SUBORDINATE LEGISLATION COMMITTEE

Tuesday 6 February 2001
(*Morning*)

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SUBORDINATE LEGISLATION COMMITTEE
5th 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

Ian Allen (Scottish Executive Justice Department)
Niall Campbell (Scottish Executive Justice Department)
Jacqueline Conlan (Scottish Executive Justice Department)
Stuart Foubister (Scottish Executive Solicitor's Office)
Liz Lewis (Scottish Executive Health Department)
Roddy Macdonald (Scottish Executive Health Department
Lynda Towers (Scottish Executive Solicitor's Office)

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERKS

Ruth Cooper
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 6 February 2001

(*Morning*)

[THE CONVENER *opened the meeting at 11:20*]

The Convener (Mr Kenny MacAskill): Good morning and welcome to the committee's fifth meeting of 2001. Apologies have been received from Bristow Muldoon, who is ill. David Mundell may be trapped in Moffat.

Regulation of Care (Scotland) Bill

The Convener: The first item on the agenda is delegated powers scrutiny of the Regulation of Care (Scotland) Bill. We will pause as our three witnesses come in and settle down.

Good morning, and thank you for coming. We are grateful that you have come along to answer our questions. It would be useful if you could introduce yourselves and give us an outline of your views on the points we raised with you, which we intend to consider further.

Liz Lewis (Scottish Executive Health Department): Thank you. I am Liz Lewis and I head the Scottish Executive's regulation of care project, which is responsible for the bill and its implementation. With me is Roddy Macdonald, the head of the bill team, and Lynda Towers, our legal adviser in the solicitor's office.

I will say a few words about the bill and the main points that the committee raised in its letter to us. The bill is intended to achieve two main outcomes: an improved experience of services for users and a confident, expert, effective and valued social services work force. It will do that by setting up two non-departmental public bodies. The first will regulate care services—not only those that are regulated by local authorities and health boards, but also local authorities' services and presently unregulated services such as care at home. The other will, for the first time, regulate the work force through registration, codes of conduct and practice, education and training.

The bill is substantial and sets out the main provisions relating to the structure and functions of the two bodies. A regulatory framework is intended to underpin the primary legislation. It will provide in detail for the way in which we expect the bodies to carry out their functions and ensure that there is sufficient clarity for the effective enforcement of the regulation of care.

Beneath the level of regulation, the bill provides for codes that will set out the requirements for the conduct and practice of the work force and the care standards for services. I know that the committee is especially interested in care standards. As we stated in our letter to you, the codes are being produced by the national care standards committee, which is chaired by the chief social work inspector, Angus Skinner. A consultative process on the standards is under way, which involves users and carers, as well as other stakeholders, in up to 16 focus groups. We have concluded the first round of consultation and are planning more. The consultation has also involved the Parliament's Health and Community Care Committee and its Education, Culture and Sport Committee.

The aim of the bill is to create standards that set out in an immediately understandable and relevant way what users can expect from services and the way in which the relevant standards should be demonstrated. The standards will also make it clear to providers what their services should look like and will give the registration and inspection staff of the Scottish commission for the regulation of care consistent and meaningful standards to inspect against. The standards therefore have three purposes.

The regulations will cover the essential criteria that must be met if a service is to operate, and the care standards will set out the wider package that a provider will have to meet, although there can be some discretion and qualitative judgment regarding the way in which individual criteria of that package are met in any specific case. We are keen that the documents should be meaningful to the users of services and recognisable to those who are working with us in developing them. The regulations, care standards and code of practice for employers will work as a total package. By the time the Parliament considers the regulations, final versions of the other documents will also be available.

Last month, the committee raised a number of points about the bill, and members will have read our reply of 25 January. We are interested in the committee's views on any aspect of the bill, and will answer any further questions that you have. We have reconsidered our written response to one point that was raised and I invite Lynda Towers to clarify our position before we proceed to further discussion.

Lynda Towers (Scottish Executive Solicitor's Office): The committee asked about the relationship between sections 58 and 59, regarding commencement orders. In our reply, we said that the commencement orders were to be subject to the negative procedure, but that is not

correct. The intention is that the commencement orders, as is usual, will be laid and not subject to procedure. We will have to instruct that an amendment be lodged to make that intention clear.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): Your statements are very helpful, but questions such as how much detail should be in the bill and whether the committee is happy with the idea of flexible codes of conduct being implemented later remain. I am happy for such codes to be flexible, but other committee members have said that they would prefer more detail in the bill. I am not making a specific point about that at the moment—I am happy to accept the structures that you describe. I also welcome the amendment that you mentioned.

The Convener: I have a question on the national care standards. It has been suggested that one way of fleshing out the code without making the primary legislation more cumbersome and restrictive is to include a requirement in the bill for the draft code of practice to be laid before Parliament under the affirmative procedure, as for the animal welfare code.

Liz Lewis: Are you referring to the code of practice for employers that the council would produce?

The Convener: Yes. It is in section 5.

11:30

Liz Lewis: There are two things. The care standards and the regulation of services are for the Scottish ministers to devise. There are also the codes of practice and the code of conduct for the work force, which are for the Scottish social services council to set. One function of the council is to be a self-regulatory body, so that the codes are owned by the work force. They should also mesh with equivalent codes in other parts of the UK, so that people can move around the UK and know what standards of conduct are expected of the profession. That is why the codes will be devised by the council, rather than through parliamentary procedure.

The Convener: I understand that, but I am wondering how there can be some democratic input rather than just an edict dispensed by the minister, for which section 5(1) appears to provide. Given the importance of those matters to the members of the Health and Community Care Committee and the Parliament, balance might be achieved by including in the bill a requirement to set the code in a draft order, so that members can see whether anything is missing or not tidily drafted.

Liz Lewis: As I said, it is our intention that the draft versions of the standards should be available to the Parliament when it considers the regulations. We could certainly consider that point further.

The Convener: We will then be in the same position as we are in with the Education (Graduate Endowment and Student Support) (Scotland) (No 2) Bill. The regulations are laid, and we see them, but there is no opportunity to do anything except lodge a motion against them.

Lynda Towers: My understanding is that the regulations on the Education (Graduate Endowment and Student Support) (Scotland) (No 2) Bill will set out a framework within which various payments and procedures for moneys can be dealt with. The sort of thing that will be included in the care standards is very different. They are not a regulatory framework that would allow one to work out what one's entitlement was. The care standards are much more general and more suited to guidance and examples of best practice, which it would not usually be appropriate to include in regulation.

I have the first draft of the standards here—the second draft will be very different. The document says that the individual is to be

"cared for in a comfortable and homely environment".

Elsewhere, the document says that one must

"make sure that staff recognise and value diversity, especially in cultural and spiritual beliefs and non-belief."

Nobody would argue that those are not perfectly appropriate standards to which people should aspire, but it would be difficult to include those in a regulatory framework.

The Convener: I agree. Perhaps that was a bad analogy. However, members, and in particular those with an interest in health, might want input on the standards. The downside of the standards not being fully detailed in section 5 is that there is no way in which members can do anything to add to or subtract from them. That is why I wondered whether laying a draft code before Parliament would create an avenue for greater scrutiny. Otherwise, we will be presented with an administrative edict—a fait accompli.

Liz Lewis: The standards are being issued for consultation in three tranches, with a short consultation on the final one. The Education, Culture and Sport Committee and the Health and Community Care Committee have been involved in that process. Only the first tranche has been issued so far; the second will come out at Easter and the third in June. A further consultation on the costs associated with the standards will also be widely distributed.

We are trying to ensure that the stakeholders

share the standards and the complicated process that we are implementing will mean that all the relevant stakeholders—but principally the service users—have an input. Once the standards have been couched in a language that is meaningful to service users and the consultation has taken place, it will be quite difficult for ministers or anyone else to participate at the end of the process. As a result, we are hoping that the parliamentary committees will participate while the consultations are still open.

Ms Margo MacDonald (Lothians) (SNP): Did the committees suggest the wording that Lynda Towers quoted from the draft standards document?

Liz Lewis: No. That wording came from a consultation document that was issued to a wide range of individuals and bodies, including the committees, and was produced by the relevant working groups of the national care standards committee. That committee is made up of all the relevant stakeholders, including principally the users and carers.

Ms MacDonald: I know that this is nit-picking, but what is the worth of that document? It has no legal standing and is not mentioned in the bill.

Liz Lewis: The bill says that all the actions of the commission's registration inspection officers and any enforcement proceedings in the courts must take the national care standards into account.

Ms MacDonald: Right.

The Convener: Are you satisfied that the consultation process will deal with that issue?

Liz Lewis: The process is at a very early stage; we have had only the first part. However, we are planning an extensive consultation. There has been a positive reaction from the various user groups who are speaking to the Health and Community Care Committee and the Education, Culture and Sport Committee.

The Convener: Section 23(1)(a) refers to regulations relating to the commission and gives Scottish ministers the power to confer additional functions on the commission. I understand that those regulations will be dealt with by the negative procedure. Given what you have already conceded on sections 58 and 59, would such additional powers not be better dealt with by the affirmative procedure?

Liz Lewis: What we have in mind is the kind of function that is currently the responsibility of ministers or another body but which might later seem more sensible for the commission to perform. Although we initially thought that the negative procedure was sufficient, we are certainly interested in hearing the committee's views on that issue.

Ian Jenkins: Perhaps the first set of regulations might be subject to the affirmative procedure.

Liz Lewis: If the committee were minded to recommend that, ministers would not feel that there were strong reasons for going against the committee's views.

The Convener: I am open minded, but I wonder whether we might be giving ministers more positive powers, so to speak, and perhaps the logical approach would be to make those powers subject to the affirmative rather than the negative procedure. I will need to consider that point.

Liz Lewis: The intention is that the power would not be used for anything terribly major. The commission will be set up with the powers that it needs to perform its main functions. However, we might decide in future to follow Sir Stewart Sutherland's recommendation and establish a national care commission to examine trends and so on, but we would not have provided that particular, useful function for the commission.

The Convener: Section 24(10) says that ministers must consult on regulations that they make

"except regulations which amend other regulations made under any of those subsections and do not, in their opinion, effect any substantial change in the provision".

However, "substantial change" does not appear to be defined in the bill. What do you mean by "substantial change"? Do you foresee interpretation difficulties?

Liz Lewis: The intention is that such regulations would effect only minor changes, would not require consultation and would not amend any major provisions in the regulations. Ministers would certainly wish to consult on anything that caused a substantive change. We believe that the wording of section 24(10) conveys that intention and would not allow ministers to amend regulations in a major way—that is not our intention.

As members will see from the bill, we are consulting on everything that we can think of. We had not intended there to be any deep meaning in that particular exception. We want to avoid the need for consultation on only minor changes to the regulations.

Ms MacDonald: The road to hell is paved with good intentions. Not that I doubt anyone's good intentions at this stage, but the way in which the bill is drafted leaves a loophole for a less constructive approach to the business of care. That is why I want to stick on the point.

Lynda Towers: Perhaps I could clarify the issue. Regulations that are made under section

24(10), whether they make substantial changes or otherwise, would come before the Parliament. If it was felt that the change was substantial, the committee could bring that to the Executive's attention. Therefore, there is a means of regulating the exercise of the power.

Ms MacDonald: I agree, but it would be up to us to spot that.

Lynda Towers: Let us assume that the Executive's view is that a proposed change to a regulation is not substantial. It would be normal for the narrative to indicate whether consultation had taken place and it would therefore be quite clear if the power had been exercised without consultation. In examining the effect of the regulations, you might consider that the change was substantial and the fact that there was a question about consultation would be highlighted. You would be able to raise the matter at that stage.

Ms MacDonald: May I ask for some guidance? Is it up to the committee to decide whether or not a change is substantial? We are talking about a policy change.

The Convener: We are straying into a grey area—if it is a policy change, it would not be for us to decide whether the change was substantial. From the committee's point of view, our difficulty would be noticing that it was a substantial change and that consultation had not taken place. There is a danger that such a change could fall through the net if we were not specifically looking for it.

I understand the difficulty in defining "substantial change". I presume that, if we noticed that phrase, we would be able to ask the Executive whether it had consulted on the regulations and, if it had not, why. We would then bring the matter to the attention of the relevant committee. The action then taken would have to be all or nothing, unless the Executive, in its wisdom, was prepared to withdraw the words and go back and consult.

Lynda Towers: I would have thought that, for such a qualification, it would be incumbent on the Executive, in the note accompanying the relevant regulations, to explain why it had not consulted—if it had not done so—and why the effect of the change in question was not substantial.

11:45

The Convener: If there are no further questions, I thank the witnesses for their time and trouble. They have made matters clearer.

Do members have any points to make about the evidence? We clearly secured a concession on sections 58 and 59. I would have thought that the same should have applied to section 23. It is not much of a matter, but if the Executive is prepared to concede on sections 58 and 59, I do not see why it will not concede on section 23. If powers are to be added, they should be subject to the affirmative rather than the negative procedure.

The more important matter was covered by the last point that we discussed. I was reasonably satisfied by the logic that the Executive note should provide the necessary explanation, but a lot rests on our advisers: they must ensure that they notice whether any wording is defective or not. If the Executive does not inform the committee by a note, it is difficult to see how "substantial change" can be defined without deciding that specific sections or provisions cannot be amended.

Ms MacDonald: The arrangements are all right just now because there is consensus. However, should that consensus break, there is room in the drafting that would allow the Executive of the time to introduce substantial changes if it wanted to.

The Convener: You are right—it is a question of how we monitor the situation. It comes down to the importance of greater experience on the committee. In due course, more people will start looking out for whether there has been consultation, rather than simply relying on the fact that similar instruments have previously come before us, sometimes with evidence from witnesses. The question, for our advisers and for members, will be whether there has been consultation, and if there has not, why. When he was a member of the committee, Fergus Ewing used frequently to ask that on agriculture matters—and rightly so.

The only alternative is to say that we wish "substantial change" to be defined. But how can it be? Our consideration today has been of benefit. We have now registered in our own minds the importance of looking out for consultation when similar matters come before us, whether they are about health or other issues.

Ms MacDonald: You are probably right, convener.

The Convener: On that basis, should we simply draw the matter to the lead committee's attention, highlighting the potential difficulty, but saying that we cannot see an easy way to address it directly without producing a lexicon on reams and reams of paper?

Ms MacDonald: It is the responsibility of the lead committee—because it is on top of the issues in a way that we are not—to determine when a change is substantial and when it is not and to question the Executive on the extent of the consultation and so on. Presumably it will tell us if it is dissatisfied.

David Mundell (South of Scotland) (Con): That is the only practical way to proceed.

The Convener: Do we wish to comment on the care standards? The only other point would be whether we want the code of practice produced before the regulations come before Parliament. We could indicate to the lead committee that that is an alternative—although I was reasonably satisfied that there would be substantial, on-going consultation in tranches. That is probably as beneficial as laying an instrument at a later stage. Early consultation is probably better than a document being laid.

David Mundell: It would be interesting to get a legal definition of "homely".

Ms MacDonald: I do not know about yours, but no one would want to stay in my home.

The Convener: Given that the lead committee is the one with responsibility to the stakeholders—I think that that was the terminology used—all that we can do is draw its attention to the options available and ask how it considers that consultation would best be achieved.

Ian Jenkins: The business under way in the Education, Culture and Sport Committee shows that consultation is going ahead well and that people feel included.

David Mundell: The only difficulty is how the codes of practice can be amended once they are produced, and that problem is not specific to the bill. The difficulty lies in producing a code which on the face of it seems fine, but which subsequent experience demonstrates is not. The procedure for amending such codes is unclear, to say the least.

The Convener: We can flag that up to the lead committee.

Convention Rights (Compliance) (Scotland) Bill

The Convener: The next item is scrutiny of the delegated powers in the Convention Rights (Compliance) (Scotland) Bill.

I welcome the witnesses. We have met several of you before, but it might be useful if you introduced yourselves and gave us any preliminary comments on the specific issues that we have invited you here to clarify. We wrote to you to identify the points on which we seek some answers.

Niall Campbell (Scottish Executive Justice Department): I am from the civil and criminal law group in the justice department. On my right is Jacqueline Conlan, who is on the bill team, and on my left is Stuart Foubister from the solicitor's office, who has a general interest in all the legal issues. Also on my left is Ian Allen, from the legal aid branch, who will be able to deal with legal aid issues that may arise.

The main point to make about the bill is that it is the product of the audit that the Executive carried out of law or practices that might be incompatible with the European convention on human rights. The bill anticipates problems that might arise and deals with them in Scottish terms. It takes account of the particular Scottish situation under the Human Rights Act 1998 as regards remedial powers, which is relevant to what the committee wants to ask us about. As you will know, south of the border there is a period of grace in which incompatibilities can be put right. In Scotland, an act is struck down at once, which means that we must anticipate incompatibilities to a greater extent and have greater powers to put things right quickly. I will say more about the remedial powers when we come to that.

There are six parts to the bill dealing with four main areas. I would not want to take up your time by describing all that unless you wanted me to do so.

The Convener: I think that we are clear that remedial powers are important. Last week, we were generally satisfied that flexibility is required and that the circumstances are correct.

Gordon Jackson (Glasgow Govan) (Lab): Niall Campbell, I am a little embarrassed because I have been over the ground before with you. I have reservations about remedial powers of such a sweeping nature being given to any Executive—I say that in case the current Executive thinks that I am worried about it in particular.

Would I be right in saying that the Scottish power is much more sweeping than the parallel

English power under the Human Rights Act 1998? We are told that the bill is necessary because the English already have such a power, but the power that we are talking about is much more sweeping.

Niall Campbell: I would not say that the power is much more sweeping. I will ask Jacqueline Conlan to comment on the differences between the powers.

Jacqueline Conlan (Scottish Executive Justice Department): The power is different from the power in the Human Rights Act 1998, and reflects what is in section 107 of the Scotland Act 1998. Scottish ministers have restricted powers under section 10 of the Human Rights Act 1998, but only in a couple of circumstances.

Gordon Jackson: Not everyone will know what section 107 is, so I want to dwell on that point. Section 107 allows the UK Parliament, by means of subordinate legislation, to do what it wants to any piece of our legislation on the basis that it considers it necessary or expedient because we are dealing with a matter beyond our powers. You say that you have modelled the new bill on that, but the English power to make changes to ensure compatibility with the ECHR is in section 10 of the Human Rights Act 1998. Why not model the bill on that equivalent power?

Stuart Foubister (Scottish Executive Solicitor's Office): We already have section 10 powers in Scotland; they were devolved to us. The issue relates to the way in which human rights were incorporated in Scotland. As Niall Campbell said, Scottish ministers have no power to act incompatibly with the ECHR, but ministers of the Crown can do so, if authorised by legislation.

Gordon Jackson: I understand that. In England, however, when an incompatibility is found—although not as drastic a problem as it is in Scotland, it has a political effect, if nothing else—or a finding from the European Court of Human Rights suggests to a minister that there will be a problem, the section 10 power can be used. However, the minister must be able to state that there are compelling reasons for proceeding under section 10 as opposed to introducing primary legislation. Why do not we have something similar in the bill?

Stuart Foubister: That is a fair point. We will take that away and consider the matter with the minister.

Jacqueline Conlan: The words that we have at the moment—"necessary or expedient"—were drawn from the Scotland Act 1998. When Scottish ministers introduce a proposed remedial order in the Parliament, they will be required to elaborate their reasons for introducing that order. It is not just a case of the provision being necessary or expedient.

Gordon Jackson: Indeed. You have conceded that there must be a compelling reason for introducing such an order. At the moment, according to part 6, the only thing that Scottish ministers would have to justify is that something

"may be incompatible with any of the Convention rights."

12:00

Niall Campbell: That partly reflects the fact that the Scottish ministers may have to anticipate apparent problems in a way that is unnecessary in England and Wales. If a case was coming before the courts, that might have to be anticipated by changing the law, because Scotland does not have the period of grace to make changes that is available south of the border. That is the point at which we go beyond the UK ministers' position and reflect the different, Scottish situation.

Jacqueline Conlan: Scottish ministers might need access to such a power if a court case was coming up and it was thought that the Parliament's legislation would be found incompatible with the ECHR, and therefore inoperable. That might have widespread implications. The wording of part 6 is intended to enable ministers to take action in such situations.

Gordon Jackson: I am not unsympathetic to that. My difficulty—if I may bore you with it—is the phrase "may be". I find "may be" very woolly. It may snow in July; it is not very likely, but it may. The phrase "may be" is too open-ended.

Stuart Foubister: Gordon Jackson is contrasting "may be" with "which is . . . incompatible". The latter phrase would identify the situation of a fairly clear court ruling.

Gordon Jackson: I do not have a problem with that.

Stuart Foubister: The difficulty is that we would expect human rights jurisprudence to progress on a UK basis. A finding down south that a specific piece of English legislation is incompatible would not be a clear finding that our equivalent legislation was incompatible. However, if that finding was by a High Court, say the House of Lords, clearly there would be incompatibility.

Gordon Jackson: Saying that it is clear beyond doubt that the legislation would be incompatible is a statement of a seriously higher order than saying that it "may be".

Stuart Foubister: That is taking things to extremes. In another example, if a Strasbourg case—not necessarily against the United Kingdom—pointed strongly in a specific direction, it might be difficult to say that our provision was incompatible beyond doubt. However, if the case pointed in that direction, ministers might want to

take remedial steps.

Gordon Jackson: Do not you recognise the legitimate worry that, although what you are saying is correct, the phrase "may be" is too open-ended? A minister could wake up one morning and say, "This legislation may be incompatible." I know that, to some extent, he would have to justify his decision; however, there would not need to be an urgent and compelling reason for it.

In a funny way, you are creating a problem of an ultra vires argument. Under the power in part 6, a statutory instrument might be produced on the basis that primary legislation "may be" incompatible. However, the phrase "may be" is woolly and causes problems of definition. When an amendment is made through primary legislation, even if the underlying reason for the change relies on a "may be" argument, that phrase should not appear in the bill.

The bill includes provisions for parole boards and so on because they may be incompatible. However, whether or not they are incompatible, the primary legislation can deal with them. The danger is of inviting ultra vires challenges by amending legislation through subordinate legislation—a risk that would not be taken if the changes were made by primary legislation.

Stuart Foubister: It is realistic to expect that challenges will not be made, given that the drift of the legislation will be towards a more liberal situation. There will not be challenges to the vires of what we are doing because we are implementing human rights legislation.

Gordon Jackson: Colleagues of mine who belong to the same party as the man on my left—David Mundell—would disagree with that. Phil Gallie, of the Justice 1 Committee, would challenge legislation on the basis that he does not want liberalisation. It is a nice liberal thought, that liberalisation would mean that people would not want to challenge the legislation, but that is not true. That is what worries me about the phrase "may be". There must be a clearer definition of incompatibility. At least in the English legislation—and I know why it is like that—there has to have been a court finding so that you know the compelling reason. Here, the "may be" is such that it almost invites a challenge.

Niall Campbell: The problem is how one deals with the situation that I described earlier, in which the legislation would be struck down at once if the Parliament did not do something. We must find a way of dealing with the Scottish situation. The bill is an attempt to deal with a Scottish issue. The Scottish legislation is quite different from the English legislation because of our different situation under the Human Rights Act 1998.

Gordon Jackson: No one has much of a problem with the legislation that is being struck down.

Niall Campbell: Yes, but there is no "may be" situation.

Gordon Jackson: Part 6 may apply in situations in which nobody is thinking of striking the legislation down, but in which it enters someone's head that they want to change primary legislation.

Niall Campbell: But, as you said yourself, they would need good justification for doing so.

Jacqueline Conlan: I do not think that what Gordon Jackson says is the case at all. The power is not intended to take the place of primary legislation; it is intended to be used in urgent circumstances or when subordinate legislation would be more appropriate. It does not mean that the Parliament will never again introduce a bill such as the one that you have before you.

Gordon Jackson: Your faith is touching. Perhaps we should consider including "urgently compelling reasons" in part 6, to put in statute what Jacqueline has just said.

Niall Campbell: We have taken careful note of your suggestion. The Deputy First Minister will appear before the Justice 1 Committee in a fortnight, and we will report the discussion fully to him.

Gordon Jackson: I am sorry that I have gone on at length.

Ian Jenkins: If a whole load of legislation collapsed the minute a judgment was made in court, there could be a serious problem. Some foresight is needed. Although I share Gordon Jackson's worry about the phrasing in the bill, I cannot see how else that eventuality could be prevented.

Ms MacDonald: How would big, bad Westminster cope with such a situation? The Parliament there would sit through the night if primary legislation was needed. The bill is trying to use subordinate legislation to get round that, but I would have thought that it would be quite serious if primary legislation was struck down.

Niall Campbell: A similar route, involving subordinate legislation, is open to Westminster. In fact, the procedure is copied from the one in the Human Rights Act 1998 which is available to Westminster. The introduction of emergency primary legislation is another route that has been used, but the remedial orders power is designed to avoid over-using that procedure or using it when it is not necessary. This would be a simpler procedure and one that the Parliament would have control over, as a remedial order would have to pass through the parliamentary process.

Ms MacDonald: I understand the theory of that

and subscribe to it, but in practice that procedure might not provide us with the safeguards that we are looking for.

Gordon Jackson: I have always been conscious of the fact that, in drafting devolution legislation, we are planning for 20 years ahead. Furthermore, anything to do with devolution has to be planned bearing it in mind that the day may come—heaven forbid—when the Scottish Executive is politically different from the Government in London.

Ms MacDonald: Six years ahead.

Gordon Jackson: I worry that, if we amend legislation through the "may be" provision, rather than by introducing new primary legislation, the vires basis of introducing the statutory instrument could be deemed incompatible, although that might be a matter of opinion. Under section 107 of the Scotland Act 1998, Westminster legislation could strike the order down. If the amendment occurs through primary legislation on a subject that is within the Parliament's competence, however, Westminster could not do that. I am not talking about next year or the year after. Is that over-technical?

Stuart Foubister: I take your point about vires and challenges. However, if we changed something in a direction that we thought was compatible with the human rights legislation, the likelihood is that Westminster would view that move as outwith the Parliament's competence. Westminster would have to take the view that what we are doing is incompatible with the convention. Westminster does not have to take a view as to whether we have satisfied the domestic vires.

Gordon Jackson: I feel strongly about this. At some stage, there may be a Government at Westminster that has a much more right-wing agenda—to use loose political terms—that would not see much merit in bringing things into line with the ECHR unless it was forced to do so, whereas the Scottish Parliament might be keen to bring things into line.

Stuart Foubister: The ability of Westminster to challenge us would exist only if we went outside our competence. That does not mean going outside the terms of section 12. The Government would have to attack what we were doing on the basis that it was incompatible with the ECHR.

Gordon Jackson: Unless of course the Government claims that what the Executive is doing "may be" incompatible and is statable.

Stuart Foubister: The Government has no locus to make such a challenge.

Gordon Jackson: Why not?

Stuart Foubister: Section 107 of the Scotland Act 1998 is about legislative or executive competence: that is, the functions that have been given to the Scottish Parliament or the Scottish ministers by the devolution settlement, rather than by the bill. Section 107 is not usable to allege that we have gone outwith the bounds of section 12 of the bill, because that is not a question of our competence, as that term is used in the Scotland Act 1998.

Gordon Jackson: I follow.

The Convener: If there are no other questions, I thank the witnesses for attending and for clarifying many of the points that were raised.

Niall Campbell: We have taken careful note of what you said.

The Convener: I do not know what report we will make on the bill. How satisfied were you by what we heard, Gordon?

Gordon Jackson: I am sorry to go on about this. My reservations are clear. What seems possible is that the Executive will tighten the bill up a bit. The Executive is taking on board some of the concerns, which are quite legitimate and are more than just nit-picking by a lawyer. My impression is—although I have no reason for it other than what has just been said—that the Executive agrees that it will have to be a bit tighter. I would be encouraged if the Executive included the phrase "for urgent and compelling reasons", rather than referring to legislation that "may be" incompatible.

The Convener: Should we welcome the Executive's reconsideration and recommend that the terminology be tightened up?

Gordon Jackson: It is obvious that that is what I think.

Ms MacDonald: I agree. I was surprised by how political, rather than legal, the witnesses' judgments were. They seemed to make political suppositions that the present liberal climate would continue. You do not frame law on that basis.

The Convener: That relates to Gordon Jackson's point about the law being made for the bad Executive as well as the good.

David Mundell: I agree that the law must be made for the longer term and that there were too many assumptions in the Executive's rationale, some of which Gordon Jackson highlighted. We would be failing in our duty if we did not highlight a potential difficulty. It is appropriate that these issues be put to Jim Wallace when he appears before the lead committee.

Gordon Jackson: If a statement is included to the effect that the minister must have urgent and compelling reasons to use the procedure, it will be clear that it is not a procedure that is to be used

when one could just as easily introduce primary legislation. That would solve the problem. Jacqueline Conlan said that the Executive would never misuse the procedure, but if such a statement were included, it could not.

The Convener: We will report to the lead committee in those terms.

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2001 (Draft)

The Convener: The only point that arises in relation to the order is that it might have been useful for anyone looking up the order—not to mention us—to know which transfer of functions the title of the order refers to. Greater definition in the title would be useful.

General Teaching Council (Scotland) Election Scheme 2001 Approval Order 2001 (SSI 2001/18)

The Convener: No points arise on the order.

Local Government Pension Scheme (Pension Sharing on Divorce) (Scotland) Regulations 2001 (SSI 2001/23)

The Convener: Various points arise on the regulations, including one on the definitions of "pension sharing" and "pension sharing order".

Although I am not noted for my political correctness, I think that if there is one area of legislation in which there should be gender neutrality, pensions legislation is probably it. We will address those points to the Executive.

Meeting closed at 12:15.

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