LOCAL GOVERNMENT COMMITTEE

Tuesday 25 June 2002
(*Afternoon*)

Session 1

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LOCAL GOVERNMENT COMMITTEE
19th Meeting 2002, Session 1

CONVENER

*Trish Godman (West Renfrewshire) (Lab)

DEPUTY CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

COMMITTEE MEMBERS

Mr Kenneth Gibson (Glasgow) (SNP)
*Mr Keith Harding (Mid Scotland and Fife) (Con)
*Iain Smith (North-East Fife) (LD)
*Elaine Thomson (Aberdeen North) (Lab)
*Ms Sandra White (Glasgow) (SNP)

COMMITTEE SUBSTITUTES

Robert Brown (Glasgow) (LD)
Tricia Marwick (Mid Scotland and Fife) (SNP)
John Young (West of Scotland) (Con)

*attended

WITNESSES

Mary Newman (Scottish Executive Finance and Central Services Department)
Peter Peacock (Deputy Minister for Finance and Public Services)

CLERK TO THE COMMITTEE

Eugene Windsor

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Neil Stewart

LOCATION

The Chamber

Scottish Parliament

Local Government Committee

Tuesday 25 June 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:07*]

Items in Private

The Convener (Trish Godman): Okay comrades, let us start. I apologise for the delay. Officials had difficulty getting into the chamber. I must ask the committee whether it agrees to take items 3, 4, 5 and 6 in private. Item 3 is consideration of our conclusions on the Local Government in Scotland Bill. Discussion of our approaches to two bills under items 4 and 5 will include mention of details of potential witnesses. Item 6 is consideration of our draft annual report. Do members agree to take those items in private?

Members *indicated agreement*.

Local Government in Scotland Bill: Stage 1

The Convener: We move to the second item on the agenda, which is our final evidence-taking session on the Local Government in Scotland Bill. I welcome Colin Mair, who is the committee's adviser on the bill, and Peter Peacock, who is the Deputy Minister for Finance and Public Services. We also welcome from the Executive Ian Mitchell, who is from the local government constitution and governance division, Mary Newman, who is from the local government finance and performance division, and Gillian Russell, who is a solicitor from the finance and central services department. We have met you all before, but I welcome you again. I ask the minister for a brief introduction, which will be followed by questions.

The Deputy Minister for Finance and Public Services (Peter Peacock): I will take slightly longer than usual, because I want to clarify how the Executive's thinking is moving along on some of the issues that the committee will want to cover. I am aware that the meeting is the final evidence-taking meeting at stage 1. If there are questions that I am unable to answer, follow-up correspondence might be necessary. We have followed with great interest the evidence that the committee has received during its recent meetings. In my opening remarks, I will touch on some of the issues that have been raised with the committee.

As usual, the Executive's and the Parliament's processes for the pre-legislative scrutiny of bills have borne fruit. We have listened closely to the arguments that have been made to us over many months informally, through the committee and by a range of interests concerned with local government. We have tried to reflect those arguments in the bill as it has developed. We already know that we want to make further refinements, and I will signal some of those to the committee.

There has been extensive and on-going consultation. We are grateful for the contribution that all sorts of stakeholders have made to improving the detail of the bill to meet our policy objectives. It is fair to say that the bill's broad principles have generally been welcomed, but the evidence that the committee has taken shows that there are potential improvements. We are keen to consider those. I will highlight a few of the suggestions.

I will deal first with best value. I am aware that there has been commentary about best value applying throughout the public sector. We made a public commitment to roll out best value

throughout the public sector and we have started that process. New legislation on that is not necessary. I make it clear to the committee that all office holders and heads of departments and agencies of the Scottish Administration have recently been put under a duty of best value. The accountable officers of bodies that receive money directly from the Scottish consolidated fund or that receive a grant or funding from other means from a department of the Scottish Administration have also been placed under such a duty. That has been done under the Public Finance and Accountability (Scotland) Act 2000, section 15(6) of which allows the principal accountable officer—the permanent secretary—to change the terms of reference of accountable officers throughout the public sector. That has been done from April 2002.

The mere fact of a duty is not enough. We must also put in place measures to encourage and ensure effective discharge of that duty. There is still a great deal of work to do to bed in best value throughout the public sector and to turn the duty into sound good practice such as has been developed in local government over a two or three-year period. I suspect that it will take time for the process to bed down in the public sector.

One matter that I will follow up arises from evidence that the committee received on the extent to which the guidance on best value that will flow from the bill can be made to work throughout the wider public sector. I will address that matter over the summer and make the committee aware of our thinking by the stage 1 debate at the end of the summer.

In the meantime, we want to continue to make progress with the development of best value in local government. That means acknowledging that relations between central and local government have matured in recent times. It is right that we should now concentrate on suitable accountability frameworks for local government rather than seek to control or direct local government closely.

I confirm that, to develop best value further in key services, we will seek to amend the bill at stage 2 to update the law in relation to HM inspectorate of constabulary for Scotland and HM inspectorate of fire services for Scotland, to ensure that they are able to examine and comment on the implementation of best value in their respective services.

On community planning, members will be aware that our proposals to provide a statutory underpinning for community planning have been broadly welcomed by all the interests that we have contacted and that have contacted us. There have been some comments on matters of detail, and I will deal with a couple of those points.

There has been discussion about which bodies should feature in section 17 as having a duty to participate in community planning. I make it clear to the committee from the outset that I want all bodies—public, private and voluntary—to engage in the community planning process. Our consultation revealed that some bodies are consistently represented on community planning partnerships throughout Scotland. Those bodies, which cover enterprise, health and the police, also deploy a significant level of funding locally and have a clear local structure for delivering services.

In view of the tough decisions that we expect community planning partnerships to take over time, a duty is the correct way to proceed for those bodies. Since the consultation, we have added the joint fire boards and Strathclyde Passenger Transport, to ensure consistency of coverage throughout Scotland. On balance, we think that their inclusion is a pragmatic starting point for securing a solid foundation for community planning partnerships.

The question arises: why stop at that? Why not include other bodies in the bill? The argument is that there is a clear consensus about those bodies. Beyond that point, the consensus breaks down. Whatever calls may be made for us to add to the list, the list can never accurately reflect the range of bodies that are important to effective community planning. For example, the diverse nature of the voluntary sector and the business sector is such that those sectors cannot be placed under a duty in the bill. Equally, reserved bodies such as the Benefits Agency and the Employment Service cannot be placed under a duty by this Parliament. Public companies such as Caledonian MacBrayne or private companies such as BP—which is engaged in the community planning process in Falkirk—cannot easily be placed under a duty, although that does not mean that companies should not continue to be involved and committed to the process. Duties are important, but they are not the be-all and end-all. Comprehensive coverage can never be achieved for all bodies for the reasons that I have set out.

14:15

As I have said, we want a wide range of partners to be engaged in community planning. Powers already exist for a range of organisations to work in partnership. Controls are in place through existing sponsorship arrangements among the Executive, non-departmental public bodies and voluntary bodies to encourage engagement in community planning. For example, management statements and corporate plans are agreed between the Executive and the NDPBs. We can attach conditions relating to participation in community planning through grant aid conditions. Various operating plans also exist across the public sector.

In many instances, ministers have powers of direction to intervene in agencies or NDPBs that come under a minister's portfolio of interests. The power of direction would be available if it ever became necessary to intervene. Most important, the bill also provides for a power to add bodies at a later date should that prove necessary. If a consensus emerges about a new body or if there is a change in the emphasis of existing bodies that requires them to be added to the list, we will have the power to make such a change.

One partner that has been consistently identified as a key player is Communities Scotland, which was formerly Scottish Homes. Communities Scotland certainly plays a significant role in community planning partnerships because it brings skills and expertise in the field of housing and regeneration. I am confident that Communities Scotland will engage in the community planning process but, in view of the organisation's pivotal role, I am willing to consider a more explicit means of commitment.

Communities Scotland is now an executive agency and, as such, is not a separate legal entity from Scottish ministers—for legal purposes, we are one and the same thing. Linked to that is ministers' more general commitment to the community planning process. There is no doubt that ministers are committed to the process, not least because they have made a collective decision to proceed with the bill. However, in view of the importance of commitment from all levels—national, regional, local and neighbourhood—ministers recognise the importance of being seen to be committed. Therefore, over the summer, I will explore again the option of placing a duty on ministers in relation to community planning. No doubt, the committee will want to pursue that issue in questions.

I know that the issue of incorporation has been raised with the committee. It has been suggested that the bill should make provision for community planning partnerships to become incorporated bodies, so that they would have the potential to form a separate legal entity at some point. That is an interesting idea, which I have considered and discussed with colleagues and which, again, I want to explore in more detail. The committee has rightly identified important issues such as accountability and the potential costs of incorporation, but it is important to recognise that community planning will evolve and mature over time. It is important that we debate the potential of incorporation as we move forward. I will be particularly interested to read the committee's views on incorporation when it eventually produces its report.

I want to clarify that, although we want to consider incorporation closely, our view is that we would only take powers to provide for incorporation; we would not require incorporation. In other words, any powers given to ministers would be permissive and would be used only when community planning partnerships explicitly sought to be incorporated. The minister would not be able to use the power without a local request. If the idea has potential, I will consider it closely, but the potential would be used only somewhat down the road, if a community planning partnership felt that incorporation would help its work. In those circumstances, it might be an advantage for ministers to have such a power, but we will need to consider that further with the committee. I will be interested to hear the committee's views on that.

Let me turn to the power to advance well-being. In setting out a power to advance well-being, we have been fortunate in being able to build on the experiences in England and Wales, which are slightly ahead of us. I am grateful to those whom we consulted for help in drafting the detail of the bill. As we proceed towards the stage 1 debate and on to stage 2, we will look at the drafting points that have been raised with the committee.

During the early stages of consultation, one or two bodies did not consider our proposals to embody the power of general competence that the McIntosh commission envisaged. I think and hope that we have demonstrated that the power that we propose gives councils the scope to be proactive and to encourage innovation and creativity. It meets all the points raised by the McIntosh commission in its description of a power of general competence. People seem to have generally accepted the main point, which is that the benefits that can arise from the use of the power are much more important than what it is called.

Finally, I should mention that the guidance that flows from the legislation will be crucial. In our approach, we have sought not only to specify necessary provisions in the bill itself but to refer to guidance around the bill. That is why we have asked two independent groups with broad membership—the community planning task force and the best value task force—to develop guidance for the bill's main components. Crucially, because the three key elements of the bill are interrelated, the development of the guidance will be joined up and integrated. The officials who accompany me this afternoon are playing a large part in ensuring that there is co-ordination between the groups. For example, the equalities co-ordinating group is seeking to mainstream equalities in the guidance on best value and community planning. We have set up mechanisms to ensure that our effort is properly co-ordinated.

Work is progressing on all three aspects of the guidance. We will provide the committee with

drafts to aid the development of its stage 1 report, although the guidance itself will be out to consultation at that stage. Although committee members have seen the broad contents of the guidance, we want them to see the developed guidance as quickly as possible because of its importance to the whole bill.

That is all I want to say by way of introduction. I am happy to answer questions.

The Convener: Thank you. Before I open the meeting up to questions, I should tell members that, as of 14:08, the score in the match was Germany 1, South Korea zilch.

Before we kick things off—that is perhaps the wrong expression—I have a general question. What is the bill's purpose, and where does it fit into the Executive's broader programme of modernising government?

Peter Peacock: I reinforce your comment that the bill is about modernising the framework within which local authorities work. Essentially, we want to create a framework that not only gives local authorities more freedom than they have had in the past but ensures accountability and proper reporting between the local authority and its community through other means as well as the formal accountability processes.

If we take a historical perspective on the matter, we see that the rules on compulsory competitive tendering—which the bill seeks to remove—were extraordinarily complex and limiting in many ways. In the latter period of CCT—that is, before 1997—local authorities were driven down a particular road with particular criteria and were required to make particular decisions about the outcomes of a tendering process, irrespective of their political judgments and views about the configuration of local services and how such services might best meet the needs of a particular community.

Moving away from CCT to a best-value approach will undoubtedly give greater freedom to local authorities. By that, I mean not that they should disregard cost, but that they should have regard to cost, quality and the three Es—economy, efficiency and effectiveness—which have now been joined by the fourth E: equality. However, local authorities will still be required to be rigorous and disciplined; indeed, they will need to learn a new discipline. They will constantly have to reappraise and reassess what they are doing, how things are done or delivered and whether they can do anything better by comparing and contrasting other approaches through benchmarking information and so on. If there is a better way of doing things and if it meets our criteria, councils should consider that approach. We do not want to keep councils in a static position; instead, we want to place them in a dynamic, changing position where they can exercise their discretion more effectively.

As for community planning, which is the bill's other main focus, one of the central preoccupations of the Executive and the UK Government is to seek to improve service delivery. It is undoubtedly the case that the public sector is extraordinarily fragmented at local level and has been subject to huge change over the past 25 years.

It is difficult for the ordinary citizen to understand the bureaucratic complexities that exist. At one level, citizens should not be required to understand those complexities; they should have simple access to public services. We, the bureaucrats behind the scenes, should take care of all the interfaces that need to exist between social work, education, health, transport and so on as we battle the big issues of the day, which include tackling drugs and crime and improving transport, education and health. None of those things can be achieved by a single agency; they require multi-agency working.

The principle of community planning is to create a framework for providers to work together in the interests of the public, having consulted the public and talked among themselves, and decide the optimum way of delivering public services in the future. We are requiring that process to occur by putting a duty on local authorities to ensure that they initiate, facilitate and maintain such a process and involve the other key players that we have mentioned. Community planning is about much better local co-ordination. It is about requiring work to be talked about, dealt with and planned for locally to improve service delivery for the citizen.

The committee is aware that the third main strand of the bill relates to the power to advance well-being, which arises for two reasons. It responds genuinely to the requests of local government over many years. Representatives of local government say that they are creatures of statute and can do only what they are specifically empowered to do at a given time. There are bits of statute all over the landscape of local government. Local authorities often find themselves constrained by their not having a power in statute to do something that they think is conducive to the well-being of their area.

Local authorities requested that we give them more of a power of general competence, as it was then argued. We have tried to respond to that in a way that gives local authorities a first-resort power rather than a last-resort power. Local authorities have been bound by statute. I recall that when I was a local authority leader—I am sure that Keith Harding and others have experienced this—I had to ask lawyers to come and see me several times about a particular issue. I had to try to find the

right question to get the right answer. I tried to get the lawyers to ask whether we had the power to do what we wanted to do and to seek in existing law the justification to do what we thought was the right thing to do politically.

The power to advance well-being removes that. I have described it as the Heineken power—the power that reaches the parts that other powers cannot reach. It is designed to flow between existing statute and to let local authorities know that if they think that something is the right thing to do in their area, rather than seeking a justification from existing statute, they have the power to do it, unless they are expressly prohibited or limited by existing statute. That ought to turn the atmosphere at local authority level into a can-do atmosphere. I hope that local authorities will say, "We can do this, because we have the power to do it." There are limitations and the committee might want to come back on them, but I have set out the principles.

The main strands of the bill are that it will free up local authorities and create an accountability framework in which everything is clear and the rules are transparent; that it will give local authorities the ability to co-ordinate and deliver better locally; and that it will provide a new power of first resort to enable the process to take place and allow councils to respond better to what they think are the needs of their community. That is the bill's essential purpose.

Dr Sylvia Jackson (Stirling) (Lab): The policy memorandum talks about how the three areas are interlinked. You talked about the aims of better services, better value, joint working and innovation. We heard evidence that a better title for the bill might be the local governance bill, which would provide the same statutory framework for all community plan partners. What are your thoughts on that?

You talked quite a bit about best value, but I did not pick up why there is not a common duty of best value. Why is that?

Peter Peacock: Are you referring to a common duty of best value throughout the public sector?

Dr Jackson: Yes. I think that you talked about that, but I would like you to clarify the position.

Peter Peacock: I presume that the argument over the title has arisen from the fact that the bill mentions bodies other than local government and so it might be better to refer to local governance. The committee will be aware that we have a white paper on the go at the moment. There may be subsequent bills and the local governance bill might be a better title for a subsequent bill that deals with the composition of local authorities and various associated factors. That is a matter of judgment.

We felt that it was better to include the word "government" in the title, partly for the reason that I have just given. Generally, we feel that it captures what we are trying to do. The bill is principally about local government and its duties. The nature of one of the duties that we are placing on local government is such that the bill impacts on other bodies, so it is important to include those bodies in the bill. However, that alone is insufficient reason for changing the title of the bill.

We do not disagree with the committee or others who have commented that if we require people to work together in a community planning partnership to plan and perhaps deliver services jointly, one partner being subject to a duty of best value and the other not might cause difficulties at local level. More generally, if it is good enough for local government to be subject to a duty of best value, why should that not be good enough for the rest of the public sector?

14:30

That is why we have advanced the matter, but under the powers that we possess under the Public Finance and Accountability (Scotland) Act 2000. As I indicated, that act gives the principal accountable officer the ability to change what might be called the standing orders of all the accountable officers who are responsible for the management of resources across the public sector—in NDPBs and so on. That has been done to place those officers under a duty of best value. The term "duty of continuous improvement" is used, as in the bill. We thought that the best way to proceed was to use the powers that we have under the Public Finance and Accountability (Scotland) Act 2000 and to make changes in advance of this bill's being approved by the Parliament.

As I indicated in my opening remarks, we have a long way to go. The fact that we have issued instructions does not mean that the next day things will be done in a spirit of best value. Members who have practical experience and who have watched the development of best value in local government will know that it takes time for people to adjust to a culture of best value, to think in a different way and to apply all the lessons that have been learned. It will take a while for best value to bed in.

That brings me back to the point I made about guidance. The committee has been told that, if the guidance on best value that flows from the bill is applied to local authorities, it should apply to every other body in the public sector. I want to examine how we can make progress on that issue. When it considered the Ethical Standards in Public Life etc (Scotland) Act 2000 and the codes of conduct that flow from that, the committee noted the

importance of having a code of conduct designed for local government that could be fine-tuned to suit the individual circumstances of other bodies in the public sector. In the same way, we want to examine whether the guidance that is issued to local authorities may be able to contribute to the guidance that is issued to other public bodies, while recognising that those bodies operate in different circumstances and have different attributes.

We are not averse to considering that possibility, but want to do so as positively as we can. Guidance must be issued on the operation of best value in the wider public sector. The more closely that guidance can be made to resemble the guidance that is issued to local government, the better it will be for all concerned. We are happy to continue to examine the matter.

Elaine Thomson (Aberdeen North) (Lab): I am not hearing the minister as clearly as I would like.

Peter Peacock: The acoustics are not very good.

Ms Sandra White (Glasgow) (SNP): I want to ask the minister about best value. I was pleased when you mentioned that, over the summer, you will consider issuing guidance for the whole public sector under section 15(6) of the Public Finance and Accountability (Scotland) Act 2000. That will also please councils. We all know that the bill requires councils to take account of cost, quality and equalities issues in pursuing continuous improvement. They are also being encouraged to advance partnerships. Many community and voluntary organisations have suggested to us that councils should be obliged to take account of the impact that their actions have on communities. Would you be sympathetic to making that an explicit requirement under the duty of continuous improvement?

Peter Peacock: I assume that the member is talking about the potential adverse impact that the requirement for councils to consider cost and quality might have on the community. As I recall, the Scottish Council for Voluntary Organisations raised that issue in evidence. We would like to get to the bottom of what is in the SCVO's mind. I would be happy to examine whether there is anything that we can do to address its concerns. However, from the evidence that the SCVO gave, I am not entirely clear what is at the root of those concerns. We would need to understand a good deal more about that before making a commitment to include specific provisions in the bill.

I would not be averse to examining the issue and to having officials speak to those who raised it, to see whether their concerns are legitimate and can be accommodated. That is the spirit in which we have approached the bill. Whenever a substantive issue is raised and we think that we can do something about it, we do so as positively as we can. I am loth to make a commitment today, other than to say that we are prepared to talk further to the SCVO with a view to reaching a better understanding of its concerns.

Ms White: I raised the issue because you indicated that over the summer you would examine the Public Finance and Accountability (Scotland) Act 2000. Are you prepared to report back to the committee on whether you have considered the impact of the duty of best value on communities? You could indicate whether the bill will require councils to take that issue into account.

Peter Peacock: We will certainly keep the committee in the picture on that issue.

Mr Keith Harding (Mid Scotland and Fife) (Con): If CCT is eliminated, will "proper accounting practices" be sufficient to ensure that trading activities are identified and disclosed?

Peter Peacock: The short answer to that question is yes. I will try to expand on that.

Mr Harding: Have you gathered evidence on the impact of the repeal of CCT on the number of trading accounts that have been disclosed down south?

Peter Peacock: After I have set out the context, I will deal with more detailed issues, where appropriate.

In the bill, we are establishing proper accounting practices as a statutory requirement for the first time. In retrospect, it seems odd that that was not the case before, but now it will be. The auditor and the local authority will decide what constitutes proper accounting practices in any given circumstance.

Members will be aware that the auditors have very high standards of probity. When making decisions, the auditors will look to the Accounting Standards Board UK, which issues the codes of practice that determine all good accounting practice. The Accounting Standards Board recognises the Local Authority (Scotland) Accounts Advisory Committee—LASAAC—which, with the Chartered Institute of Public Finance and Accountancy, provides guidance on proper accounting practice, such as the best-value accounting code of practice.

The new conventions that flow out of BVACOP will help to determine when trading accounts are required. As members are aware, under the bill trading accounts will be required when there is significant trading activity. Whether such activity has taken place will be determined by both the guidance and the codes of practice that flow from the bill, and through discussion between local authorities and their auditors.

We want as much information as possible on the trading activity of councils to be exposed to public scrutiny. Decisions must be made within a sensible framework. It is for the auditors and local authorities to make those decisions. The requirement for proper accounting practices is intended not to hide activity, but to expose activity that should properly be exposed to public scrutiny.

If an auditor did not like the practices that a local authority was following, I am sure that they would raise that matter informally with the authority concerned, and suggest that it change its practice and expose its trading accounts, where required. If that advice were not followed, the auditor would raise the issue more formally, perhaps as a qualification to the accounts. Normally, the advice would then be followed within a short time.

If the advice was not followed and the auditor felt that things were being concealed, they could escalate actions through the normal procedure. For example, they could go to the Accounts Commission for Scotland at a certain point, if that was felt appropriate. The Accounts Commission could then call a hearing, on the basis of which it could report to ministers, who could issue a notice or direction. If the auditors—who are our guardians on all such matters—felt that things were not being done properly, they could take a gradated approach to the situation. As a result, there should be no doubt that such an approach will continue to expose to public scrutiny whatever needs to be exposed. Equally, we should not be silly and unnecessarily require every final dot and comma of every activity to be exposed. However, that is a judgment for the auditor and the local authority.

I am confident that our proposed framework creates the proper set of dynamics of disclosure between the auditor and the local authority, and that if things are not going well, a clear process of intervention can still be followed.

Mr Harding: I was going to ask about rolling out the duty of best value to other public bodies, but you have answered that question.

Do you not feel that the bill represents a lost opportunity? The duty of best value is firmly entrenched in councils, and good councils are already carrying out community planning. As for the power of well-being, I look forward to receiving your notes on what councils will actually do in that respect, because no one has answered that question yet. Why did we not complete the operation and introduce a local government bill that addressed issues such as councillors' remuneration and electoral reform, which were raised in the white paper, to ensure that councillors will know what they are standing for next year? Could you outline the thinking behind the bill and say whether those issues will be addressed before the elections?

Peter Peacock: You are tempting me, Keith.

I have heard the argument that, because councils are already carrying out community planning, there is no point in creating a duty. However, you have indicated the reason for doing so in your question. Community planning is not necessarily being done consistently everywhere, and introducing the duty will ensure that that happens. We believe that community planning is central to the task of improving the delivery of local public services. In most legal contexts, a duty means that something is required to be done.

The difference between our approach in the legislation to best value and to community planning is that best value is currently a voluntary arrangement. We have temporarily suspended the legal provisions for CCT, and seek to change the law to remove those provisions without leaving a vacuum. We have to fill the gap that will be left with some kind of framework, so we have to give legislative status to best value. Best value governs major aspects of how a local authority behaves with large amounts of public expenditure, and it is important that a legal framework exists. I hope that the framework will have the lightest possible touch to encourage responsibility and innovation at local level; nonetheless, we need a means of dealing with things that go wrong. As a result, any framework must ensure that people know how they are required to behave.

You asked why the bill does not address issues that were raised in the white paper. With the exception of calling meetings electronically, which is picked up in the bill under miscellaneous items, we believe that those issues form a logical group that relates to the constitution of local authorities, how people are elected to them and remunerated within them and so on. We would rather deal with those issues as a group of self-reinforcing provisions than pick them out separately in the bill.

In addition, our thinking is much more advanced on the detail of the bill than on the issues in the white paper. We are still consulting on the white paper; as we will not receive the responses until the end of the summer, we will not have a chance to consider them until we return to Parliament. In the meantime, we will be getting on with our work on the bill.

I might have slightly misled the committee in one respect. We have signalled our intention to introduce the abolition of section 94 consents and the prudential regime into this bill. However, that will depend on whether our work is sufficiently advanced by that time.

Iain Smith (North-East Fife) (LD): I am pleased that Keith Harding seems so keen to get on with proportional representation for local government

elections.

The issuing of an enforcement direction by ministers

"is justified in order to protect the public interest from substantial harm."

What objective criteria would define substantial harm? Would it be useful for ministers to place such an order before the Parliament to build controls into the process?

14:45

Peter Peacock: That question gets to the heart of the tensions that arise from time to time between the detail that one seeks to specify in the bill and the latitude that one allows the courts and others to determine matters at a later date. The general route that we have taken is that we do not want to seek to define too precisely such matters in the bill. We have also sought in the bill not to prescribe other matters, such as well-being. That allows some latitude for judgment to be exercised.

Iain Smith picked out the phrase

"to protect the public interest from substantial harm",

which was added to the bill. I may be giving away secrets that we are not meant to disclose, but I will do so anyway. The first drafts of the bill did not contain that phrase. I, for one, was anxious that we did not want to give the impression that ministers were waiting in the fringes ready to intervene. We want to give the opposite impression. We want there to be a high hurdle for ministers to overcome before they can intervene. In this context, the hurdle that must be overcome is to say that we are, first, protecting the public interest and that we are, secondly, protecting it from substantial harm. Ministers will have to have good justification for saying that the public interest is being harmed and it must be subject to substantial harm before they can seek to intervene. That is a pretty high hurdle and it is there on purpose.

In the final analysis, it would be for the courts to determine whether we had lowered the hurdle for ourselves to be able to successfully leap it, or whether we had genuinely subjected ourselves to those tests. That is what the courts are there to help to do. We do not think that it would be helpful to further restrict that in the bill. As soon as one starts to do that, one begins to hem oneself in, in a variety of ways. We think that the hurdles are sufficient in themselves for ministers to be required to give great thought to those matters before they issue a direction under those provisions. It is a much higher hurdle than currently exists.

Iain Smith: I will raise another issue about best value. Does not the relaxation of the exclusion from non-commercial considerations allow councils to force on independent contractors terms and conditions of work that are well in excess of what is required by employment law, minimum wage requirements and so on? If so, why is that justified?

Peter Peacock: I will put the matter in context. We have received a lot of representations about the restrictions that are imposed by section 17 of the Local Government Act 1988. People have been arguing for relaxation of the restrictions, for what they believe to be legitimate reasons. We propose some relaxation of those rules so that local authorities, if they believed that they would be compromising best value considerations or that the delivery of their service would be in question because of those factors, would be allowed to take account of the terms and conditions, or related matters such as training provisions, of employees of an organisation with which they were about to enter into a contract. That would apply equally to subcontractors and to main contractors. It would also extend to matters such as the behaviour of potential contractors in relation to industrial disputes. There are provisions in relation to the Transfer of Undertakings (Protection of Employment) Regulations, which are being discussed in the south, which might also come to apply. The intention is to create some relaxation to allow more discretion in the award of contracts, if a local authority felt that the factors that I mentioned could compromise its ability to meet best value or the delivery of a service.

We are not seeking to remove all the constraints because we believe that some of the constraints in the non-commercial considerations remain valid. For example, the restraints in relation to discrimination remain valid—matters such as where someone has worked in the past, who they have worked for, what their politics are, whether they have sectarian affiliations, or their involvement in employment relations after industrial disputes. There are things on the basis of which people should not be disqualified from accepting work from a local authority and there are other areas in which we want there to be more freedom. It is a question of finding a balance between those things that we can relax reasonably and those things that should be maintained. We think that we have struck the right balance.

Elaine Thomson: The bill contains a provision to allow councils to trade with contractors to the council without that counting as commercial services income. Will that apply to public-private partnerships? For example, would a council be allowed to provide the facilities management input to a PPP if that facilitated the contract?

Peter Peacock: My understanding is yes, but I hope that Mary Newman will shake her head

vigorously if I am going in the wrong direction. Provided that it would meet the public benefit—presumably any public contract for a PPP would provide a public service—the local authority would be much freer than in the past to provide certain services back to the PPP contractor. It might be helpful for Mary Newman to address some of the details of that.

Mary Newman (Scottish Executive Finance and Central Services Department): The intention is that where there is a pre-existing contract, which could be a PPP contract, the local authority would be able to facilitate the contract. The purpose has to be to improve the service to the local authority and therefore to the public. In PPPs and facilities management contracts, the issues about who does what in the PPP have to be thrashed out as the project develops and such decisions will be discussed at that point. The service will have to constitute best value for the authority. Whether that means that the local authority can insist on providing facilities management services in every circumstance would be up for negotiation at that time.

In the past, authorities have asked for such provision in circumstances such as payroll, combining training or catering services on a joint project, or easing a staff shortage on the part of the contractor by using people in the authority as back-ups. Those were the sort of criteria that we were considering when we put that provision in the bill.

Elaine Thomson: Can I clarify that? AMEC is doing the maintenance of schools in the Glasgow PPP. Would the proposed provision allow Glasgow City Council to provide that maintenance, as it would be within the PPP project?

Mary Newman: It would depend on the PPP. Sometimes one of the purposes of a PPP is to outsource the facilities management. I cannot comment on a specific case such as Glasgow because I do not know what was taken into account. It depends on the contractual negotiation in the original deal.

Peter Peacock: If you are asking whether the local authority would be legally prohibited from entering into discussions about providing that service, it would depend on the nature of the service that they were offering and whether the other party in the PPP thought that it would be beneficial in terms of the overall contract. As I understand it, the local authority would not be prohibited from entering into such discussions.

Mary Newman: When the North Lanarkshire PPPs were set up last year, we amended the Local Authorities (Goods and Services) Act 1970 designated list to allow the council to provide payroll services to its contractual partners in the new ventures.

Dr Jackson: I want to follow up one of the things that Sandra White said about the impact on communities. Community groups and voluntary organisations seem to be making a strong argument for including the impact on the community in the criteria that councils are required to consider. They think that that criterion would be a big advantage in the type of activities that they are engaged in, along with the quality of what can be provided and sustainable development. What is the difficulty in having the impact on the community as one of the criteria?

Peter Peacock: Given that I am not entirely clear about the point that community groups and voluntary organisations are making, I cannot say whether having the impact on the community as one of the criteria will present a difficulty. In my earlier responses, I hinted at the fact that once we understand better what is meant by "impact on the community" and whether the impacts are positive or adverse, we will look closely at whether we can accommodate them. I am not saying that we are not going to move on this. I am saying that I have to understand a bit more about what precisely is envisaged. I cannot give a firm commitment on that today.

Dr Jackson: That is fine.

Small businesses talked about the impact of councils' actions on them and said that that should be required explicitly. Are you sympathetic to that?

Peter Peacock: To supporting small businesses?

Dr Jackson: Small businesses said that specific community planning actions could have a detrimental effect on them. They thought that councils should consider such effects in the community planning process.

Peter Peacock: If we are talking about actions that flow from a community planning partnership having an effect on small businesses, the basic answer is that part of the community planning partnership's duty is to consult the community and it ought to be making such contact. If the partnerships are discussing small business support or ways in which to foster more small businesses in the area, small businesses should be round the table for the discussions. Perhaps those discussions would take place principally through local economic forums, on which small businesses are represented. I hope that when there will be an impact on small businesses, the business community will be part of the community planning process.

I am conscious that in evidence that you have received questions were raised about the ability of local authorities to favour local businesses in a

trading sense. Local authorities are of course caught up with European procurement legislation and cannot discriminate in favour of local businesses in contracts. However, a number of local authorities have taken action to relate better to local businesses by setting out well in advance when contracts are coming up for award, so the business can think about whether it wishes to put itself in a position to get on tender lists.

As I understand it, local authorities are trying, wherever they can, to reduce the amount of bureaucracy that is attached to business tendering work at local authority level. They are trying to slim down the specifications, which can be very thick, and to make it easier for local businesses that do not have the resources that national organisations have to bid for contracts. In those senses, a local authority can help local businesses to benefit from insights and information about potential contracts so that they are in a better position to bid. However, local authorities cannot discriminate in favour of local businesses, because of European contract rules.

I think that I am correct in saying that we are also working with the Joseph Rowntree Foundation, which is considering ways of helping to advise local businesses on how they can be better informed and better able to participate in seeking contracts from local authorities. The foundation has been talking to us and to others about that research.

Dr Jackson: Thank you—what you have said has touched on a bigger issue than the one that I raised originally.

Mr Harding: Irrespective of the nature of the goods or services provided, if the charges for them are at a level of cost recovery only, or are below the level of cost recovery, are they exempted from being counted as commercial income? For example, almost no Scottish councils cover their leisure services costs. Are they therefore excluded?

Peter Peacock: Do you mean excluded from having trading accounts?

Mr Harding: Yes.

Peter Peacock: I will get Mary Newman to—

Mr Harding: Will those charges not count as commercial income? Are they exempt from that?

15:00

Mary Newman: Could you clarify your question? Are you talking about external provision of services—between departments of the authority—or internal provision of services?

Mr Harding: There is a duty there. Unless I have misread the situation, anything of a commercial nature or that provides a commercial income will come under trading accounts. Will services such as those that I have described come under trading accounts or will they be exempt from them, simply because they do not recover their costs?

Mary Newman: BVACOP says that a trading operation is one that provides services at a level other than just pure cost recovery. That is one of the criteria that must be met for it to count as a trading operation. If the charges were just at the level of cost recovery, it would not be called a trading operation.

Peter Peacock: Accounts would not be required for operations whose purpose was treated as internal. In the general revealing of accounts at the year end, we would expect a local authority to reveal what contracts it had with external parties for the provision of certain services, for example leisure services. The extent to which those operations broke even, or not, would come under the accounts. They would not have a trading account per se, although that would be encouraged under the code of practice. There is no sense in which that should be hidden from the public. In fact, the reverse is true—such operations should be exposed as a result of the rules that we are putting in place.

Incidentally, Audit Scotland will be considering how to follow the public pound more effectively in relation to arrangements around leisure companies, among many others. That will give us visibility with regard to where the public pound is going and in relation to whether operations are being subsidised.

Mr Harding: You are trying to achieve best value in opening up such operations. It may well be that an outside organisation could deliver a better service for what a council is paying for it, but delivering it at a loss. How can that be identified if an exemption covers the production of trading accounts?

Peter Peacock: That would come under general best value provisions. Under the terms of best value, any council is under a duty to improve continuously. That means that they must systematically subject their activities to review with regard to how they are delivered and to whether delivery can be improved or costs reduced.

At some point, under normal best value provisions, the council in Keith Harding's example would undoubtedly conduct a best value review. It would consider its budget for the service in question and how the service was being delivered. It would examine alternative ways of providing the service, look at benchmarking information and consider what happens in other local authorities.

If the council felt that the service could be

delivered more effectively at the same cost, or as effectively at a lower cost, it would be free to use the alternative. In fact, the council would not just be free to do so; it would tend to go in that direction because of best value considerations and because it had weighed up the various attributes of that option. If a contract with an outside party was involved thereafter, that contract would, under accounting procedures, have to be revealed as part of the annual accounts.

The Convener: I think that we have exhausted our questions on best value, and we will shortly move to the subject of community planning. I have one last question on best value. The bill empowers ministers to set limits or not set limits. It empowers them to set limits variably within and between different classes of services and authorities. Does not that create rather too much space for ministerial preference and judgment? Practically, and given the potential for variation, how will any defensible set of limits be developed?

Peter Peacock: The question relates to local authorities that seek to trade with parties outside the public sector. We have wrestled long and hard with the construction of the provision. The essential point is that we do not want unnecessarily to limit local authorities' freedom. Equally, we do not want to say to local authorities that they should divert their eyes from their principal purpose—providing public services within their existing powers—by setting up businesses with public capital and taking on companies such as CR Smith. Clearly, the main purpose of local authorities is not to be commercial organisations that trade within the private sector. We are saying that where there is sufficient capacity and local need, authorities ought to be free to meet that need appropriately.

It would not be right for a local authority to increase its commercial activities to about 50 per cent of its total activities. That is not the purpose of the bill, so we had to establish a limit for such activities. We could have picked 10 per cent or 20 per cent of total activity, but we thought it best to pick zero per cent as the limit and to have local authorities make a case to us for why they should be involved in certain activities. Under the bill, ministers will have the power to invite comments on such proposals. For example, we could ask the local business community whether such a proposal is reasonable. If we are convinced after that process, we will allow the council to go ahead.

Recently, as a result of vast public sector building works in Glasgow, a skills shortage emerged in central Scotland. Councils around Glasgow found it difficult to carry out their normal work because many joiners, brickies, electricians and plumbers had gone to Glasgow. Given the way in which public procurement is going, there could be other situations like that. If such situations arise, it is reasonable for local authorities to trade and work commercially, at least up to a limit. The underlying logic of the provision is to provide flexibility in such situations.

You asked whether the provision gives ministers too much power and whether they might show preferences in exercising their judgment. Ministers will have discretion, but they should exercise it wisely. The alternative is to set strict limits in the bill, which might mean that councils would be caught on the wrong side of the limit. The aim is to provide flexibility rather than for us to be overlords of the commercial activities of local authorities.

The Convener: We have exhausted the questions on best value. We turn to community planning.

Iain Smith: I have questions on the bodies that are involved in community planning. Communities Scotland is not included on the list of bodies that have a duty to participate. Why? Communities Scotland has a regulatory role, but it also has a role in community regeneration. Given that, should Communities Scotland be included on the list?

Does the inclusion on the list of Scottish Enterprise and Highlands and Islands Enterprise include the local enterprise companies? How do local economic forums, which are not tied in to local authority boundaries, and therefore to community planning boundaries, fit in?

When the community planning task force gave evidence to the committee, it suggested that the Executive is a key partner in community planning. Do you agree with that? If so, should the bill embody that idea?

Peter Peacock: I will try to answer all those questions. Local enterprise companies are wholly owned subsidiaries of Scottish Enterprise or HIE, which means that the duty that is placed on those bodies will apply to the local enterprise companies. The duty will be part of the operating contract between Scottish Enterprise and HIE and their LECs. The LECs should be firmly caught up in the process.

We have said that Communities Scotland is an important player in community planning. An interesting legal point arises—Communities Scotland is ministers, or ministers are Communities Scotland. There is no legal distinction, so placing a duty on Communities Scotland places a duty on ministers. We want to display our commitment to making progress with community planning. We are prepared to consider placing a duty on ministers to do that. That would take care of Communities Scotland and wider matters, which might answer Iain Smith's question. Through its agencies or more directly, the Executive is potentially an active participant in community planning. We intend to look into that.

Local economic forums are, for all practical purposes, the economic development part of community planning. They are partners at the community planning table and they present their vision of economic development locally, working out who will deliver what and what the best relationships should be. Local economic forums tend to work at a higher geographical level than the local authority level. The boundaries will not always be coterminous with local authority boundaries; in most cases, they will not be. Therefore, a number of councils might be involved in a local economic forum. Serving the wider economic interest in that way would be in the spirit of community planning. We see no contradiction in that—it will be one dimension of community planning that will be at work in many parts of Scotland.

Dr Jackson: The bill asks partners to consult community bodies but it does not go into detail. Will the guidance stipulate minimum requirements, or even a minimum list, to ensure that such consultation is taken seriously?

Peter Peacock: That is an important point. Whether ways of consulting community bodies should be specified in the bill is a matter of judgment. On balance, we felt that simply specifying a requirement to consult was sufficient. The guidance will make more practical suggestions on how that will happen. There will not be one fixed way of consulting; there will be different ways in different areas. Existing good practice may be used as examples.

I am not sure that the guidance will prescribe the bodies but it will, no doubt, illustrate the kind of bodies that should be involved, which will vary throughout Scotland. For example, community councils are very strong in some parts of Scotland but not so strong in others, so they will feature in community planning more in some areas than they do in others. Tenants associations and parts of the voluntary sector are stronger in some areas than in others. The guidance will have to reflect local circumstances. I am not talking only about written guidance; the community planning task force has already held a seminar and I am sure that more such events will be held to help people to explore how they can be involved in community planning as effectively as possible.

Ms White: The Society of Local Authority Chief Executives and Senior Managers and the community planning task force have proposed that, if all parties consent, community planning partnerships should be able to incorporate legally and to receive cross-cutting funding directly. I was intrigued when the minister mentioned in his opening remarks that there would be cross-cutting exercises between bodies, and that ministers will have powers to allow such activity if it is requested by a body. Could you clarify what you mean by that? If there are to be cross-cutting exercises between bodies, will they also receive cross-cutting funding?

15:15

Peter Peacock: We think that incorporation is an interesting idea. The issue of where community planning is leading us in certain respects has been going round in my head for several months. I have considered whether the time might come—I stress "might"; there is a question whether, not a definite belief that, the time will come—when bodies that work together locally will believe that for certain purposes it would be better to be a legal entity, for example to receive certain cross-cutting funds so that they can impact more effectively on issues that face their communities. I can envisage circumstances in which that might well be of benefit. I can also envisage that some people might find that to be a rather threatening concept. Therefore, I am not at this stage saying that incorporation is a definite runner, but that there is something in it and we want to examine it more closely and listen to the arguments. I am keen to hear the committee's views on the matter, because it is hearing the evidence. That will help to frame how we think about the matter.

I make it clear that I do not envisage a situation in which ministers could from the centre require incorporation at local level. Incorporation has to happen on the basis of local partners saying unanimously that they want to be incorporated, so it seems to be wise at least to think through whether we should take such powers in the bill. Whether they are used in the short to medium term is immaterial. Some people—perhaps the community planning task force and some members—would argue that it would be regrettable if a community planning partnership wanted such powers, but we had no means of granting them. If such provisions are to be included in the bill, they will be permissive and enabling, rather than prescriptive or requiring. We want to hear other views on the matter before we even go that far, because we recognise that there are sensitivities around the matter in relation to accountability and so on.

Ms White: Are you sympathetic to the idea of cross-cutting funding? Take the example of Glasgow Alliance, as we have mentioned Glasgow before. It cannot possibly incorporate itself. I want to explore further the idea of ministers having the powers to grant incorporation. You are saying that if all the partners came together and went to the appropriate minister, the minister would examine such a request sympathetically and grant incorporation. Would that be the minister's individual choice? If all the partners decide that

they want cross-cutting funding to participate in a cross-cutting exercise and they put that request to the minister, would it be granted? Would the minister have such discretion?

Peter Peacock: I say—wearing my finance hat, rather than my local government hat—that we are already interested in some of those matters.

The ways in which funds flow out of the Executive are many and varied. A consequence of that is that sometimes funds do not at local level appear to be as joined up as they might be. We are, for example, considering ways in which we can better align or unite certain funds to tackle particular issues. A good example of that is drugs funding. Funds go out on a cross-cutting basis and there is a cross-cutting review of how the money is spent locally through drug action teams. We have moved down that road to some extent. The changing children's services fund requires more than one interest to consider how the money is spent. Other ideas are being considered about how we could better theme certain budgets and allow them to be spent collectively, rather than individually, at local level so that we can meet collective targets that we have set on issues such as drugs, improving children's services and so on. We are interested in that idea generally, as separate from community planning.

However, it is obvious to us that community planning is the vehicle for much local cross-cutting work. A logical consequence of that is that we might at some point want to channel funds through that cross-cutting mechanism, or we might be requested to do that. People from a community planning partnership might say to us that if the Executive joined up funds A, B, C and D, they would be better able to use the money locally. We would want to consider all that.

In that spirit, incorporation is part of the picture, because it might become a legal way of receiving those funds on a cross-cutting basis. However, it is not essential and there are other ways in which we can issue funds collectively—colleagues are considering that at the moment.

Mr Harding: As councils are the lead partners in community planning partnerships, would they be able to incorporate legally under the power of well-being without reference to the Executive?

Peter Peacock: They would not be able to do that using the mechanism that we have in mind. We are seeking an incorporation mechanism that requires the collective agreement of all the partners. In other words, any partner who did not want incorporation would, in effect, veto it. The power would allow incorporation in a manner similar to a joint committee. We have not fully thought this out yet, but there are already powers in other legislation that allow ministers to do that in relation to the delivery of particular services.

If you are asking whether the partners in a community planning partnership could of their own free will create corporate status, the answer is that they probably could, although that would not necessarily come under the power of well-being. The partners could set up a company limited by guarantee in which they were all joint shareholders. We are seeking a more public sector approach—similar to joint boards—because the community planning partnership is a public sector creature. If we go down the road of incorporation, we would prefer a public sector approach because of the accountabilities and rules that are associated with that. Those are the factors that are emerging, to the extent that we have considered the matter. Unless Gillian Russell tells me otherwise, a community planning partnership could not use the power of well-being to incorporate in the way that I have just described, although it could create a corporate entity that it owned jointly.

We have not thought through the matter fully, but when we have thought about it more, some issues might emerge. For example, issuing guidance to a community planning partnership that was incorporated in the spirit of the public sector would be much easier than trying to issue guidance to a separate corporate entity such as a company limited by guarantee. There are all sorts of reasons why incorporation could be a more attractive route and that is why we have been thinking about it. However, we have not concluded our consideration.

Mr Harding: I thought that I had identified something that might happen under the power of well-being. However, let us take the matter a little further. If the Executive goes ahead with the powers and receives a request for direct funding that cuts across all the public bodies in a partnership, thus bypassing the main public body, would the Executive be sympathetic to that request? I am concerned because it is an interesting concept. However, I fear that we will create another tier of bureaucracy that uses more scarce resources.

Peter Peacock: That is why I have tried to make a distinction between the Executive requiring incorporation and permission to incorporate being asked of it unanimously and collectively by a partnership. If the partnership has in its joint working reached the point at which it wants to incorporate for the purpose of receiving certain funds—for example to tackle collective health matters—I would expect the Executive to consider the request sympathetically. If there were local consensus that that is the right way to do things, we would have to listen carefully to such a request.

I do not want to give the impression that we are seeking to create an alternative way of funding local services; that is not what we are doing. The principal means of funding local services are local authorities, the health service and so on. The process that we suggest would be valuable at the margins. If that process could improve joined-up service delivery to meet particular objectives such as tackling drugs problems better or whatever, that is something we would want to examine. The process would not be an alternative vehicle for mainstream funding, but it might at the margins provide a mechanism for dealing more effectively with some important cross-cutting issues. It is in that spirit that we are considering the matter.

Mr Harding: Surely that is what you expect community planning task groups to deliver without incorporation.

Peter Peacock: That is why the question of incorporation is being raised by the task force, among others. We are beginning to think about it as well. Where would incorporation logically lead us? Community planning partnerships are still in their early stages. As I said last week in a speech about community planning, we have been working on the easy bits of community planning—the bill, the voluntary partnerships, the long-term visioning and agreed long-term objectives. I am not saying that that work is simple. It is far from simple and a lot of hard work has gone into it so far and complex relationships have been set up.

The really difficult bit will come when we have to say, "The consequence of agreeing those long-term objectives is that we must change our budget tomorrow. I'll stop doing something and give it to you to do, because it's better that you, rather than I, do it." Alternatively, we might need to reconfigure a set of services. We will get into real, practical, nitty-gritty, difficult decisions at local level, so the difficult bit is yet to come. If, in that process, a partnership matures to the extent that people say, "Look, there's even more that we could do collectively if we had the legal framework to do it," we will have to consider whether it is right for us to enable that. That is what we are interested in.

Ms White: I would like to clarify a point. It is difficult, but communities and various agencies working and planning together is something that we all want to look towards. In your opening remarks, you said that ministers would have the power to grant incorporation if that was requested by a body. You said that you would be sympathetic to such a request if you were approached by a body. Will ministers grant bodies only the right to work in joined-up partnerships, or will they grant the money to enable that? I have not been able to establish exactly what you mean when you say that ministers will have that power.

Peter Peacock: If there was consensus that it was sensible to have on the statute book powers to allow a body to become incorporated, that is what we would seek to do. How would that be triggered? A minister would, in effect, be given a power to grant incorporation on request, perhaps through a statutory instrument laid before Parliament under either negative or affirmative procedure. Ministers would say, "We've had this request from community planning partnership X. We have the powers to grant incorporated status. We wish to do so." That would then have to be agreed by Parliament. Only then would ministers have the power to grant incorporation. It is a way of triggering people's desires—there is no sinister motive behind it.

Ms White: You have not said anything about the funding. That was the second part of my question. You say that ministers will have the power, under a statutory instrument, to grant partners who say that they want to take part in joined-up thinking and supply something to the community the right to come together. I also asked whether that would mean that ministers would have just the power to say, "Yes, you can deliver that" or whether, if the different bodies needed extra moneys, you would have the power to grant those moneys.

Peter Peacock: I am saying that, if such an incorporated community planning partnership came to us and asked for its funds for that purpose to come down to it in a particular way, ministers would almost inevitably be sympathetic to that, if the partnership was trying to achieve our objectives and if there was local consensus that we could parcel our funds more effectively. Many areas are arriving at that point and saying that we should be doing things differently, irrespective of incorporation. Incorporation may help, but we do not know that.

The Convener: Let us move to the power of well-being or general competence. Nearly all our witnesses have suggested that the wording of section 23(4) should be modified to prohibit duplication without the consent of the other party, or positively to permit the duplication of a function with consent. Do you accept the logic of making that explicit in the bill, given that that is your clear intention?

Peter Peacock: As I said in my opening remarks, which I intended to cover this point, we have been listening to the detailed points that people have been making about that. We will consider all those points. The intention of section 23(4) is clear enough and we will reconsider whether the way in which it is expressed could be improved. I am not giving an absolute commitment to do anything about the wording, but I have heard sufficient to say that we should have another look at the section and decide whether our intention

could be expressed in a different way.

Our underlying purpose is to ensure that we do not leave the situation exposed in such a way that a local authority could use the power to start running things that were already provided at public expense in the local community. We are trying to ensure that there is no unreasonable duplication of things. However, we are happy to look at whether that can be expressed differently.

15:30

Elaine Thomson: The Society of Local Authority Lawyers and Administrators in Scotland suggested in evidence that the principle of ultra vires—which is the whole business of operating within the rules that the minister referred to earlier—is so entrenched that courts may interpret empowerment very narrowly. On the basis of English evidence, SOLAR suggested that the fear of such an interpretation might lead to councils not using the power of well-being as intended. The couple of options that SOLAR suggested to address that issue were for the power of well-being to be made a duty, or for wording to be built into the bill to state explicitly that promoting well-being is a core statutory function of a council. Will the minister expand on that?

Peter Peacock: Sorry, can you repeat the second point?

Elaine Thomson: SOLAR suggested that either the power of well-being should be a duty, or alternatively, that wording should be built into the bill to state explicitly that promoting well-being should be a core statutory function of a council.

Peter Peacock: If I may go back to square one, I accept that there is an ultra vires culture. It is perhaps not surprising that that evidence came from SOLAR, given the fact that local authority lawyers and central administrators are very much caught up with the issue of the powers that local authorities have. From my own experience, I can readily understand that there is a cautious culture. Councils are cautious about undertaking activities for which they have no statutory basis, because action can be taken against them in the courts, which can impose all sorts of different penalties.

However, we are trying to change that culture through the bill, by saying to councils that with a first-resort power they need not think in that way any more. Therefore, I am not clear that the courts would interpret the use of that power in a conservative way. Whether they do so remains to be seen. It does not necessarily follow that, because we have had an ultra vires culture in the past, the courts will behave in the same way as regards the new powers that the bill will give to local authorities. Ultimately, that is for the courts to determine.

On whether the promotion of well-being should be a duty rather than a power, I am not clear what a duty to secure well-being would require and where such a duty would take us. What would happen if an individual citizen or a group of citizens felt that, at a given moment in time, the local authority had not done anything to secure the community's well-being? A duty to promote well-being might take us into difficult legal territory.

We have framed the bill in such a way as to say that, if the locally elected people make a judgment that they want their local authority to do something, they will have the power to do that thing unless it is expressly prohibited. That immediately puts in a democratic test. If the local democratically elected people, in consultation with others through the community planning partnership, think that doing a particular thing is the right thing to do and it promotes the well-being of the community, they will have the power to do that. We should move forward on that basis.

Placing a duty on local authorities to secure well-being would put a rather different complexion on things. In many respects, such a duty would take the initiative away from the local authority, because the authority would need to look out constantly for what it had to do next under that duty. Such a duty would change the nature of the power quite substantially. Over the years, I have heard many arguments for a power of general competence for local authorities—indeed, I used to advance those arguments—but none of them ever envisaged that that would be a duty. The power to promote well-being is about enabling, facilitating and empowering rather than requiring. There is a big difference between those things.

Elaine Thomson: SOLAR felt that, despite section 21(2)(c), councils would remain somewhat insecure about their ability to form companies, partnerships and joint ventures, unless the power to do that was stated explicitly. Are you sympathetic to that view? Should the bill make a more explicit reference, to give councils more confidence?

Peter Peacock: We have tried to do that and I hope that we have succeeded. If we have not, we are always prepared to consider how we might make the provision more explicit. In England, councils have had broadly similar powers, but the distinction between implied and explicit restrictions has not been made clear. In section 23(2), we try to make it clear that a limiting provision

"is expressed in an enactment"

and that implied restrictions do not apply. People will have to get to grips with the fact that we are moving the ground substantially. Only an express prohibition or limitation, not an implied limitation, will count for the purposes that are concerned. We

have probably found the right balance, but if there are ways of making the provisions clearer, I am happy to consider them.

I hope that any SOLAR representatives who read the evidence will not take what I say amiss, but part of the culture that we are trying to change is that ultra-cautious questioning of whether councils have the power to do things. I hope that people will be sensible about the use of the power, but will nonetheless explore its boundaries to do good for their communities.

Keith Harding has made a couple of points as throwaway lines. He said that nobody had given an example of a use of the power of well-being. In a sense, that is the point. We are saying, "You have a power. If you think that this is something that you want to do for your community, test the use of the power. Provided that what you want to do meets best value tests and would improve the well-being of your community, you have the power to do it."

If someone took a contrary view and applied to the courts for judicial review, councils would have to show that they had thought about the intended measure and that it would improve the well-being of an area. Councils would have to have a clear rationale for using the power. It is not to be used willy-nilly. I hope that the guidance on the bill and on the power of well-being will set out some of those matters and explore some of those issues in more detail. Perhaps it will help councils to think through the tests that they might want to apply in deciding to use the power of well-being.

Mr Harding: You said that experience would allow us to find out whether something could be done. Surely the opportunity exists to clarify that now. According to what you said, we will still be in the hands of lawyers, who will test the power to find out whether councils can do whatever they are trying to do. Will the situation change?

Peter Peacock: The difficulty is that, as soon as we try to qualify or specify the meaning, we restrict it. We are genuinely saying that we want councils to have the freedom to decide what will increase the well-being of their communities, whether they are communities of interest or geographic communities. A council will have to be able to argue its case in court, eventually, but reasonable people should be able to do that reasonably, if they have made reasonable decisions. The problem with saying now, "What we mean by well-being is this, this and this," is that that means saying what well-being does not mean. We genuinely seek not to do that. We want a much freer and more open power that people can interpret as they see fit.

Mr Harding: Surely that is the case now. Lawyers interpret various pieces of legislation. I have never faced the problem of a council being unable to do something. You say that we will still have to go through lawyers before we do something.

Peter Peacock: I experienced that problem, but perhaps I was more ambitious than you were.

Ms White: I would like you to clarify a small point. Perhaps I am reading the bill wrongly—although I am sure that I am not. As the bill stands—at least in the way that I read it—as long as provision is made on a cost-recovery basis, that would appear not to exclude rural authorities getting involved in, say, fuel distribution, or authorities whose areas contain deprived areas getting involved in, say, the distribution of food in those areas. Would that be a correct assumption?

Peter Peacock: I am not sure that I followed that. Could you give me that question again?

Ms White: Having looked through the bill and listened to evidence, I note that some councils would not want to encroach into distribution in a community where, say, the health service was also distributing, while other councils felt that they could do so as long as they recovered their costs. That is basically what it says in the bill—as long as a council's costs are being recovered, it can supply anything. Does that mean that councils can in fact supply anything, for example fuel, in rural areas or food in areas of deprivation, as long as they fully recover their costs?

Peter Peacock: The reason why cost recovery is a factor in the bill is to make it clear that councils can recover costs—they do not have to do so. I am not sufficiently familiar with the examples that you have just alluded to, but if a council wished to provide a service to an area of the sort that you may have described—although I am not entirely clear about that—and if it voted a budget for that purpose under the power of the well-being provisions, it could simply say that it wanted to do that and that it had voted a bit of the budget in order to provide the service in question. The council could still recover the costs of providing the service under that power, although it is not required to do so. The provision is more a permissive power than an obligation.

Incidentally, on something that has sometimes been mistakenly picked up in previous conversations that I have had, councils could, in the circumstances that I have described, use income for some other purpose, not just for the purpose of providing the service in question. There is much more freedom around this than I think some people imagine. I hope that that covers Sandra White's point: the recovering of costs is not a requirement; it is permissible if the council wishes to recover the costs.

Ms White: I would assume that most councils

would want to recover the costs, given that they are as cash starved as they are at present. You are saying that if a council works with another agency, which offers to provide a service, and if it is easier for it to allow that agency to provide it, the council is not required to recover the costs. What happens if the council bills that other agency and payment is required for some of the work under the partnership agreement in place?

Peter Peacock: That would have to be negotiated locally. If a local authority was working with another body in delivering a particular service, it may well, in the course of discussions, require that organisation to recover the cost of the service. The key thing is that, under the bill's provisions, it would not be obliged to do so. It would be a matter of local discussion and choice about how the service was delivered. If the council chose to recover costs, it could do so.

Ms White: I have a wee small further question.

The Convener: Could you be very quick? We are running out of time.

Ms White: I am sure that I picked the minister up on this correctly, but, if a council in a deprived area wanted to supply food as a cost-cutting exercise and did not recover the costs, am I right in saying that it would be allowed to do so under the bill, without being penalised?

Peter Peacock: I am not clear about the question.

Ms White: You said that the council does not have to recover the cost.

Mary Newman: There are various hoops that the authority would have to go through. It has to consider whether its actions are for the well-being of the community and whether they offer best value for the council. In considering that, it has to assess the impact of its actions. Guidance will make it clear that councils have to consider what they might be doing in terms of obligations under competition law, for instance.

If the council gets through those hoops and decides to do as Sandra White described on the basis of the power to advance well-being, it can recover its costs. If it decides to do that under an agreement for the provision of goods and services—it may be a bit of a murky question whether the council's actions are truly for the purposes of well-being—it can come to an agreement about payment. In any event, accounting rules about how that payment is accounted for will apply, but that is a separate matter and more to do with the recording of the payment.

If the council has cleared all the considerations that I described, then, in theory, it could do as Sandra White described.

Ms White: As long as it gets over the hurdles—I see. Thank you.

The Convener: We have exhausted all our questions. I thank the minister and his officials very much for coming along. If we wish to ask any further questions, we will write to you if that is acceptable.

Peter Peacock *indicated agreement*.

The Convener: I ask for the public gallery to be cleared and for the official report to leave, as we are going into private session, following a two-minute suspension.

15:44

Meeting suspended until 15:48 and thereafter continued in private until 16:07.

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