SUBORDINATE LEGISLATION COMMITTEE

Tuesday 9 January 2001
(*Morning*)

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1ST MEETING 2001, SESSION 1

CONVENER

*Mr Kenny MacAskill (Lothians) (SNP)

DEPUTY CONVENER

*Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
*Gordon Jackson (Glasgow Govan) (Lab)
*Ms Margo MacDonald (Lothians) (SNP)
*Bristow Muldoon (Livingston) (Lab)
*David Mundell (South of Scotland) (Con)

*attended

WITNESSES

David Cassidy (Office of the Solicitor to the Scottish Executive)
David Dunkley (Scottish Executive Rural Affairs Department)
Joy Dunn (Scottish Executive Rural Affairs Department
Jim Logie (Office of the Solicitor to the Scottish Executive)
Gillian Thompson (Scottish Executive Department of Enterprise and Lifelong Learning)

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Ruth Cooper
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 9 January 2001

(*Morning*)

[THE CONVENER *opened the meeting at 11:18*]

Education (Graduate Endowment and Student Support) (Scotland) (No 2) Bill

The Convener (Mr Kenny MacAskill): Good morning. I welcome everyone to the first meeting in 2001 of the Subordinate Legislation Committee.

The first item on the agenda is scrutiny of the delegated powers under the Education (Graduate Endowment and Student Support) (Scotland) (No 2) Bill, for which we have been joined by witnesses from the Executive.

The committee is aware that this is the second bill that has been introduced on this subject. It might be useful if, after introducing themselves, the witnesses let us know whether they have any introductory comments on the bill and on any subordinate legislation that relates to it.

Gillian Thompson (Scottish Executive Enterprise and Lifelong Learning Department): In line with normal procedure, I have prepared a short statement. I am head of student support policy development in the Scottish Executive. With me is Jim Logie, the solicitor who is working on the bill.

In the Executive's response to the recommendations of the Cubie committee, we announced that we would introduce a new package of financial support for living costs to help students from low-income families. The new support will take the form of bursaries for young and mature students and additional loans for young students; it will be for Scots studying in Scotland and will come into force this autumn for new students. The plans were set out in our consultation document "Scotland the Learning Nation: Helping Students", which was launched in May 2000.

We also agreed with the Cubie committee's recommendation that graduates should make a contribution through the graduate endowment in recognition of the benefits that they have received from their degrees. The income raised from the endowment will be used to offset the cost of our planned new support scheme. The bill introduces the graduate endowment that will be paid by Scots and European Union students studying in Scotland and makes provision for future use of the income raised. It enables ministers to introduce regulations to govern the detail of the endowment scheme, including the administrative arrangements. Ministers wish to make the detailed arrangements through such regulations to allow flexibility to adjust the scheme to meet changing requirements in future.

As the graduate endowment is new, specifying the detail in regulations will ensure that ministers can respond quickly to the changing student support scene. For example, there will be provision to make changes to the amount of the graduate endowment and to the group of courses that will be exempt from the endowment.

There is also a technical issue about the use of the income-contingent loans scheme, which is governed by regulations. The graduate endowment regulations will contain a provision that specifies how the income-contingent loans system can be worked into the overall scheme.

Ministers propose that the affirmative procedure will be used for the first set of regulations, after which the negative procedure will be used. Although we have published a first set of illustrative regulations, a new set that we have been working on over the past month will be available before stage 2. As a result, the detail of any regulations that the committee might have seen up to now will change fairly substantially.

The Convener: How does the bill differ from the first as far as subordinate legislation is concerned?

Gillian Thompson: Unlike the first bill, this bill incorporates an explanation of the term "graduate"; under the first bill, that definition had been contained in the subordinate legislation. Jim Logie will correct me if I am wrong; as we have all been working on the No 2 bill, it has been a while since I looked at the first one. All the other areas where we wish to take powers under regulations remain the same.

Bristow Muldoon (Livingston) (Lab): In earlier discussions of the bill, the committee commented that the powers to make subordinate legislation were quite broad. Subsections (7) and (8) of section 1 define the way in which statutory instruments will be made under that section. Subsection (8) stipulates that the first regulations under the section will be made through affirmative procedure, but that subsequent regulations will be made through negative procedure. However, subordinate legislation can be made under a range of subsections in section 1. Should each of those subsections be governed by a requirement for any initial regulations to be made through affirmative procedure?

Gillian Thompson: The regulations—which will

be known as the graduate endowment (Scotland) regulations—will cover all the powers mentioned in section 1 on which ministers will make regulations. That first set of regulations will be made through affirmative procedure, which will allow the Parliament to have a good look at all the details of the scheme; those regulations will be pretty detailed about the scheme and its arrangements. All the powers affecting graduate endowment that ministers wish to take under subordinate legislation will be contained within the same set of regulations and will be treated exactly the same.

Bristow Muldoon: So there will be one all-encompassing set of regulations.

Gillian Thompson: Yes.

The Convener: If you are preparing a substantial piece of subordinate legislation that deals with regulations concerning the graduate endowment, why not put that in the primary legislation?

Gillian Thompson: To do that would be extremely inflexible. There will be a need to monitor the scheme regularly, which is what we do with all other legislation governing the student support system, and to make adjustments as required. In such a situation, it is extremely difficult to come back and make any necessary changes to primary legislation, as we need to find an opportunity to do that. The Executive's view is that the only sensible way of dealing with the scheme—including issues such as liability for the endowment, all the administrative arrangements and the collection of the graduate endowment—is through subordinate legislation. That will give us the flexibility to make changes as required.

The Convener: Could the primary legislation not only specify the principal criteria but include the opportunity for any future amendments to be made through subordinate legislation?

11:30

Gillian Thompson: The bill sets out what the graduate endowment is, but it would be inappropriate for primary legislation to include, for example, the amount of the graduate endowment—if I understand you correctly, that is what you are suggesting should be included. If we specified the amount in the bill, the way in which we would change the amount would be in doubt.

If ministers wished to make changes to the liability—for example, ministers might want to vary which people were exempt, such as lone parents and people who are eligible for the disabled students allowance—they would have to find an opportunity to make those amendments through primary legislation. If we were unable to find an appropriate vehicle, it would be extremely difficult to make changes. From a practical point of view, the Executive is satisfied that such specific, detailed elements of the scheme have to be covered by subordinate legislation.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): I sympathise with the position that you are taking on flexibility, as people do not fit easily into boxes. The student population contains a variety of people, who switch courses and so on. It would be very easy to include provisions in primary legislation that would not apply to individual cases that turned up unexpectedly. There needs to be flexibility, and to that extent I am happy. However, we are worried that Parliament might not be able to take a view on these matters. We want to ensure that we have opportunities to scrutinise, comment on and provide input into any changes in regulations.

Gillian Thompson: That is why ministers have taken the view that the first set of regulations should be subject to the affirmative resolution procedure. The whole scheme is new, and that procedure will allow debate on the regulations and allow people to consider them in detail.

Historically, for the reasons that I have outlined, student support has been delivered through subordinate legislation, whether that has related to the making of provision for support or to the collection of repayments of loans that students have taken out to cover living costs. Generally, experience suggests that there is not a great deal of change annually. Clearly, we consider every year whether something needs to be changed to respond to changing circumstances. The fact that the Parliament will have the opportunity to take a view on the whole of the regulations at the outset should be sufficient, as subsequent changes are unlikely to be huge—there will only be minor amendments here and there.

Bristow Muldoon: I fully recognise the need for flexibility in the system. The bill has been introduced and a major piece of subordinate legislation will follow hard on its heels. However, much of the definition could have been included in the bill and we could still have had subordinate legislation with the power to amend it. An example from last year is the Ethical Standards in Public Life etc (Scotland) Act 2000, which defined the public authorities to which it applied, but gave ministers the power to add or delete organisations from the list of bodies to which it applied.

Jim Logie (Office of the Solicitor to the Scottish Executive): We would probably find that difficult. As Gillian Thompson said, we will produce a complete set of regulations. Anyone who wants to know anything about the graduate endowment will simply need to read the bill and the set of regulations to learn all that they need to know. If we proceeded with your suggestion and drafted a

huge bill that would be amended incrementally, year on year, through delegated legislation, the paper trail would soon become very long. An omnibus set of regulations will still create a paper trail as we amend it, but every so often we will have to consolidate the regulations. At various key points, a consolidated set of regulations will be available and will be the only document that will need to be read. If we had to find time every few years or every decade to introduce another graduate endowment bill that contained every provision about the graduate endowment, a lot of parliamentary time would be taken up and a lot of Executive time would be used in preparing it.

David Mundell (South of Scotland) (Con): You make the case well for giving ministers flexibility. We have heard that argument time and again. We understand why ministers want the maximum flexibility, but that should not be the main concern. A balance should be sought between the outline in the bill and some substance. Many people would argue that the bill is the most significant that the Parliament has considered—it is flagship legislation. On this important subject, people could argue that, as the Parliament is taking a different track from that of the Westminster Parliament, the issue is therefore worthy of a substantive bill that sets out as much as possible in its body.

It is for the Parliament to determine how it allocates its time. We have chosen to allocate a lot of time to discussing the graduate endowment, which has been an important issue in Scotland. When the regulations can be produced almost simultaneously with the bill, there is a strong argument for putting as much as possible in the body of the bill.

Gillian Thompson: Ministers accepted that the bill that was introduced at the beginning of October did not detail sufficiently well some of the policy intention behind the graduate endowment. That is why we took the opportunity to introduce the Education (Graduate Endowment and Student Support) (Scotland) (No 2) Bill at the beginning of December. As I said, in doing that, we recognised more clearly in the bill concerns such as those about the meaning of "graduate", "higher education benefits" and "publicly-funded institutions". Most important for many people, we addressed how the income would be used. Ministers accepted that the original bill was not as well drafted as it might have been. The No 2 bill is the Executive's attempt to make the provisions clearer.

Having said that, I think that ministers are satisfied that the bulk of the scheme's detail needs to be in subordinate legislation, as described. Ministers have said that the first set of regulations—the substantive set—will be subject to affirmative resolution, to allow the Parliament to debate it, as the bill sets out.

Gordon Jackson (Glasgow Govan) (Lab): Is there no room for compromise? I accept the use of affirmative resolution, but my cynical mind tends to the view that regulations are never considered in the same way as primary legislation is.

Kenny MacAskill asked whether the original regulations could be included in the bill and amended by statutory instrument. I take the witness's solicitor's point that that would produce a huge and detailed regulation. In any set of regulations, there will be a lot of detail, but there will also be big policy issues dealing with the things that people really care about. Although deciding what those big issues might be would involve a value judgment, there might be an argument for putting such issues—the sort of things that David Mundell was referring to—in the bill, which could be amended by secondary legislation, and for dealing with the detailed regulations differently. I think that we could separate the big points from the nitty-gritty. I am slightly worried about putting all the provisions or criteria into delegated legislation. From my cynical point of view, that does not have the same effect as primary legislation.

Gillian Thompson: That would be a political decision for ministers to make. Speaking as an official with experience of student support, I have to say that I understand what you are saying, but my view is that the detail of the scheme needs to be in the subordinate legislation, so that we do not get hung up on trying to find vehicles for making changes that would benefit students but that, because the detail was not in the subordinate legislation, would take longer to introduce. Ministers would have to decide whether the bill should be changed to reflect the suggestions that you are making. I cannot comment on that.

Gordon Jackson: I accept that. The difficulty might be in the definition of detail. What one person regards as a detail might be regarded by another as the principle of the bill. Am I right in thinking that, as an official, you see nothing technically impossible about achieving the kind of compromise that I am talking about?

Gillian Thompson: Having had some experience of this area over a number of years, I feel extremely uncomfortable about doing anything that would cause a difficulty in developing the detail of the scheme over time.

The Convener: There is a great deal more specification in the primary legislation on many matters that come before us, such as legal aid and health issues, than there is in this case. I am not sold on the argument about the paper trail because, as a practising solicitor, I always found it far easier to go to the primary legislation than to

try to follow the trail of the subordinate legislation that comes thereafter. Although an Executive of whatever political colour must be able to make changes in due course, there is benefit in having as much of the skeleton and outline of the matter as possible contained in the primary legislation. If the subordinate legislation is already prepared and is about to be rolled out, there must be some opportunity to provide some beef for a bill that, despite its importance for Scotland, is contained on three sides of A4 paper.

Gillian Thompson: That was one of the reasons why we published the illustrative set of regulations when we introduced the bill in October. As I said, the Executive made it clear at the outset that that was the first stab at drafting the regulations. The regulations that I think will be published at the end of January will help people to understand what is in the bill and what will be done next in regulations.

David Mundell: Other than the political issues and the amounts of money, what elements do you think will change substantially over time?

11:45

Gillian Thompson: It is difficult to say. You are asking me to speculate on an area that has changed substantially and unexpectedly in my six-year experience of it. However, on housekeeping issues, the new set of regulations—this was not the case in the previous ones—will set out the courses that will be exempt. For example, a schedule to the regulations will contain a list of higher national certificate and higher national diploma courses. We are talking only about degrees taken at publicly funded institutions; we have already indicated that students taking courses in professions allied to medicine, nursing and midwifery will be exempt from the graduate endowment. Those courses will be specified in a schedule to the regulations. If those courses were specified in the bill, it would be difficult to make changes to the list.

I accept that there might be a slightly easier way in which to do that than finding another bill to which to attach things. However, if for some reason ministers were minded to make a change to the courses that were exempt from the graduate endowment, that would be done most straightforwardly by simply introducing an amendment to the regulations. As another example, if there were a desire to adjust the minimum period of study that a person had to undertake in order to be liable for the graduate endowment—once we have settled on that—that would be difficult to achieve if the period were specified in the bill. Such difficulties would result in a delay in implementing a perfectly sensible change that would be to the benefit of students.

Ian Jenkins: I support that view. We are dealing with shifting sands and we cannot fix these provisions. As MSPs, we will receive various representations from people on the regulations. It would be silly if that advocacy could not lead to a change in the regulations or if making that change would take an unreasonable amount of time. It is not as easy as it seems to construct regulations and definitions that will stick. Situations change—students may shift courses or their course might become a degree course part way through. It is legitimate to use a vehicle other than primary legislation to deal with that. We should assume that the Executive is being positive. I see this as a way for the Executive to provide more for students rather than to take away privileges.

The Convener: We will debate that shortly. If there are no more specific questions for the officials, I will simply thank Ms Thompson and Mr Logie for attending the committee.

Gillian Thompson: Thank you.

Bristow Muldoon: How much time do we have before we have to report to the lead committee?

The Convener: We have to report forthwith—today.

Bill Butler (Glasgow Anniesland) (Lab): I agree with Ian Jenkins. As far as I understand the situation, if something is stipulated on the face of the bill, there is a greater probability that there will be delays in making changes that benefit students. I support what Gillian Thompson said, as far as I understood it.

Ms Margo MacDonald (Lothians) (SNP): I apologise for being late. I was detained by the constabulary in Fettes Row. [*Laughter.*]

I can understand why the provisions might take longer to organise if they are on the face of the bill, but that would be the case only if the system was allowed to take control of what we are trying to do. Why should it take longer for an amendment or change to be made to a bill than to a regulation?

The Convener: It is substantially more complicated to change primary legislation than it is to change subordinate legislation because of the various stages that are involved. My disagreement is because the bill covers only three sides of A4, but there are already substantial regulations that are ready to be rolled out contemporaneously. It seems to be a matter of balance and of allowing Executive officers to deal with matters of a relatively minor nature, such as deleting "2,000" and inserting "2,100", for example. I feel that some of the matters that will probably be covered under the regulations could be in the bill. I am not seeking chapter and verse on this, nor would I want every t to be crossed and every i to be dotted, but we seem to have got things out of

kilter—the regulations will be far too great while the bill will be far too shallow.

Bristow Muldoon: I would have preferred a lot more definition in the bill. Gordon Jackson's point—that a bill will tend to be the subject of greater scrutiny than any piece of subordinate legislation—is fair. However, in this case, given that a major piece of subordinate legislation will follow hard and fast—by the end of January—and will be the subject of significant scrutiny, I would be prepared to go along with the bill. As a general principle for bills in future, however, I would wish there to be greater definition in bills, with the power to amend them contained in the subordinate legislation.

The Convener: Margaret Macdonald is drawing to my attention the fact that primary legislation can be changed by subordinate legislation. It is not the case that everything must be contained in the subordinate legislation if it is to be changeable. A lot of health service and legal aid regulations provide evidence of that.

Ian Jenkins: What do you want to be more defined? Give me some examples of things that should be in the bill.

The Convener: Whom are you asking, Ian?

Ms MacDonald: I was just wondering about how we find out about—

Bristow Muldoon: We could ask which courses and people were exempt and so on—

Ms MacDonald: But can you not see that courses come up—

David Mundell: I understand what is being said, but the argument that is being made is, effectively, that primary legislation should have minimal content and that bills that have two or three pages should be passed regularly. I suppose that there is an intellectual argument for that, but I agree with the convener; if we run primary and subordinate legislation almost simultaneously, the presumption should be that as much substance as possible is included in the bill.

We see regulations every week that amend dates, amounts of money or courses—I believe that that was the case for the bill that introduced individual learning accounts—the Education and Training (Scotland) Bill—for which a list was drawn up to cover amendments for scuba diving or whatever it was.

We should keep the Executive—of whatever political hue—on board and suggest that it should put as much substance in legislation as is practical. There is an argument for some points not being included in legislation but, on this occasion, the bill is too much of a mere framework. At the very least, we should point that out to the lead committee, which should make ministers justify that.

Gordon Jackson: Those are difficult balancing acts. I do not really sympathise with Bill Butler's point about delay. If we are to consider carefully the delegated legislation, it would all come to much the same thing.

The argument that I sympathise with for having subordinate legislation to deal with regulations is that, every five years or so, we can consolidate them by producing a set of regulations without having recourse to primary legislation. That kills the paper chase. That is not unimportant, but my niggling feeling is that, on serious political issues, there is a danger in going too readily down the pathway of bills that consist of—as the convener said—three sheets of A4. When there are serious political matters, the substantive matters should as far as possible—at least the first time round—be in primary legislation.

I do not care what the theory is, but no member ever takes statutory instruments quite as seriously as primary legislation. The average member of any Parliament does not consider delegated legislation as seriously and carefully as he or she considers primary legislation.

It is one thing to change the cost of a marriage notice from £12 to £13—big deal—but for the big political issues, to have everything done by delegated legislation gives me an uneasy feeling. I accept that, as Ian Jenkins said, that makes no difference in theory and might be better administratively, but Executives need to be watched a wee bit more than that.

The Convener: In practice, it makes a difference. It is not the committee's job to specify what should be in the regulations. We could go to the ridiculous extreme of including, for example, that the payment will be £2,000 and how that sum will vary—that could be fleshed out a bit more. The real difference is that, if the regulations introduce a group of exemptions that we like in part but not as a whole, there is not much that we can do. With a bill, a member can at least lodge an amendment to delete, for example, section 3(1). With subordinate legislation however, we have to throw out the baby with the bath water.

Bristow Muldoon: Is not that the case only for any subsequent amendments? Is not a statutory instrument introduced under an affirmative resolution that is subject to amendment?

The Convener: No. Affirmative resolution is simply a different method of moving against an instrument. That is why we have argued in the past for a hybrid super-affirmative procedure that would allow greater flexibility. The affirmative and negative procedures would not allow us to delete, for example, a specific Queen Margaret University

College course.

Gordon Jackson: That is a serious issue. I thought, perhaps wrongly, that certain types of regulations could be amended. If we cannot amend statutory instruments, but must instead strike them completely, that is a strong argument for dealing in primary legislation with matters such as those that the statutory instrument we are discussing deals with.

David Mundell: I was concerned when, shortly before Christmas, a group of statutory instruments was put to the vote. One of my Conservative colleagues wanted to vote against one of the instruments, but we were forced to vote down four separate instruments on different subjects. We could not vote on the individual instrument; we could vote only for or against the group of four instruments. When serious political issues are concerned, that is not acceptable.

The Convener: The difference between affirmative procedure and negative procedure is to do with the way in which members can move against an instrument, not whether they can move against a part of it. There must be a balancing act between having turgid bills that are 50 pages long, which slow down the Executive because it cannot get through its legislative programme while Parliament meets for days on end to discuss matters, and the right of Opposition and other members of Parliament to scrutinise proposed legislation and follow-up procedures.

Gordon Jackson: What worries me is this: suppose that there are in the regulations five substantive matters—five big issues—one of which members disagree with. We could take that out of a bill. In regulations, the gun is at Parliament's head. If we want to remove something, we must knock the whole thing out. That is a serious gun to allow the Executive to load too often on such important matters.

The Convener: We have never before had to come to a vote in the committee; we have always managed to be consensual. We are not here to comment on policy as such—we consider matters from the perspective of subordinate legislation. However, this is something that we may have to vote on. I regret the fact that the balance is out of kilter. We would have preferred more of those provisions to be included in the bill, because too many are drafted into subordinate legislation.

Ian Jenkins: I am happy to agree with the view of the committee. I do not want to force a vote. There is, however, a danger that inclusion in the bill of all provisions might lead to inflexibility in future. I listened to Gordon Jackson's argument about where scrutiny should happen if not in the Subordinate Legislation Committee. If the issue is put in those terms, I am happy to agree to what is suggested.

12:00

The Convener: I have always taken the view that the Subordinate Legislation Committee is the eyes and ears of Parliament. Members look to us for guidance when subordinate legislation is passed to a lead committee.

As Gordon Jackson said, we should be able to express satisfaction with one matter and dissatisfaction with four other matters in the regulations. We should express the committee's regret that the balance is out of kilter and we should explain in the report why we are worried. Not all our colleagues will appreciate fully what the outcome of the legislation will be. Unless members can persuade the minister to amend the instrument, it will not be subject to amendment by the whole Parliament if there is a part of the instrument that they do not like.

Does the committee agree that we should balance that warning with an acknowledgement that we do not seek to impede the Executive's ability to push legislation through or to vary legislation in due course?

Bill Butler: That seems to be a perfectly reasonable general comment to make. Nobody would be against that.

The Convener: We could say that, for various reasons, we are worried that the balance is out of kilter in this instance.

Ms MacDonald: That is entirely reasonable. Most people would agree that the balance is out of kilter. However, the instrument is now an intensely political document—not because of what it says, but because of the fact that it must be passed for the scheme to start when it was promised that it would start. How much time would be lost in our telling the Executive that we would like it to rejig the regulations? Would we carry the can for any delay?

The Convener: We cannot tell the Executive that; we can only submit a report to the lead committee. We can give our views from the perspective of subordinate legislation, within the parameters of what the committee is charged to do. It will then be for the lead committee—I think that that is the Enterprise and Lifelong Learning Committee—to take cognisance of the matter when the bill is debated at stage 1 or stage 2, as would be the case for any individual member.

Gordon Jackson: It is important to highlight the issue. Like Margo MacDonald, I do not want to slow down the process. However, our colleagues may say, "Wait a minute—we have regulations that we must accept in an all-or-nothing way and we do not like that." We should at least be able to

say that we had pointed that problem out to the Executive. It is a problem. Executives prefer statutory instruments, because they allow an Executive to push through whole rafts of provisions.

David Mundell: Gordon Jackson and others have made the point that, regardless of individual and party views of the bill, it will be a significant piece of legislation. That reinforces the argument that the provisions should feature in the bill, perhaps more than other matters that are much less politically contentious.

Bill Butler: We are making a general point that applies not only to this bill, but to all bills and it is perfectly reasonable for us to do so.

The Convener: Okay—we have managed to reach a consensus on the need for balance. Without seeking to restrict the Executive in its legislative programme, we want to see as much as possible included in the bill and, perhaps, an explanation to our parliamentary colleagues of the effect of the provisions and how restricted members' ability to deal in due course with subordinate legislation and the regulations will be. As Gordon Jackson said, at least we could say, "We telt ye so."

Salmon Conservation (Scotland) Bill

The Convener: The next matter is the Salmon Conservation (Scotland) Bill, for which there are witnesses. I should explain to new committee members that we are heading for a record time for a meeting. We are usually out of here by 11:30.

Gordon Jackson: I trust that the new members are not to blame for that.

The Convener: No—that is all down to the witnesses. A meeting of 15 minutes would normally be viewed as a busy meeting.

I welcome the witnesses to the committee and I am sorry for any delay. We had some of your colleagues giving evidence on another bill and unfortunately that ran on for longer than we expected.

We are aware of the effects of the bill on subordinate legislation, but we have asked the witnesses to address us today because of a letter that was copied to us from the Association of Salmon Fishery Boards. I had not thought that there was much that was of a contentious nature in the bill until I received the letter dated 28 December, which was sent to the Deputy Minister for Rural Development. Could you make general comments on the Salmon Conservation (Scotland) Bill and give the committee your views on the matters that are raised in the letter?

Joy Dunn (Scottish Executive Rural Affairs Department): As the bill has gone through its various stages, the Association of Salmon Fishery Boards and other constituencies have been fairly supportive of the measures in it. Obviously, the letter that you have from Andrew Wallace raises some concerns. The Deputy Minister for Rural Development met a delegation yesterday afternoon and focused on three main issues.

The first issue is point 1 on page 2 of the letter, and concerns conservation and management. Although we were keen to listen to the points that the ASFB was making, the fundamental change that it is asking for would change the policy in the bill. The focus of the bill has been the conservation of fish and ministers' responsibility to fish, as opposed to fisheries. It is difficult for us to accept the small wording change that the ASFB proposes, because it would change the shape of the bill.

Secondly, the association has concerns about consultation with district salmon fishery boards and the fact that such consultation has not been written into the bill. The minister listened carefully to the representations that were made at the second stage 2 meeting of the Rural Affairs Committee. Yesterday, she indicated to the

association that she is minded to lodge an amendment for Thursday's stage 3 debate, to cover that point and to reassure the association that whenever it is proposed to introduce a regulation, the minister will consult the district salmon fishery boards. It is likely that an amendment to that effect will be moved on Thursday.

The third point on which the association had some difficulty relates to time limitation. We listened carefully to the points that it made. We covered those issues during the various stages of the bill's passage and we are clear that time limitation is covered by two separate mechanisms in the bill.

Yesterday, the association did not raise with the minister any of the other more technical and less controversial points that are in its letter. It was keen to raise those three points with the minister and, as I said, the minister has listened to the point about consultation with boards and is likely to lodge an amendment for Thursday's stage 3 debate.

The Convener: Thank you.

I should have asked the witnesses to introduce themselves and to say whether other amendments are likely to be lodged, apart from those that have been mentioned during the discussion about the association's letter.

Joy Dunn: There is likely to be only one Government amendment at stage 3. That amendment, which I outlined, will make it clear that district salmon fishery boards will be consulted.

The Convener: Could I ask you to introduce yourself?

Joy Dunn: Sorry. My name is Joy Dunn and I am in the salmon and freshwater fisheries branch of the Scottish Executive rural affairs department.

David Cassidy (Office of the Solicitor to the Scottish Executive): I am David Cassidy and I am from the Scottish Executive solicitors office.

David Dunkley (Scottish Executive Rural Affairs Department): I am David Dunkley and I am the inspector of salmon and freshwater fisheries in the salmon and freshwater fisheries division.

David Mundell: I would like to ask for a little clarification. Part of the committee's role is to keep a weather eye out for people who have to apply and to deal with subordinate legislation.

New section 10A(3) provides:

"The Scottish Ministers shall have power to make regulations—

(a) on an application under subsection (1) above; or

(b) otherwise",

which is wide. I presume that new section 10A(3A) is being inserted to try to define "otherwise".

David Cassidy: That is not my understanding. New section 10A(3)(a) says "on an application" and paragraph (b) covers the position where no application has been made. In the absence of an application, ministers may make regulations on their own initiative. That is the position that is covered by "otherwise"—the shortest way of saying that was to insert "otherwise".

David Mundell: So what is the effect of new section 10A(3A)?

David Cassidy: Do you mean 10A(3)(a)?

David Mundell: Yes—sorry, no. I mean 10A(3A).

David Cassidy: There was some concern in the committees that there might be conflict between conservation and management of fisheries. The bill was amended to it make clear that conservation and exploitation were not exclusive. I suggest that management is the overarching issue.

There may be tension between conservation and exploitation. The amendment that inserted section 10A(3A) makes it clear that the measures may also have effect in relation to management of fisheries for exploitation and that those two propositions may live together in the regulations.

David Mundell: Right.

I am not indicating that I thought the explanation was clear—I am noting the explanation.

12:15

The Convener: Was the association satisfied by the points that you and the minister made in relation to new section 10A(3A)? On the minister's powers to act in relation to fish and fisheries, where is the dispute between what the association wants and the bill?

Joy Dunn: The dispute is about the bill treating fisheries as people's fisheries that they manage and putting that ahead of the term "fish" and the conservation of fish. We had a long meeting with the association yesterday. It felt reassured by some of the points made by the minister and our solicitor. The minister has undertaken to write to the association today to confirm all that she said yesterday.

The Convener: Am I right in assuming that the Salmon Act 1986 is primarily to do with fish as opposed to fisheries?

David Dunkley: The Salmon Act 1986 is about salmon fisheries, although among the powers

granted to district salmon fishery boards is the power to do such acts, execute such works and incur expenses for the purposes of, among other things, increasing the number of salmon.

The bill will not end up as a stand-alone act; it inserts sections into the part of the Salmon Act 1986 that relates to the regulation of fisheries. Rather than concentrating on conserving the fishery we are taking the line that if measures are provided to allow for conservation of the resource upon which the fishery is based, the fishery will necessarily flow from that. That implies conserving the fish, but it is much better if the fish are explicitly conserved for the purposes of maintaining a sustainable fishery.

The problem that we have with the association's suggested amendment is that it turns that on its head and concentrates solely on the management side.

The Convener: Thank you for attending. We are sorry to have detained you for so long.

Do members have any comments?

Is David Mundell much clearer?

David Mundell: I am not.

This bill is interesting as, rather than the natural course of a bill starting off with a lot of contentious provisions and ending up with general agreement, it appears to have started off as uncontentious for people with an interest and has become more contentious. Most of the relevant issues will have to be discussed during Thursday's debate. The timetable for the bill has been a bit rushed for the detailed consideration it merits.

The Convener: I asked some questions, but I do not know whether they fall within our remit. Given the functions with which the committee is charged, I am not sure whether we are required to draw anything to the Parliament's attention on Thursday. We have been seen to make some investigation on behalf of the association. Beyond that, it is for members to act as they see fit on Thursday.

David Mundell: In its press release, the association says that amendments will be lodged on its behalf on the issues about which it continues to be concerned. We can be satisfied that those issues will receive a full discussion.

Gordon Jackson: There is nothing to report on the subordinate legislation.

Ms MacDonald: The issues appear technical, but they are not; they are highly political.

Teachers' Superannuation (Additional Voluntary Contributions) (Scotland) Amendment Regulations 2000 (SSI 2000/444)

The Convener: Some minor drafting points arise on the regulations, which we will deal with in the usual fashion.

Births, Deaths, Marriages and Divorces (Fees) (Scotland) Amendment Regulations 2000 (SSI 2000/447)

The Convener: It has been suggested that we ask for the reasons for the delay of 14 days between the making and laying of the instrument and for the lack of a footnote. For the benefit of those who advise us on time scales, we should draw those matters to the Executive's attention. There are reasons for the time scales, such as allowing an opportunity to consider an instrument. We might as well bring that to the Executive's attention.

Agricultural Business Development Scheme (Scotland) Regulations 2000 (SSI 2000/448)

The Convener: Does anyone wish to comment on the regulations? The regulations could raise European convention on human rights issues. Is there to be an independent tribunal for appeal against the decision of the Scottish ministers? Given the continuing debate about that, I do not know whether we should seek clarification about whether an explanation will be given for the absence of any right of appeal and whether the Executive is considering changing that, with hindsight.

David Mundell: In that context, we could raise the issue of entry to dwelling houses.

The Convener: That regulation seems over the top.

Bill Butler: It would be interesting to have an explanation for that.

The Convener: There may be a good reason. I would like to know what it is.

David Mundell: You would find it out only if you were accompanied by a female sheriff officer.

The Convener: Such a requirement was a previous bête noire of the committee.

We will raise those two points with the Executive and see what response we get.

Fresh Meat (Beef Controls) (No 2) Amendment (Scotland) Regulations 2000 (SSI 2000/449)

The Convener: We will take no action on the regulations.

Feeding Stuffs (Scotland) Regulations 2000 (SSI 2000/453)

The Convener: These regulations are the final negative instrument before us today.

Ian Jenkins: We might point out to the Executive that some associated legislation has not been implemented.

The Convener: We will ask the Executive for clarification about whether our law complies with European Community law and consider the issue in the light of its response.

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 5) (Scotland) Revocation Order 2000 (SSI 2000/446)

The Convener: The third item on the agenda is an instrument that is not subject to parliamentary control. No points arise on the order.

Youth Justice and Criminal Evidence Act 1999 (Commencement No 6) (Scotland) Order 2000 (SSI 2000/445)

The Convener: We will seek some clarification about the delay in submitting the instrument.

Act of Sederunt (Rules of the Court of Session Amendment No 8) (Fees of Solicitors) 2000 (SSI 2000/450)

The Convener: No points arise from the instrument.

Sexual Offences (Amendment) Act 2000 (Commencement No 2) (Scotland) Order 2000 (SSI 2000/452)

The Convener: We had a lengthy discussion on this order in the private session.

Gordon Jackson: I have to say that during the public meeting half my brain has remained preoccupied with that discussion. I have learned that one cannot simply turn up at a Subordinate Legislation Committee meeting and work at it out as one goes along.

It is clear that section 7(2) of the Sexual Offences (Amendment) Act 2000 is the post-devolution element. Are you saying that the way to solve the problem is for Westminster to approve an order to commence section 7(2)—in other words, that unless section 7(2) is commenced at Westminster, we cannot act under section 7(3) of the act?

The Convener: That is the question that we need to ask.

Gordon Jackson: Our adviser seemed to suggest that the problem would be solved if section 7(2) were commenced at Westminster.

The Convener: Yes.

Gordon Jackson: We need to ask why that is not happening.

The Convener: Yes. We should ask whether it is okay for us to approve the order without section 7(2) having been commenced south of the border and, if so, why. As Gordon Jackson suggested earlier, there is some concern about the general issue as well as the specific problem. There will be other such cases and if there is to be a logjam in the proceedings, we should raise the issue so that Westminster and the Executive can find a solution.

We should be asking the Executive to say whether it is satisfied that, notwithstanding section 7(2) not being commenced south of the border, matters are vires in Scotland and to confirm that it does not expect a long-term problem. We might ask what the Executive considers the best way in which to address legislation that post-dates the Scotland Act 1998.

Gordon Jackson: I hope that I have understood the problem. Will we ask officials to come and talk to us or will we request a written answer?

The Convener: Usually, we write to the Executive and wait to see whether the response is satisfactory. We are entitled to ask for witnesses at any stage. That is a matter for the committee to decide. The time scale is not an issue. If there is a significant problem with the response, at least the officials will know why we have asked them to give evidence.

Meeting closed at 12:28.

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