an area in which the committee is expert—timing. The first question asks:

"At what stage in the passage of a UK Bill affecting devolved matters should an approach be made to the Scottish Parliament for consent, and how quickly should the Parliament be expected to reach a decision?"

The second question asks:

"In what circumstances would it be appropriate for Westminster to proceed without consent"—

for example, if the Scottish Parliament was in recess? What are members' thoughts about the first question?

Bill Butler: An approach should be made as soon as is practicable and the Parliament should be expected to reach a decision in the fullness of time—that is, we must have enough time for the request to be considered by the appropriate committee and for the matter then to go before the whole Parliament. That would be the optimal approach on those two issues.

Jeremy Purvis: As the issue is primarily between the UK Government and the Scottish Executive, that involvement should begin not at the start of the passage of a bill, but way before that. The concordats state that if the UK Government is intending to introduce such legislation, it will consult the Scottish Executive, and vice versa. We might seek clarification of that from the Procedures Committee.

The question is then about when the Scottish Parliament, rather than the Scottish Executive, is informed, and I support Bill Butler's suggestions in relation to that. It is worth stating that, when the UK Government puts a bill out to consultation, there should be correspondence between it and the Scottish Executive, which the Parliament should have the opportunity to scrutinise if it is to be proactive in that area.

The Convener: That is quite an interesting proposal. You are saying that the Scottish Parliament should begin to take a proactive role at the embryonic stage of the Westminster legislation, before a bill is even published.

Jeremy Purvis: Absolutely. We are able to scrutinise the concordats between the Executive and Westminster. I would have thought that there would be no harm in a subject committee considering a draft bill that a UK department had published.

The Convener: That would be a kind of statement-of-intent stage, at which we would have some prior warning and could scrutinise things if we were so minded.

Jeremy Purvis: Yes.

The Convener: That is interesting.

Mr Maxwell: The UK Government often publishes related material long before it publishes a bill, yet we seem not to get involved until the bill

itself is published. There is ample opportunity for us to get involved at an earlier stage. The papers are published at Westminster and we all know that they are there.

The Convener: That is helpful. In the past, the committee has essentially been asked to consider a Westminster bill at stage 2. By then, the bill has been in a recognisable form, although we know that a bill after stage 2 can be dramatically different from the stage 1 version. Would it be appropriate for us, as Jeremy Purvis suggests, to advocate a statement-of-intent stage at which we could consider the general proposal and general principles of a bill? After that, we would want to see the bill again at stage 2, at which point the substance of it would be available.

Jackie Baillie: I have no problem with the principle of our intervening as early as possible. That would be helpful. However, I am mindful of the number of Sewel motions that could arise, which might create quite a heavy agenda for us. I wonder whether we should scrutinise the consultation papers or, as you suggest, ensure that we see the bill at stage 2. I would have thought that the most accurate reflection of whether the Westminster Government was going to legislate would be the Queen's speech. It would be valuable for the committee to have an early-warning mechanism that enabled us to monitor and track the progress towards legislation. Nevertheless, I take your point that the best opportunity for our intervention is perhaps at stage 2.

The Convener: Okay. That is extremely helpful.

Let us move on to the second question:

"In what circumstances would it be appropriate for Westminster to proceed without consent on the grounds that the Parliament has not had time … to consider the request?"

The example that is given in the clerk's note is when the Scottish Parliament is in recess. My view on that is simple. As a lawyer—I hope that that phrase is not too provocative in current times—I would have thought that the consent of the Scottish Parliament is implicit in the arrangement and that, therefore, there should be no situation in which our consent is lacking.

Bill Butler: I agree with that. I would like to know whether that has ever occurred. I agree with what you say, convener—not as a lawyer, but simply as a layperson.

Mr Maxwell: As far as I am aware, that has happened only once and that was an error—a mistake was made in housing legislation. The Scottish Parliament has been in existence for six years and the recesses do not seem to have caused much of a problem. I would not accept the suggestion that Westminster should go ahead without consent on the basis that the Scottish Parliament was in recess. However—it might sound strange for me to say this—there may be instances in which it might be appropriate for Westminster to legislate without consent for reasons of timescale, for example in the case of a national emergency. A piece of emergency legislation might go through the bill process at Westminster in a day.

The Convener: Nevertheless, it is fair to say that what we are discussing is a convention that is observed by the courtesy of the two Parliaments.

Jeremy Purvis: That is right and that should be retained. We all know that Westminster retains the right to legislate on anything at any time. That is right. However, we are able to convene the Scottish Parliament at short notice, and it is important that we keep the convention of courtesy between the two Parliaments.

The Convener: Okay. That is helpful.

The next question is about the information that should be provided to assist the Parliament in reaching a decision. It asks:

"Are the existing Executive memorandums sufficient for this purpose?"

Can I have the committee's comments, please?

Bill Butler: I hope that the memorandums are sufficient for the purpose. Certainly, they should contain as much detailed information as possible.

The Convener: Given what we have just discussed and our unanimous desire for a much earlier awareness of where Sewel motions might arise, I think that that information will be made available at an early stage. You are right to say that the memorandums should contain as much information as possible. They should also be made available to us as soon as possible. That is perhaps all that we can add to that.

The next questions are a little more technical. The paper asks:

"To what extent is it appropriate for the Parliament to subject the relevant provisions of a UK Bill to detailed scrutiny before deciding whether to give consent? In particular, should a Scottish Parliament committee always … be given an opportunity to take evidence and report to the Parliament before a Sewel motion is taken in the Chamber? Or should the detailed scrutiny be left to Westminster (and Scottish MPs in particular)?"

That question is almost self-answering, as there is in fact detailed scrutiny at Westminster, whatever we think. There is a more relevant issue. It is arguable that the Scottish Parliament may have more detailed knowledge and greater awareness of the activity in some areas that will be affected by proposed Westminster legislation. That brings us back to what it is reasonable or appropriate for

the Scottish Parliament to do in relation to matters that are likely to be Seweled.

Jeremy Purvis: We all know that a Sewel motion will be used by the Parliament to allow another institution to legislate on the Parliament's behalf in an area that is within the Parliament's remit. Difficulties are posed if we then change our minds or wish to do the detailed consideration that we have allowed another institution to do. My view rather than my party's view is that we should consider different ways in which the Parliaments can work together. There should be a United Kingdom committee of the Scottish Parliament, so that if both institutions wanted to consider a measure—bearing in mind that the reason for having Sewel motions in the first place was simply that it would be more efficient for Westminster to legislate in certain areas—there would perhaps be an opportunity for us to link in with MPs or UK ministers. It may be thought that that goes beyond what the committee should suggest to the Procedures Committee, but I want to record my personal view in the *Official Report*.

The Convener: That is certainly another suggestion.

I pose a question to try to ascertain whether an issue of principle is involved. In general, what do we understand should be covered by Sewel motions? Are they intended to cover essentially technical issues that, for reasons of practical and legislative convenience, can be dealt with at Westminster, or are we anticipating that substantive issues can be appropriately Seweled? The principle must be clarified.

Jeremy Purvis: As a result of our political views, something that is technical to me might be of constitutional importance to Stewart Maxwell. The issue is hard. The view was that it was more efficient and speedier for Westminster to deal with civil registrations, for example, which is quite a major policy issue, and therefore that there should be no objections, but there are other Sewel motions. I think that Margaret Curran used the example of having the same taxi regulations north and south of the border—it would be a nonsense if they were not covered. I do not think that there is a set approach, but I would like there to be flexibility so that the committee or the Parliament can decide on the substance of the issue rather than all issues being treated the same.

Mr Maxwell: I understand what Jeremy Purvis is saying. It is clear that people can have different views, depending on their perspective. Each Sewel motion should probably be considered individually. In general terms, from my understanding of the original purpose of Sewel motions, the comments that were made at the start were accurate. However, we have strayed slightly from that purpose with some more recent Sewel motions.

I return to the question that we are considering. The point is whether we should get involved in detailed scrutiny. Until now, I do not think that we have got involved in detailed scrutiny. We have got involved in scrutiny to an extent, but it has been nowhere near as detailed as I would like it to have been in a number of cases. Again, each Sewel motion is different. Some have involved issues that are small and not really issues for any of us, but others have related to major issues that involve many different pieces of legislation. The crux of this problem is detailed scrutiny. I do not support Jeremy Purvis's view on having a UK committee of the Parliament. Detailed scrutiny should take place in the committees and the chamber.

It all goes back to the earlier point that we need the information as early and as detailed as possible. If that happened, we would have the opportunity to examine in detail some of the more contentious Sewels, the most obvious examples of which are the Sewels that cut across the justice area. After all, that is why we are sitting here today. That would mean taking evidence and providing a detailed report to the Parliament, instead of having some of the rather rushed jobs that we have had recently.

14:30

Bill Butler: I can see where Jeremy Purvis is coming from and find his suggestion interesting, but I tend to agree with Stewart Maxwell about it. However, as you might expect, I disagree with Stewart in that I believe that the Parliament does as much as it can to give Sewel motions detailed scrutiny.

In response to the questions in the fifth bullet point, I believe that detailed scrutiny must take place. The relevant parliamentary committee should carry out a detailed evidence-taking session and submit a report to the Parliament and the Parliament should then hold a plenary debate on the matter. I also believe that it is always appropriate to subject the relevant provisions to such scrutiny. Indeed, I hope that that is a given.

I do not think that detailed scrutiny should be left to Westminster. I agree that scrutiny takes place there, but we in this Parliament must play our part and ensure that our own scrutiny is as detailed as it can be. That is my tuppenceworth on the matter.

Jackie Baillie: Our default position must be that parliamentary committees should be given time to scrutinise Sewel motions. If we have a better early-warning system, I do not think that we will experience some of the difficulties that we have had. That said, I remember that the committee

spent quite a bit of time on the Constitutional Reform Bill and our ability to scrutinise it was not hampered. Perhaps that represents an ideal to which we should aspire.

The Convener: That is helpful. Your example is interesting, because although there was a division in the committee about whether the Constitutional Reform Bill should have been Seweled—which is what happened—I understand that its deliberations played a role in informing and instructing the debate down south. That is perhaps an interesting and unexpected consequence of the devolved parliamentary committee system.

I get the impression that members generally feel that committees in the Parliament should have a scrutinising role with regard to Sewel motions and that that scrutiny process would be slightly less pressurised if we had earlier intervention and a more elastic timescale.

I also get the impression that members think that it is quite difficult to define precisely what legislation might or might not be appropriate for Seweling. As Jeremy Purvis has pointed out, all but one of us—Stewart Maxwell might disagree on constitutional grounds—might be content to agree that Westminster is the better place to deal with certain quite chunky pieces of proposed legislation.

I believe that the clerks now have enough information on that question to draw something up.

We move to the next question in the paper, which asks:

"How should it be decided whether a request for Sewel consent should be referred to a committee? Should there always be an opportunity for a debate in the Chamber on a Sewel motion before a formal decision is taken?"

Let me take the second question first. I presume that all members think that there should be an opportunity for such a debate.

Members *indicated agreement*.

The Convener: As far as the first question is concerned, I presume that the Parliamentary Bureau is responsible for such a mechanism.

Mr Maxwell: Yes, it is really up to the bureau and business managers to sort the matter out.

The Convener: I do not see how else that system can operate. Are we content that the Parliamentary Bureau should make the initial decision on whether a request for Sewel consent should be referred to a committee and that the Parliament should always have the final say after debate?

Members *indicated agreement*.

The Convener: I thought that the next question was unnecessary because I do not think that there is anything to prevent the Parliament from imposing conditions if that is its will.

Mr Maxwell: I was a bit confused and wondered whether my interpretation that Sewel motions could be amended was correct. Surely any motion can be amended—the Parliament can decide whether to amend or not, as it sees fit. Is that correct?

The Convener: Yes, that is my understanding. At the end of the day, the will of the Parliament will prevail. The Sewel motion will come before the Parliament as drafted by the Executive. Amendments have been made to Sewel motions, have they not?

Mr Maxwell: Yes.

Jeremy Purvis: Indeed.

Jackie Baillie: I think that Bill Butler should speak at this juncture.

Bill Butler: I can exclusively reveal that that is a fact.

The Convener: There we have it. I do not think that the question needs to be asked. It is current procedure.

We now revert to a more technical question:

"What process should there be to monitor Westminster Bills as they progress through their amending stages, so that the Parliament's consent can be sought for any amendments that substantially affect the Bill's impact on devolved matters".

Perhaps the most important point is in the next part, which reads:

"beyond the scope of any Sewel resolution already agreed".

Again, I think that we have to be careful—I say that as convener to try to direct thoughts before members contribute. In essence, we are talking about a mechanism to decide which Parliament deals with legislation. Therefore, we have to acknowledge that if we agree in principle that the Westminster Parliament should deal with legislation, we must be careful that our deliberations do not make the process more complicated. I make that as a passing observation. If it is agreed in principle that something should be Seweled, the Executive must be the body that keeps the Parliament and its committee system, if appropriate, informed of developments.

Bill Butler: I do not see any other way.

Jackie Baillie: I absolutely agree. We would expect that the respective Governments would speak to each other, particularly if there were amendments that impact on devolved matters. In turn, we would expect the Executive to report to Parliament or a committee if there were any substantial differences.

Bill Butler: My recollection is that when we have asked that question of ministers or deputy ministers, they have answered that they would come back to the Parliament at least.

Jackie Baillie: Did they not do that with the Constitutional Reform Bill?

The Convener: That is correct. Most recently, ministers did so with reference to Westminster's Serious Organised Crime and Police Bill but, in fairness, the Lord Advocate was also extremely helpful to the committee. He was able to confirm which aspects of the Constitutional Reform Bill were going to be amended and what he understood the terms of the amendments to be. If that is the sort of information that the Executive can transmit to committees, I do not see how we can ask for more.

Mr Maxwell: I accept and agree with everything that has been said, but I have a couple of points to make. After the Justice 1 Committee had dealt with the Civil Partnership Bill, a wrecking amendment was tabled in the House of Lords. That amendment was agreed to and then subsequently revoked. However, if the amendment had stood, it would have completely reversed what we had agreed to.

The convener referred to our agreeing in principle that Westminster should legislate on a bill as it stood in front of us at the time, but in the example that I gave, the position was completely reversed. I agree with what has been said about the principle and that once we decide, we decide. However, I have a caveat: if something is completely changed, we should be informed. In my example, it was difficult for us to be kept informed because things were happening during the night. Given the way in which Westminster operates, it was very difficult for us to keep up to speed with what was going on. If the amendment to the Civil Partnership Bill had not been removed by the UK Government, effectively we would have agreed to a bill with which subsequently all of us would have disagreed. It was never the intention of the Sewel procedure that the Parliament should give away its ability to comment.

Although I do not know exactly what the procedures or mechanisms should be for dealing with that particular problem, there should still be a way for the Parliament to keep an eye on legislation as it goes through Westminster even after we have agreed to a Sewel motion, in case the situation that I described recurs.

The Convener: The Executive has to be the conduit; I do not see any alternative to that. I take your point: if a wrecking amendment were passed, the effect could be completely different from what the Parliament had initially agreed. What would the Parliament do in such a situation? Its ability—never mind its competence—to deal with the issue might well have passed by the time things got to that stage.

One would imagine that, if a wrecking amendment became likely, the Executive would be aware of it and we would be informed. We are being asked whether we should be kept up to date on the basis of the amendments that are tabled, or whether that should happen only after they have been debated and voted on.

Jeremy Purvis: I am sympathetic to Stewart Maxwell's view. When the Parliament votes on a Sewel motion, it is effectively doing two things. First, it is allowing Westminster to legislate in a devolved area; and, secondly, it is allowing Westminster to legislate in an agreed devolved area on an agreed subject. The Sewel process should be divided into two. First, the Parliament should be asked to agree to Westminster legislating in the area concerned. Much of the pre-legislative scrutiny that the Scottish parliamentary committees carry out with respect to Sewel motions relates to the question whether Westminster should legislate in that area at all and the reasons for or against such a decision.

The second stage of the process, which I would like to be handled at the concluding part of the work of a UK committee, should be that the Parliament be asked to ratify the decision. The Parliament must retain the ability to say that it will legislate in the devolved area concerned. As I understand it, part of the Sewel convention is that amendments will not be tabled by the Government in another chamber. The convention recognises that the Government may change its view for good reasons, but if Westminster amends a bill through its own legislative process, that could radically alter things up here. The Parliament has no ability to come back after it has agreed to a Sewel motion. In my view, the process should be split into two.

The Convener: Your two stages would involve an early intervention stage, where we say that something looks okay, and—

Jeremy Purvis: At that stage, we would agree with the Executive to allow Westminster to legislate. That is the Sewel motion. The second stage is to ask the Executive to have another parliamentary motion under which we would agree to the bill that is passed at Westminster. If we do not do that, we rely on the good—

The Convener: What do you suggest is the practical and constitutional consequence of not agreeing to legislation that has been passed at Westminster?

Jeremy Purvis: We would legislate in that area ourselves. The Scottish Parliament would agree to a motion that asks Westminster to withdraw the

Scottish elements of the bill. At the moment, we are relying on the good relationship between Scottish Executive ministers and Westminster ministers. The Serious Organised Crime and Police Bill is a case in point. The Parliament asked Cathy Jamieson to ask the Home Secretary to take out measures that the Westminster Government had put in, but the Westminster Government could have said that it did not want to. In this case, a request by a minister, in correspondence that we saw, was involved, things were all very gentlemanly and fine and a good relationship was demonstrated. However, the Parliament did not make a statement on the matter until it debated a hybrid Sewel motion, with an amendment from Bill Butler. It is a bit clumsy to proceed in that way, and I do not think that the matter was very clear.

Bill Butler: I will not comment on the clumsiness or clarity—

Jeremy Purvis: No—

Bill Butler: I am only jesting, Jeremy. The proposal for a UK committee is an interesting extension of Jeremy Purvis's argument, but I am not convinced. I think that the convener was right to talk about the Executive being the conduit, which I think represents the most sensible approach. There are certain attractions in what Jeremy has been saying, but it is not attractive enough to me. I prefer to be conservative—with a small "c"—on this matter and to go for the Executive being the conduit.

The Convener: I can see both practical and constitutional consequences to what Jeremy Purvis proposes, which could create considerable difficulty, not just for the Government at Westminster but also for this Parliament. For example, the Westminster Government could say that if the Scottish Parliament was not willing to ratify a bill, everything that refers to Scotland could simply be taken out of the bill, which would be passed for England and Wales only. That might leave the Parliament unable, at short notice, to deal with a situation that was in need of being addressed, and I am anxious about that. The suggestion lacks coherence, interesting though it is.

14:45

Mr Maxwell: I hate to disagree with you, but I do not think that the suggestion lacks coherence. The Parliament would be aware that, if it decided not to ratify a bill, it would have to legislate on the devolved areas in that bill. It would be up to the Parliament to decide on the principle of allowing Westminster to legislate, as Jeremy Purvis said, and, subsequently, to consider the reality of the bill after it had gone through the process at Westminster. It seems entirely reasonable that, at that subsequent stage, this Parliament would view the bill and, if it had gone in the direction in which the Parliament thought it was going, confirm that there was no problem. However, if something dramatic had changed in the bill, the Parliament might take the view that it was not what we wanted and agree to another motion to say that we were not happy with it and would legislate ourselves. The Parliament is aware of the consequences of its actions and if it wants to reject such a bill, it is up to the Parliament to decide to do so. I see nothing wrong with that.

The Convener: That is an area in which the committee will not achieve unanimity. Our letter, which I detect will be a slightly lengthy epistle, might have to include paragraphs here and there in which we agree to note dissent, but we have a picture of what the committee feels, which is extremely helpful. Do committee members want the clerks to include any other points in the letter?

Jeremy Purvis: The clerk's note was interesting, and, as I have not been on the committee for long, I would be interested in having the clerks produce a matrix of previous experience on Sewel motions that shows when the Executive got in touch with the committee or how the committee was informed. That would add weight to the letter that we are writing and might help the Procedures Committee.

The Convener: I think that we can answer that. My understanding is that the process is almost certainly triggered by the Westminster legislative timetable. A bill enters the portals of Westminster, which is the first trigger to alert the Scottish Executive that a Sewel motion might be required, and, depending on the timescale of the legislative process at Westminster, the Sewel procedure is either relaxed or extremely urgent.

Jeremy Purvis: I take your point, but the reason for laying the information out is to make clear to the Procedures Committee and the public the short timeframe about which we have been complaining. It was no more than a thought.

Bill Butler: As the convener says, the timeframe is not always short.

Jeremy Purvis: I accept that, but that lack of consistency would show itself.

The Convener: I have no objection to the production of a matrix, but I do not think that the detail would add significantly to our understanding. However, in the letter, we can perhaps give two examples: one in which we had a fairly relaxed opportunity to consider a bill, take evidence and produce a sensible report; and one in which we agree that we found ourselves under significant pressure. That might illustrate the point.

In the first instance, I will ask the clerks to draft the letter and circulate it to committee members. We can then consider it further.

Members *indicated agreement*.

The Convener: This might be an appropriate time to adjourn for five minutes before we move on to agenda items 5 and 6, which are fairly substantial.

14:48

Meeting suspended.

14:54

On resuming—

Scottish Prison Service

The Convener: I reconvene the meeting for item 5 on the agenda. I welcome, from Audit Scotland, Bob Leishman, a senior manager of performance audit, and Phil Grigor, a project manager of performance audit. They are here to brief the committee on the Auditor General for Scotland's report, "Scottish Prison Service: Correctional opportunities for prisoners". I invite Mr Leishman to make a short opening statement, after which members will ask questions of our witnesses.

Bob Leishman (Audit Scotland): The Auditor General's report records the results of our examination of the opportunities that are provided in Scotland's prisons to reduce the risk of reoffending by improving prisoners' skills, addressing their offending behaviour, tackling their addictions and preparing them for release. Those opportunities include education, work-related training and behaviour management programmes.

There are three reasons why we carried out the study. First, reoffending is a major problem for the Scottish criminal justice system. Prison Service research indicates that nearly half of all the prisoners who were released in 1999 were back in prison within two years. In addition, the costs of reoffending are likely to be high. It is estimated that recorded crime by ex-prisoners in England and Wales costs at least £11 billion a year. Secondly, the cost of operating the Prison Service in 2003-04 was around £260 million. The SPS estimates that it spent around £30 million of that—some 12 per cent of the full cost of prison operations—on the provision of correctional opportunities. Thirdly, research evidence, mainly from outside Scotland, indicates that the provision of opportunities and interventions for prisoners during their sentences can be effective in improving basic skills and reducing reoffending.

The overall message to emerge from the Auditor General's report is that the Prison Service needs to do more to demonstrate the effectiveness and value of the opportunities that are provided to reduce the risk of reoffending. The report's findings show that, although the Prison Service has no statutory duty to rehabilitate prisoners, it recognises the importance of doing so and has increased the provision of education, vocational training and behaviour management programmes over time. However, a number of weaknesses are also apparent, which prevent a clear conclusion being reached on the extent to which that expenditure provides value for money.

First, the Executive has set an objective of reducing reoffending but it has not set any specific objective or target to make clear how it expects the Prison Service to use its resources to contribute to that overall objective. Secondly, prisoners' access to appropriate opportunities is variable and often depends on the resources that are available in each prison and the duration of prisoners' sentences. The report shows that a lack of staff and facilities at several prisons has resulted in waiting lists for access to correctional opportunities. Thirdly, the Prison Service has limited cost information on the correctional opportunities that it provides, which inhibits assessment of value for money. Due to an absence of robust local information on costs and activities, a full benchmarking exercise of all correctional opportunities across all prisons could not be carried out.

The Prison Service has undertaken limited evaluation of the success of some of its behavioural programmes, but it has yet to evaluate the effectiveness of the full range of correctional work in reducing reoffending. There is also scope to improve the way in which the Prison Service works with external organisations that are involved in the rehabilitation of offenders to promote the effectiveness of the opportunities that are provided in custody. Scotland's criminal justice plan, which was published in December, includes proposals for the establishment of closer working links between the Prison Service and community-based criminal justice services.

The Auditor General's report highlights a number of positive steps that the Prison Service is taking to address some of the issues that I have just mentioned. In 2004, the Prison Service introduced a range of initiatives that were designed to improve the provision of correctional opportunities in the prisons that it manages. Those include the creation of performance contracts for each prison to improve business planning and performance measurement, including assessment of correctional work; the adoption of a menu-based approach that is designed to provide prisoners with opportunities that are appropriate to the length of their sentences; and the introduction of a new information technology system to improve information sharing within the Prison Service and between prisons and outside agencies.

Overall, the Prison Service accepts the need for improvement and has recognised the need to evaluate better the impact of its correctional work in order to demonstrate value for money.

We are happy to answer any questions that the committee has.

The Convener: Thank you for that introduction. I want to raise a general point. You say that the Scottish Prison Service has no statutory duty to rehabilitate prisoners; however, I presume that there is some kind of framework—the report refers to the core plus initiative. How do prisons and prison governors know what they are supposed to be aiming for? What are their parameters?

15:00

Bob Leishman: That is a difficult question to answer as far as the existing business planning process in the Scottish Prison Service is concerned. One of the points that we have tried to make in our report is that there are no objectives for some correctional opportunities. The targets that are used in the Prison Service cover some activity in some areas, such as education. However, there are no targets or objectives for important areas such as employment and addictions treatment.

The Convener: Are we effectively asking our prisons to operate within a slightly unrealistic framework, in that they are charged with the responsibility of detaining people in custody and generally looking after them but, other than that, they are in slightly unmapped territory?

Bob Leishman: To an extent. As our report says, the Executive has set the overall objective of reducing reoffending, but has not outlined what it thinks the Scottish Prison Service's contribution to that should be. That cascades down to individual prisons deciding what their individual contributions should be, on the basis of their resources. As business planning is developed, there is an iteration, but it is not clear who should be contributing what. We were unable to get a clear position as to why there were particular levels of provision in the individual prisons.

The Convener: You state in your report that there should be a review of resource allocation in certain prisons. That would be desirable but, in all honesty, it is quite difficult for the service to know what reallocation to make.

Bob Leishman: Yes.

Jackie Baillie: Having visited a number of prisons, I am conscious that behaviour management programmes are accessed by substantial numbers of prisoners. Was there any evidence to suggest that the SPS had examined not just the effectiveness of those programmes but evidence from other countries that operate similar behaviour management programmes?

Bob Leishman: There is some limited information. The SPS itself evaluated some, but not all, programmes, and it did not go beyond the behavioural programmes into the educational programmes. The service is also involved in an international group that compares practice across

prisons, although the group has not produced an awful lot of evidence yet. There is a degree of willingness, but the service has not got there yet, and there are no specific plans for when it is going to get there.

Jackie Baillie: So there is no indication of the likely effectiveness of the behaviour management programmes.

Bob Leishman: As we reported, there is information from research carried out down south that various interventions can reduce reoffending by certain amounts.

Jackie Baillie: You make a point in your report about tracking prisoners after their release. Is the SPS likely to take that issue on board? You state that the SPS recognises the need to evaluate better the impact of its correctional work. Specifically, do we know whether it will engage in tracking prisoners?

Bob Leishman: I do not believe that the SPS has any such specific plans. However, there are plans to improve working relationships between the SPS and the external agencies that look after the prisoners after their release. The improved IT system will allow for a better information trail. That should help, but I do not know whether there is any specific objective for the SPS to start to track prisoners.

Jackie Baillie: Do you think that that would be desirable, given that we are trying to understand what works? An understanding of what particular prisoners who have gone on to reoffend have done might well inform future policy.

Bob Leishman: Anyone evaluating the success of a programme would want to find out what happened after the prisoner left.

Jeremy Purvis: I start by asking about the evidence and level of data that we have. You mentioned the United Kingdom study by the Office of the Deputy Prime Minister on the financial cost of reoffending and indicated that the Scottish Executive has not carried out an equivalent study. Have you had discussions with the Scottish Executive or the Scottish Prison Service on why there have been no such studies in Scotland?

Bob Leishman: We have had no specific discussions about that. The reason is probably to do with scale and the availability of resources.

Jeremy Purvis: Early in your report, you mention a 1999 survey that showed that 47 per cent of prisoners released from Scottish prisons returned to prison. Are those the most recent data?

Bob Leishman: Yes.

Jeremy Purvis: On the variation in programmes that you mention in your report, you said that longer-term inmates are more likely to be offered places. To an extent, that is inevitable, because the programmes are often at least a year long. Is there any evidence on the effect that such access to programmes has had on reoffending among longer-term inmates? Have you been able to tell what that effect has been?

Bob Leishman: No, because the evaluation that the Prison Service has done is limited.

Jeremy Purvis: The SPS conducts an annual survey of all prisoners and you cite the 2003 survey on page 27 of your report. I was struck by the fact that it indicated that 51 per cent of respondents

"thought prisoners attend programmes just for show."

On the basis of that, has the SPS done any work on the quality of the experience of the programmes that it delivers so that we get away from examining attendance rates for the programmes and concentrate on the proper intervention work that they contain?

Bob Leishman: A limited number of the programmes have been evaluated in a bit more detail.

Jeremy Purvis: What were your findings on the efficacy of the programmes that might be considered, if I can put it flippantly, more of a tick-box exercise? I mean those that prisoners attend for show. You give quite a bit of detail on the financial cost per programme per establishment. Has there been any change to those programmes on the basis of the evaluation that you have just said has been taking place?

Bob Leishman: We do not have a history of the costs or evaluation results over time to allow us to do that.

Jeremy Purvis: That would—

The Convener: I know that other members want to ask questions, so I ask you to be brief.

Jeremy Purvis: I have one further, brief question, which concerns the menu-based approach. Did you find that the SPS was working with the shorter-term prisoners, for whom the year-long programmes could not be carried out in prison? I could not see in the report whether you found any instances of the SPS working with the local community or outside agencies so that the same programme, or the same content, carried on being delivered outside the prison setting.

Bob Leishman: The Scottish Prison Service is attempting to develop link services to link what happens in prisons with the outside world, but that work is variable throughout the prison network. Some prisons have developed better link services than others.

Mr Maxwell: Like other members, I have visited a number of prisons and my impression was that many of the courses were popular while some were unpopular. In effect, demand for certain courses in some prisons outstripped supply and prisoners could not get on to those courses. Did you find that that was the case and, if so, how prevalent was that problem? Did it arise because prisoners who had drug, alcohol or anger-management problems were being directed to the correct courses on which there was no room, or was it because prisoners liked to work in the workshop rather than do some of the other courses and were, as Jeremy Purvis said, ticking boxes—that is, going somewhere to fill in time rather than attending courses that dealt with their behaviour?

Bob Leishman: During the study, we examined the process through which the Prison Service assessed the prisoners' needs and transferred that information on to an action plan that would refer the prisoner to appropriate courses. It was not always possible to track that through, but where we could do so we found that, in a substantial number of cases, the prisoner was put on a waiting list because demand outstripped supply. However, we could not go into the business of assessing whether a prisoner's needs assessment was adequate—we would not be equipped to do that, and it would be unfair for us to do so.

Mr Maxwell: I understand that. That leads on to my second question. Your key messages report states:

"Prisons are inconsistent in the way they plan and manage the opportunities offered to individual prisoners."

Was there any evidence of best practice being shared among prisons? It seems as though individual prisons are often isolated from one another in tackling the problems. The report goes on to talk about the variability in the completion of the forms, which you have mentioned. Have you seen any evidence of best practice being shared?

Bob Leishman: We did not see an in-built mechanism for sharing best practice; however, that is not to say that that does not happen. The Prison Service works as a network and there are a lot of conferences and so on. Nevertheless, there was no mechanism that we could recognise whereby good practice would be highlighted and spread across the network.

Mr Maxwell: That was my opinion.

The Convener: Did the witnesses have any sense of how the prison governors see themselves fitting into the whole structure? Everything in the report is about and directed towards the Scottish Prison Service and the Scottish Executive. Are prison governors able to be proactive and innovative in relation to their prisoners, or are they very much the delivery arms of the Scottish Prison Service?

Bob Leishman: It is a bit of both. The Prison Service sets a strategy within which there is a good deal of room for governors' discretion in identifying the needs of the individual prison populations and in developing appropriate opportunities to meet those needs. The governors are the men on the ground who know the prisoners and what is coming out of the needs assessments.

The Convener: I wonder whether there is a slight confusion of roles. The report talks about the need to continue to establish links with relevant external organisations to promote the effectiveness of the opportunities that are provided in custody. It seems that it would be easy for a prison governor to cultivate those arrangements, depending on where the prisoners come from. It is not quite clear to me who, within the Prison Service, Audit Scotland thinks should assume responsibility for the delivery of some of your suggestions.

Bob Leishman: In our view, there should be a top-down allocation of the strategic direction. That should set out the aims and objectives for the service. Then, through the prison governors' contracts that have been introduced, the contribution that is expected of each individual prison can be made clear. There would be an iterative process between the Prison Service headquarters and local management to determine what was required of each prison, which would involve the governor looking at his prison population and identifying the needs of his prisoners and the Prison Service saying, from its point of view and considering the direction in which it wants to go, what it wants to see more or less of.

The Convener: That, of itself, would begin to construct the mechanism.

Bob Leishman: Yes.

The Convener: Are there any other questions?

Jeremy Purvis: Paragraph 3.23 of the report states that, in the interviews that you carried out, a number of prisoners said that they would prefer programmes to be delivered by psychologists rather than by prison officers. As far as I can see, none of your recommendations regarding the programmes of support within prisons includes anything to do with mental health or psychology. My question is in two parts. First, how extensively do the programmes cater for prisoners' mental health issues? Secondly, why did you not consider recommending the improvement of mental health services in prisons, particularly when prisoners go out into the wider community, given the

establishment of links with criminal justice social work departments and local authorities?

Bob Leishman: We looked at correctional opportunities in terms of education and work-related training; we did not look at health issues, as such. That would have taken us in a different direction.

Jeremy Purvis: On the evidence of your inquiry, do you not think that the issues are connected? Is not mental health a contributory factor to the effectiveness of the educational and training programmes? You mention addiction treatments for prisoners who have substance abuse problems but not treatments for those with mental health issues. Arguably, such treatments could have a considerable impact on the effectiveness of the education, training and link programmes that exist.

Bob Leishman: It would have been necessary for us to see an evaluation of the individual opportunities. It may be that there is a need to evaluate what is delivered for prisoners with mental health difficulties; however, that information was not available, as the Prison Service had not collected it. It would probably have been beyond the scope of our inquiry to have undertaken what would have been a very detailed evaluation.

The Convener: Would like to make any concluding remarks, Mr Leishman?

Bob Leishman: No, thank you.

The Convener: On behalf of the committee, I thank you and Mr Grigor for appearing before us this afternoon. We all found the report extremely interesting.

15:16

Meeting continued in private until 15:59.

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