SUBORDINATE LEGISLATION COMMITTEE

Tuesday 25 June 2002
(*Morning*)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE
22nd Meeting 2002, Session 1

CONVENER

*Ms Margo MacDonald (Lothians) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
*Colin Campbell (West of Scotland) (SNP)
*Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab)
Murdo Fraser (Mid Scotland and Fife) (Con)
*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE SUBSTITUTES

Mr Kenny MacAskill (Lothians) (SNP)
Mr Brian Monteith (Mid Scotland and Fife) (Con)
Mr Mike Rumbles (West Aberdeenshire and Kincardine) (LD)

*attended

WITNESSES

James T Brown (Scottish Executive Health Department)
Laura Dolan (Scottish Executive Justice Department)
Stuart Foubister (Office of the Solicitor to the Scottish Executive)
Kay McCorquodale (Office of the Solicitor to the Scottish Executive)
Fiona Tyrrell (Scottish Executive Health Department)

CLERK TO THE COMMITTEE

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ASSISTANT CLERKS

Joanne Clinton
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 25 June 2002

(*Morning*)

[THE CONVENER *opened the meeting at 11:19*]

Delegated Powers Scrutiny

Debt Arrangement and Attachment (Scotland) Bill: Stage 1

The Convener (Ms Margo MacDonald): Good morning. I welcome everyone to the 22nd meeting of the Subordinate Legislation Committee. This morning's agenda starts with a question-and-answer session with our guests from the Scottish Executive: Laura Dolan, the bill team leader on the Debt Arrangement and Attachment (Scotland) Bill, and Kay McCorquodale, from the Office of the Solicitor to the Scottish Executive.

The committee has already notified you of its questions. Obviously, our work is not concerned with the purpose, content or efficacy of the legislation, but with whether the subordinate legislation is properly drafted and complies with the European convention on human rights—to name but one hurdle. We are also concerned about the apparent breadth of the powers that are to be invested in ministers. This is an important and high-profile piece of legislation that affects people directly and everyone is concerned about it. As a result, it must be easily understood and accountable in its application.

I want to start with sections 2(5)(a) and 2(5)(b), which deal with debt payment programmes. Why have you chosen to use the negative procedure to introduce those programmes?

Laura Dolan (Scottish Executive Justice Department): As the intention is to exercise the powers in section 2 and section 7 together and to deal with them under a single set of regulations, it is appropriate to use the same parliamentary procedure for both. As a result, our response to the committee's questions about section 2 is perhaps also relevant to the committee's questions on section 7.

Because of the slightly unusual situation with the bill, in these two sections the Executive has endeavoured to give particularly detailed notice of the contents of the regulations on debt arrangement schemes. The current consultation paper, entitled "Enforcement of Civil Obligations in Scotland", provides considerably more detail on the proposals. Issues such as the time limits and the numbers of creditors, for which section 2 makes provision, will be determined on the basis of the results of the consultation exercise. It is intended that those results will be independently analysed and published for the Executive, and ministers have already undertaken to keep the Social Justice Committee and the Parliament fully informed about their intentions for the scheme.

Section 7 clearly and deliberately sets out the scheme's limits. The committee will be aware of the time constraints on the introduction of the bill. If we had not had those constraints, we could have carried out the exercise in a different sequence by completing the consultation and then introducing the bill. Unfortunately, we have to deal with the situation that we are in. Last week, in their evidence to the Social Justice Committee, ministers advised that they wanted to bring arrangements for the debt arrangement scheme into effect as quickly as possible. Indeed, members of the Social Justice Committee pressed ministers on that very point, because they—and other witnesses who had given evidence—felt that the matter should be dealt with urgently. Therefore, it is thought that because of the unusual circumstances, particularly the combination of urgency and the arrangements for transparency about what is intended in the scheme, the negative resolution procedure would be the most appropriate course.

The main concern for ministers is to produce transparent, workable and speedy arrangements for the scheme. The ministers have endeavoured to be as transparent as possible so that what is intended is clear. However, if the scheme is to be workable, it is important to take on board views from the consultation, which means that it is not possible to finalise the scheme's fine detail at the moment. Several experienced people will contribute useful information and lend weight to the consultation exercise. Of course, once the consultation is completed, it will be essential to bring the scheme into being as speedily as possible, given Parliament's timetable.

The Convener: I accept what you say about carts being put before horses and things like that. We also understand the difficulty for you. It is up to the lead committee to say whether it thinks that the interests of the citizen are being protected. However, I would say that your choice of procedure does not seem like a good precedent. Other members of the committee might be interested in contributing to that point.

Colin Campbell (West of Scotland) (SNP): I understand the need for consultation and accept that there is continuing consultation but, as the

convener said, to use that as an excuse for not using the affirmative procedure does not seem to set a good precedent.

Bill Butler (Glasgow Anniesland) (Lab): Why is the affirmative procedure not considered the proper way of going about things in the first case?

Laura Dolan: It is thought that there is already a lot of information in the bill—more so than would usually be the case—and in the consultation paper, which will allow members to see their way around what we hope the scheme will look like, subject to fine detail. There is already a lot of information out there.

The Convener: I am not sure whether that completely covers it. Section 7(3) states:

"The regulations may modify any enactment (including this Act), instrument or document for the purposes of making such further provision as is mentioned in subsection (1) above."

Section 7(1) states:

"The Scottish Ministers may, by regulations, make such further provision as they think fit in connection with—".

A huge list then follows. Although there is a lot of information around, I am not at all sure that we are disposing of it in the correct way.

Kay McCorquodale (Office of the Solicitor to the Scottish Executive): It comes down to the unusual situation that we are in, as the convener said, of the cart being before the horse. We tried to include in the bill all the considerations that will be taken into account in the regulations. Until the results of the consultation are known, that is as much as we can offer.

Colin Campbell: It seems to me that there is no reason at all why an overarching principle of the affirmative procedure should not be applied, regardless of the fact that the fine print has yet to be arrived at.

The Convener: I do not think that we will progress beyond this point, other than to record the committee's concern that such a fundamental change and such an important measure should be subject to the affirmative procedure in the first instance, as Bill Butler said.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): How would the witnesses envisage that affecting the timing or things such as that?

Kay McCorquodale: The timing is a concern. Ministers made it clear in evidence to the Social Justice Committee that they were keen to have the scheme in force as quickly as possible because one of the fundamental principles of the bill is to have the debt arrangement scheme in place with the other schemes. It was made clear that we would try to get the scheme in place as quickly as possible. That is why the negative procedure was felt to be more appropriate.

11:30

The Convener: I completely understand the political imperative and I am sure that the committee does, too. However, I do not know how you can describe timing as a fundamental principle. I suspect that if we stress strongly enough that this sort of procedure should not be adopted—

Laura Dolan: We have certainly taken on board what the committee has said and the concerns that have been raised. We will take that back and discuss it with ministers again.

The Convener: Right. Okay.

Laura Dolan: There is something outstanding from the committee's first question that might be worth mentioning. The theme of consultation runs generally through the committee's questions.

The position is—this applies generally to the committee's questions—that ministers routinely consult as they think fit before exercising powers. If the bill were to contain duties to consult appropriately in some cases, but not in others, the effect might be to imply that, in the case where there was no duty to consult, ministers might exercise powers without consulting in circumstances in which it would otherwise be appropriate to do so. We do not want the inclusion of a general duty to have an unintended effect. It may be that any duty to consult should specify persons or classes of persons whom the committee thinks should be consulted. You could, of course, add words to the effect that it would be such other persons as the ministers thought fit. However, the Executive's position is that we do not think it necessary to state that there should be a duty to consult because it is ministers' practice routinely to consult on these matters.

The Convener: Hmmm—not that we doubt the ministers. We think that the ministers are just peachy, but sometimes it is quite a good idea, if you are talking about sequestrating people's assets and stuff like that, to have more formalised consultation.

Laura Dolan: I think perhaps that ministers have, in this subject matter, demonstrated their commitment to consultation in, for example, the weighty consultation document and also in the report by the working group, "Striking the Balance: A new approach to debt management", which preceded the bill.

The Convener: Nothing in the bill states that the next lot of ministers who come in must produce as weighty a consultation tome. That is where we would take issue with what was, no doubt, an

exhaustive consultative exercise this time round. However, we would like to feel that future ministers might feel themselves under a duty to do exactly the same thing.

Laura Dolan: I would hope that the Executive's practice on consultation generally would continue.

The Convener: We hope also, but this committee does not go in for hope; it goes in for small print, does it not?

Bill Butler: What would be the problem in making that willingness to consult explicit rather than implicit, as you seem to say it is? The problem with that implicit consultation, of course, is that it is not visible in the bill.

Laura Dolan: For practical purposes, it would be helpful to know exactly whom it would be appropriate to consult. There is an extensive list of those who have been consulted at the back of the consultation document. Obviously, one would not want to list all of those, although ministers thought that it was appropriate to take their views if they wished to give them.

Bill Butler: Perhaps I am missing the point, but why should there be hesitation in making a general duty to consult explicit?

Laura Dolan: I have tried to explain the implications of making a general duty—if one then does not have a duty to do something, the implication might be that one need not do it.

Bill Butler: That would be unfortunate. However, if I may say so, such a construction on a circumstance would not be commonsensical. I still do not understand why there is such hesitation in expressing explicitly a general duty to consult.

Laura Dolan: I think that there is such hesitation simply because ministers regard consultation on legislative change as normal practice.

Bill Butler: I ask for the convener's indulgence. I take Laura Dolan's point, but the convener asked, if the current estimable bunch of ministers were some day to be replaced by a not so estimable bunch—

The Convener: Excuse me—I did not refer to an estimable bunch of ministers. I said that they were peachy.

Bill Butler: You can say things your way, convener, and I will say them my way. It may be highly unlikely, but what if the current ministers were replaced by a not so estimable bunch of ministers?

Laura Dolan: I would hope that the officials who would advise them would continue to follow a reasonable course.

Colin Campbell: We are probably being a little paranoid and thinking about the worst possible scenarios, which will obviously not occur in a democratic, freedom-loving country such as ours. However, Bill Butler is trying to say that there should be consultation and that one cannot presume that everybody will be normal and decent down through history.

The Convener: I will try to summarise. The committee remains mystified about such reluctance for the general requirement to consult to be included in the bill. That is the belt-and-braces procedure, which the committee likes with consultation and people's rights.

Laura Dolan: There is great strength of feeling in the committee and I will make ministers aware of it.

The Convener: Thank you. Does that cover sections 2 and 7 of the bill?

Members *indicated agreement*.

The Convener: Section 8(1) deals with the functions of the Scottish ministers. We have no difficulty with the power in principle, nor with the chosen annulment procedure, but we consider it to be unusual that the bill would allow the Scottish ministers to delegate their powers to make delegated legislation under this part of the bill. We doubted whether that is the Executive's intention and whether it is acceptable for some other person to exercise the function of making delegated legislation. Was that the intention? Is it okay for somebody else to do what the ministers normally do?

Laura Dolan: We are grateful to the committee for raising the issue, as it was not intended that the powers to make subordinate legislation should be exercised by anyone other than the Scottish ministers. The section should be amended to provide that the powers cannot be delegated and it is intended that an amendment be lodged.

The Convener: That is good. I thank you for your answer.

Section 10 is on attachment. Section 10(5) provides a definition of the word decree and section 10(6) allows the Scottish ministers to modify that definition. We note that the Executive offers no justification for the provision, and that a change to the definition of decree could have a considerable effect on the operation of attachments. The issue goes to the heart of the matter. Should not exercise of the power be subject to the affirmative procedure?

Laura Dolan: The exercise of the power would involve updating the list to include any other order of a court or tribunal which authorised diligence to be done. The exercise of the power would not itself extend the list, as that would be conferred by other primary legislation. Little change would be possible by the exercise of the power. The

intention is simply to accommodate in the definition of decree any other type of order or warrant that other primary legislation had deemed enforceable by that means. We thought that the matter was one of detail and that it was appropriate to proceed by the negative procedure.

The Convener: Perhaps the lawyers in the committee can help me. Is the matter one of detail?

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): I have no concerns about the issue.

Laura Dolan: I should add that we appreciate that it was intended that the power would also be exercised in relation to the definition of "document of debt" and should apply in the same way. Again, the intention is to prepare an amendment.

Brian Fitzpatrick: Perhaps at section 5, a liability order would be a good example of an innovation with an equivalent effect to a decree. The intention is to allow the possibility that in future there might be a liability order or an equivalent under another piece of primary legislation. Discussion of that could take place in the context of primary legislation.

The Convener: I am glad that you caught that train this morning, Brian.

Brian Fitzpatrick: I am always glad to catch the train to come to the committee.

The Convener: That is good. What you said is helpful.

Do members want to press the matter or accept the Executive's explanation for the use of the negative procedure?

Brian Fitzpatrick: I accept the explanation.

The Convener: Okay. Brian rules.

Sections 11(1) and 11(2) are on articles exempt from attachment. The powers seem to be very wide and affect the debtor and the creditor. Should section 11(2) be subject to the affirmative procedure? Should there be a statutory requirement to consult before the power is exercised?

Laura Dolan: My comments in this context are also relevant to schedule 2 and the committee's question about that. Section 11 and schedule 2 provide in a similar manner for assets that are to be exempted. The difference lies in whether they are in domestic premises or premises that are not domestic. The aim of the provisions is simply to allow the list of items of types that are already set down to be added to, deleted or varied according to changing circumstances. Changes in the economic or social climate and technological developments might merit updating the list. The intention is not to widen the scope in any way, but to enable particular adjustments to be made effectively in the lists. It was thought that the most appropriate, straightforward and efficient way of responding to change was by making the power subject to the negative resolution procedure, which follows similar arrangements made under the Debtor (Scotland) Act 1987.

11:45

Brian Fitzpatrick: Do you envisage any circumstances in which technical innovation would lead you to remove any of the articles that are exempted from attachment?

The Convener: It is mainly a case of adding articles, is it not?

Laura Dolan: I imagine so but, not being technically innovative, I find it difficult to imagine what new developments will come along. I imagine that such items might be added.

Brian Fitzpatrick: I have no difficulty with additions but, given the narrow scope of section 11(1)(a), for example, I do not understand what would need to be removed as a result of technological advance. Books might need to be removed. We are straying into policy areas.

Laura Dolan: I cannot imagine that, even if we had electronic forms of books, we would want to do away with standard books.

Brian Fitzpatrick: I am pleased to hear it.

The Convener: It is true that we do not want to stray into policy areas, but if the Executive can add to, delete from or vary the list of articles exempt from attachment, should not that be debated?

Laura Dolan: That comes down to consultation. Section 11 follows similar arrangements under the Debtors (Scotland) Act 1987. Changes were made to those provisions only after consultation.

The Convener: The bill contains no statutory requirement to consult on such changes. I agree that, if a duty to consult existed, that would negate our objections and concerns.

Laura Dolan: If ministers thought that there was an issue with the provisions, they would consult and then introduce an appropriate amendment that reflected the views that they had heard.

Gordon Jackson (Glasgow Govan) (Lab): I agree with the convener in principle. I am a great fan of using the affirmative procedure rather than the negative procedure, as the committee knows. However, it is hard to envisage a situation in which ministers would want to remove anything from the list. That would be such a draconian change that it would completely do in the legislation. Articles are much more likely to be added, which does not

cause the same worry. Most of us are not worried about that.

What could be removed? If we removed the sort of things that are listed in section 11(1) and said that the exemption from attachment no longer applied to tools of trade, for example, we would be defeating the purpose of the bill. Oddly enough, that never worries me much. If a Government wants to change the legislation, it can just repeal it anyway.

Laura Dolan: The changes to the similar provisions in the Debtors (Scotland) Act 1987 involved additions. Computers, for instance, were added. That is a prime example of technological advance meaning that something becomes a household item.

Gordon Jackson: When a bill provides for a power that can defeat it, that worries me less than when a bill contains a power that undermines it. I know that that sounds rather odd. However, once a Government has decided to defeat legislation, it will do so by one method or another, such as introducing a bill to repeal it.

The Convener: A duly elected Government has the right to do that.

Gordon Jackson: The power in section 11(2) is included to enable ministers to add to the list of exempt items. I find it hard to imagine that it will be used to take items out—although that is theoretically possible—and I therefore worry about it less than I might under other circumstances.

Laura Dolan: There might be a situation in which, in adding an item, ministers might want to delete a previous item that the new one makes obsolete.

Gordon Jackson: I am totally determined that Mr Fitzpatrick will not make books obsolete. I will rail against that. I cannot imagine that we would ever get to that point.

Laura Dolan: I know that the committee is concerned not to raise policy issues, but we can discuss the matter of deletions from the list with ministers.

The Convener: Section 39 concerns expenses chargeable in relation to attachment. Subsection (2) enables the Scottish ministers to modify schedule 1 in order to add or remove types of expenses incurred in the processes of attachment and auction to or from those listed or to vary any of the descriptions of the types of expenses listed. Why is the provision not subject to affirmative procedure?

Laura Dolan: The issue is similar to the one that we discussed on section 11 and also applies to schedule 2. The Executive feels that, once the new arrangements are up and running and have been reviewed—ministers have made a commitment to carry out a review to find out how the arrangements are working—it may be necessary to add such items to the list, remove them from it or vary descriptions. The power would give ministers the flexibility to do that in a straightforward manner.

Brian Fitzpatrick: Presumably, any amendment to sheriff court fees or sheriff officers' fees in respect of any actions that they were taking in relation to attaching, taking, offering for sale and auctioning items would be dealt with by a sheriff court fees amendment order or a similar order for sheriff officers and messengers-at-arms. Did we not do a sheriff court fees amendment order only last week?

The Convener: Yes, we did.

Brian Fitzpatrick: If we tried to set such matters out in the bill, we would simply be replicating other legislation.

Laura Dolan: The fees are dealt with in a separate statutory instrument.

The Convener: That is reasonable.

Laura Dolan: There was another matter.

The Convener: There was a wee typo somewhere.

Laura Dolan: Yes. Section 39(1) contains an incorrect reference. That was a printing error, which needs to be corrected. The error is replicated in sections 40(2)(a) and 44(1). I am advised that those printing errors will be corrected in the next print of the bill and that there will be no need for amendment.

The Convener: If they can be fixed, that is all right. You spotted one more error than we did. Good.

Section 46 deals with exceptional attachment orders. Subsection (4) specifies the factors to which the court must have regard when considering whether to grant an exceptional attachment order that affects non-essential assets within a dwelling-house. Subsection (6) provides that the Scottish ministers may by order modify subsection (4) by adding or removing matters or varying descriptions of those matters. As the ministers will exercise a fair amount of discretion through the power, we consider that affirmative procedure would be the most obvious way of dealing with the matter.

Laura Dolan: Again, we are grateful to the committee for that observation, because it is a bit different from the question of adding or removing items from the lists of exemptions and expenses that we have already discussed. The policy intention is that an exceptional attachment order will be granted in very limited circumstances and

that the factors to which the sheriff should have regard will have a direct bearing on the situations in which it will be appropriate to grant such orders. Taken with section 47, section 46(4) defines the exceptionality of the order. We agree that we should consider further the choice of procedure for section 46(4). As a result, we intend to discuss the matter with ministers.

The Convener: Good. Thank you.

Gordon Jackson: I welcome that clarification. I know that I have already had my thruppence-worth on the matter. However, we should revisit the provision. Because the legislation sets out factors that sheriffs should bear in mind, it virtually tells them when or when not to grant an order. Changing such a provision is not a minor matter; it is at the heart of things. Because the granting of orders will depend on what we tell the sheriff to take into account, changing any of those factors will affect whether orders are granted. Although it might not seem as though we are taking powers away from a sheriff, in effect we are, because we are telling him in a roundabout way when to grant an order. I am glad that the procedure will be reconsidered, because any changes should be subject to the affirmative procedure.

The Convener: I am glad that the Executive officials have taken on board the committee's point of view. What about section 47, which relates to exceptional circumstances?

Gordon Jackson: It is the same difference.

The Convener: Is that right?

Laura Dolan: I am not so sure of that. The figures were based on the Scottish Law Commission's recommendations. The intention was to ensure that a minimum significant proportion of the debt would be realised. Section 47 simply allows for the figures to be reviewed in light of changing circumstances.

Brian Fitzpatrick: Presumably the section simply allows for the passage of time and the effects of inflation.

Laura Dolan: Those factors would probably give rise to a change. I cannot think of any others.

Gordon Jackson: I have to back-pedal now; the provision is not the same. I do not think that section 47 is as important as section 46. However, I have just noticed that both the amount and the percentage can be changed. We could change the figure to 1 per cent.

Laura Dolan: Once the legislation is up and running and there has been a review, it might well become apparent that the percentage is either too high or too low.

Gordon Jackson: That becomes quite a substantive change. Changing the percentage again might affect when the sheriff decides to grant an order.

The Convener: I realise that section 47 is not exactly the same as section 46. However, it could give rise to a considerable change and the committee would want to press for further consideration of the use of affirmative procedure for the provision.

Laura Dolan: We can certainly take ministers' views on that suggestion.

The Convener: Brian, are you happy with that?

Brian Fitzpatrick: I share Gordon Jackson's view. I am not too bothered about the reference to £50 in section 47, but the percentage is another matter. The only detriment to the debtor that I can foresee is where that percentage is decreased.

Gordon Jackson: Absolutely. Ministers could say, "We want to make it harder for debtors, so we will make the figure 1 per cent." The figure could even be changed to half a per cent, although I am not saying that anyone would do that.

Laura Dolan: One could imagine that, with the passage of time, the percentage would be increased, but who knows what lies ahead?

Gordon Jackson: I do not think that any of us would mind if the percentages were increased, although that might involve policy considerations. However, not everyone thinks like I do on the subject.

The Convener: Oh, no. We all think like you do on the subject, Gordon. That is why we—

Gordon Jackson: My point is that changing the percentage would be a substantive change.

The Convener: Yes, it would be. In the light of the committee's concerns, will the officials reconsider the procedure, please?

Laura Dolan: We certainly will.

12:00

The Convener: Section 58(4) makes provision for schedule 1 to the bill, regarding non-essential assets, to be applied to other methods of enforcement—that is, sequestration for rent and arrestment. The subsection also enables such application to be modified by the Scottish ministers by order. An order under section 58(4) is not subject to any procedure. That is okay, although we appreciate that the power is wide-ranging and consequential. However—

Ian Jenkins: This is about consultation, convener.

The Convener: Yes. A number of comprehensive powers that relate to reform of the feudal system have been introduced recently. If

those powers were insufficient, would any necessary repeal be swept up in a statute law revision exercise?

Kay McCorquodale: We are grateful to the committee for raising the main question, which is about the power under section 58(4). As drafted, that power could be exercised in circumstances other than as a consequence of the abolition of the feudal system. No doubt, the committee will be pleased to learn that that was not the intention. The Executive intends to lodge an amendment at stage 2 to provide that the power can be exercised only on or after the date that ministers appoint for the purposes of section 71 of the Abolition of Feudal Tenure etc (Scotland) Act 2000. That should deal with the problem.

The Convener: Yes. Thank you. Before you go, we will ask you about paragraphs 3(b), 3(d) and 5 of schedule 2, on non-essential assets.

Laura Dolan: Those provisions deal with altering the aggregate money limit and adjusting the list of non-essential assets and they raise similar issues to those that we discussed earlier. Our response is the same. We have already undertaken to discuss those provisions with ministers and to advise them of the committee's views and we will do so in relation to schedule 2 as well.

The Convener: I thought that we had satisfied ourselves on that point. I thank the witnesses for attending.

Instruments Subject to Annulment

Adults with Incapacity (Specified Medical Treatments) (Scotland) Regulations 2002 (SSI 2002/275)

The Convener: We have made a change to the agenda, if that is fine with everyone. We agreed at the beginning of the meeting to take our next set of witnesses—

Gordon Jackson: Could I have a copy of the regulations to which the witnesses will speak? I do not have a copy.

The Convener: Aye—no problem.

I wanted to let the official report know that we are moving on to the Adults with Incapacity (Specified Medical Treatments) (Scotland) Regulations 2002 (SSI 2002/275). Just before the witnesses come in, I want to say that we had thought that the regulations might have been overtaken by events, but that is not entirely the case.

I welcome James T Brown, Fiona Tyrrell and Alexandra Campbell, from the public health division of the Scottish Executive health department, and Stuart Foubister from the solicitor's office. Thank you for your attendance.

We know that since we asked you to come and explain the regulations further to us, there has been an announcement about the regulations. However, the committee is still concerned.

First, we are interested in the consultation because there does not seem to be much information about the results or analysis of the responses. Will you explain that to the committee?

James T Brown (Scottish Executive Health Department): Last June, we issued a consultation document, which was based, in essence, on the recommendations of the Scottish Law Commission and the Millan committee. The consultation was part of a tripartite exercise. One exercise sought views on the code of practice in relation to part 5 of the Adults with Incapacity (Scotland) Act 2000. The second exercise was for setting up the ethics committee under the same part of the same act, and the third sought views on the specified treatments that could be included in the regulations.

More than 800 copies of the consultation document were issued and more than 80 responses were received. Of those responses, 49 commented specifically on the proposals for specified treatments. The responses were summarised by Scottish Health Feedback on behalf of the Executive's central research unit. A

summary document and analysis of the findings were published. Those findings were placed on the Scottish Executive website. In addition, the summary findings were distributed to all who had been the subject of the consultation and the full summary report was sent to all who had responded to the consultation.

The Convener: So we were just unlucky.

James T Brown: I thought that the summary and the full summary report would have been made available to the Scottish Parliament information centre. I apologise if that was not the case. We can make them available if that would be helpful.

The Convener: It is always helpful if they are sent with the instrument.

Can you answer our other questions?

Stuart Foubister (Office of the Solicitor to the Scottish Executive): Obviously, the Executive's position is that the regulations are compatible with the European convention on human rights. We accept that issues that arise under the articles that were mentioned in the paper that the committee sent to us should be examined.

Article 3 deals with inhuman or degrading treatment, and the standards at which it operates are set fairly high. "The Law of Human Rights", by Clayton and Tomlinson, says:

"The high 'minimum threshold' for 'inhuman or degrading treatment' means that, in order to breach article 3, mistreatment must be very serious. As a result, it appears that well regulated and monitored mental health practice, even at the extremes of treatment, will rarely, if ever, breach article 3."

I do not think that the combination of the regulations and the provisions of the Adults with Incapacity (Scotland) Act 2000 gives rise to serious questions under article 3.

The article under which serious issues are likely to arise is article 8, which deals with the right to private life, including the right to physical integrity. A situation in which treatment is given without informed consent might give rise to a breach of article 8.1. Article 8.2 is the provision that allows contraventions of article 8.1 to be justified. Our view is that the balance that is struck by the regulations and the act, between respecting the rights of the individual and protecting the health of the individual, would be justifiable under article 8.2.

With regard to article 14, the paper that we were sent raised the issue of differences in the regimes that pertain to those who fall under the adults with incapacity legislation and those who are detained under part 10 of the Mental Health (Scotland) Act 1984. We think that the two regimes must be considered in their entirety. It is a misconceived approach to consider only one aspect of a treatment regime. The condition of those who are detained under the 1984 act is considerably different from that of those who fall under the 2000 act. Accordingly, we do not think that there is likely to be any breach of article 14.

The Convener: I understand that there is a difference between people who are held securely and people who are not. I know that the United Nations charter does not carry the same force in law as the ECHR does, but I thought that there was an implication that the rights of those people—

Stuart Foubister: We would not suggest in any way that those who are held under part 10 of the 1984 act do not have equal rights under the ECHR. The issue with regard to article 14 is whether there is an entitlement to deal with those people differently without there being a breach of law. We take the view that the difference in their overall situation is such that not every aspect of the treatment regime needs to match up exactly.

The Convener: We have our own pet lawyers in this committee, so I shall let them loose on you.

12:15

Gordon Jackson: I always think that there is very little that we can do about these things politically. There are lots of provisions that people could argue to be a breach of the ECHR and, no doubt, this is a prime example. If the Executive says that it has looked at the regulations and we do not think that there is a breach, that is all that we can do, at one level. If it is proposed to carry out an abortion under these regulations, somebody will pop along to the court and say, "This is a breach of the ECHR" and the court will reach a decision about that.

It is inevitable that there will be occasions on which the Executive will be wrong in producing instruments. Somebody will take the Executive to court and it will lose. That is the nature of the process. From a political point of view, there is not much that we can do about that, because we can never be satisfied that there is a breach of the ECHR. The Executive can never be 1,000 per cent, hand-on-heart satisfied that it will win a case and we can never be satisfied that it will not. It is not our job, as politicians, to be satisfied of that.

Stuart Foubister: It might help the committee to know that this is not an area of law in which there is much case law from the European Court.

Gordon Jackson: No doubt somebody could have a stab at it.

Stuart Foubister: Yes, but most mental health case law from the European Court relates to article 5 of the ECHR and the ability to detain

people with mental disorders. There is very little case law on treatment.

The Convener: Does the UN not say:

"Sterilization shall never be carried out as a treatment for mental illness"?

Stuart Foubister: Sorry, where does that statement come from?

The Convener: It comes from the General Assembly of the United Nations.

Stuart Foubister: The UN recommendations are in no way binding in law.

The Convener: But everyone aspires to them.

Gordon Jackson: That is why I think that a lawyer could go to court and put up an argument about what you have said. I am never quite sure what we, as politicians, can do to strike in such a situation, unless we are 1,000 per cent sure that the regulations are in breach of the ECHR, and I do not think that we ever can be that sure. Five judges in the House of Lords could sit and decide on that point—it is that difficult and narrow. Where does that leave us? The Executive raises the matter and says that it is satisfied and all that we can say is, "Good luck to you; time will tell."

Ian Jenkins: I was going to mention the phrase that the convener used from the General Assembly of the United Nations. I am inclined to agree with Gordon Jackson. Such matters come down to case law, because cases help to make the law when it is challenged.

Gordon Jackson: Perhaps the convener does not agree, but what is the alternative?

The Convener: That is what I am trying to work out.

Gordon Jackson: What can we do?

The Convener: What can we suggest?

Gordon Jackson: The Executive will just have to take its chances.

Stuart Foubister: I agree almost entirely with what Mr Jackson said. The area with which we are dealing is one in which domestic courts might be reluctant to get involved. If someone brings a case that challenges the law, the courts would consider it. However, with cases with strong ethical or moral elements, courts might think that as long as there is no clear breach of the convention they would defer to the judgment of Parliament.

Gordon Jackson: I doubt that. Some judges will argue an application that is put before them regardless of whether anybody argues the contrary. Some judges will say that their duty in terms of the Scotland Act 1998 is to not breach the European convention on human rights. They will quote what Margo MacDonald said about the UN's recommendation that we cannot sterilise people and they will ask how we get round that. Some judges will challenge regulations like these at their own hand. It is for the judicial process to sort out. I am not sure what politicians can do. I would not bet on the fact that a judge might get smart, say that the points that the regulations raise are interesting and have a go at them without a contradictor. Some might, but some would not.

The Convener: So, the committee summarises its feelings on this matter as, "You have been warned".

Gordon Jackson: They know that.

Stuart Foubister: We are always pleased to receive the views of the committee and to have warnings brought to our attention.

Gordon Jackson: Are we allowed to ask about anything else?

The Convener: Of course.

Gordon Jackson: We might stray into areas that we are not here to discuss.

The Convener: I will tell you if you do.

Gordon Jackson: What does

"the adult does not oppose … and … the adult does not resist"

mean in regulation 3?

Fiona Tyrrell (Scottish Executive Health Department): We thought that opposition would probably be expressed by the adult either verbally or in an advance directive stating that treatment was not wanted in the event of incapacity. The use of "resist" refers to physical resistance. We allow for both types of opposition.

Gordon Jackson: So "resist" means "struggle".

Fiona Tyrrell: Yes.

Stuart Foubister: That measure would kick in after the court had considered the matter. The first stage is the court's being satisfied that the adult does not oppose the treatment. There is an entirely separate test—that the adult does not resist the carrying out of the treatment.

Gordon Jackson: To what does "does not oppose" refer? If an adult is mentally incapacitated and is not in the land of the living, they will not oppose anything. However, what about an adult who, while gradually becoming incapax but knowing what is happening said, "See when I'm no compos mentis, don't do that." Would that constitute opposition?

Fiona Tyrrell: Such views would be taken into account by the court.

Gordon Jackson: But would that constitute opposition? Would that ban treatment? The

regulation refers to an adult's opposition to treatment—end of story. Is it anticipated that if someone opposed future treatment—

The Convener: I am sorry, my learned friend.

Will there be a test at any point to decide whether a person is of sound enough mind to oppose treatment rationally? Can treatment be opposed at any point before deterioration in mental capacity? Can someone say, "I don't want that", as they can say, "I do not want to be resuscitated after an accident"? If so, at what point can that be done? Is there a test to determine whether someone is capable of doing that?

Stuart Foubister: The test is that the court must judge whether the adult does not oppose the treatment. The court would have to take into account all materials that were put before it in that regard. If opposition were expressed prior to an adult's becoming incapable, that would be examined by the court.

Gordon Jackson: I find the situation strange, because it seems that if the adult says, "I oppose the treatment", the court has no discretion. The court can agree to treatment only if the adult does not oppose that treatment—

The Convener: That would be the case even if the adult had resisted, and all the rest of it.

Gordon Jackson: An adult who desperately needs treatment but who says, "I oppose", could be mentally incapacitated to the n^{th} degree. What would happen if somebody who was mentally ill said, "I oppose", but that view was totally irrational. Such opposition would be effective under the regulations. The argument is circular. Do you see what I am saying?

James T Brown: Yes, I see exactly what you mean, but that is one of the issues with which the court would need to grapple. The certificate of incapacity under section 47(1) of the Adults with Incapacity (Scotland) Act 2000, which triggers the process, could be issued only if the medical practitioner who had primary responsibility was satisfied that the adult was incapable of reaching a decision in relation to treatment.

Gordon Jackson: So what does "oppose" mean?

James T Brown: As Fiona Tyrrell said, there would need to be an assessment of the adult's views prior to incapacity being certified.

Gordon Jackson: But the regulations refer only to opposition.

Ian Jenkins: It is catch 44.

Gordon Jackson: Yes.

The Convener: It is a catch-44 situation. The issue is also about the interface with policy. I would love to pursue the matter, but we have made our guests from the Executive think about the matter, so I ask them to really think about it and to let us know more when they have thunk.

Gordon Jackson: I have one more question on an interesting matter, which might not be entirely to do with policy. On what basis were the different procedures included in parts 1 and 2 of schedule 1? It seems to be irrational that, although a person cannot be sterilised without the approval of the Court of Session, treatment that will unavoidably lead to sterilisation can be carried out. To a person who has been sterilised, there might be no distinction to be made when they are told, "We did not sterilise you; we just did something else that in turn sterilised you." The consequence for the patient is identical. What is the thinking behind making only one procedure subject to the approval of the court when the result to the patient is the same under both types of treatment?

Fiona Tyrrell: There are occasions when a patient must be treated—such as when they have cancer—even though the treatment might unavoidably cause sterility. The treatment that is specified in part 2 of schedule 1 is for where sterilisation is not intended but occurs as a side-effect.

Brian Fitzpatrick: However, the same reason could not be given as to why abortion is included in part 2.

Fiona Tyrrell: Abortion is included in part 2 for a different reason.

Gordon Jackson: Why was abortion thought to be less serious. There are some people out there—if I may say so—who think that abortion is every bit as serious as all the other things that are done to people.

James T Brown: Abortion was clearly a difficult matter. One objection to requiring that abortion be referred to the court was the time factor; there might be situations in which a very quick decision is necessary.

Brian Fitzpatrick: The only Scottish case on entitlement to abortion—for a capax person—was Kelly v Kelly. That case was resolved within a week despite the fact that it stopped just short of the doors of the House of Lords.

Gordon Jackson: The courts can do certain things very fast.

James T Brown: That is true, but we followed the Scottish Law Commission's recommendation on abortion.

Brian Fitzpatrick: Is that an innovation in the Adults with Incapacity (Scotland) Act 2000? As far as I can see, even for persons aged 16 or 17, no

approval of the court is required, nor is it required that representations be taken from someone else who might be interested in the welfare of that 16 or 17-year-old. It is required that only one general medical practitioner certify the treatment. Does that innovate on the Abortion Act 1967?

James T Brown: No. In addition to the regulations, the 1967 act's criteria must be satisfied.

Brian Fitzpatrick: Will the regulations ensure that the person who certifies the treatment of a patient who has a mental condition is neither a certifying general practitioner under the 1967 act, nor the patient's family general practitioner?

James T Brown: The regulations do not preclude the Mental Welfare Commission doctor from also certifying under the 1967 act, so it would be possible for that to happen.

The Convener: Is that a change, Brian?

Brian Fitzpatrick: It strikes me that people might be concerned about the potential risk if the same person does the certifying.

James T Brown: I suppose that the safeguard is that the doctor is appointed by the Mental Welfare Commission.

The Convener: However, it would be the same doctor.

We have given the Executive witnesses an indication of our interest in, and slight concern about, the previous matter. Perhaps they can consider the matter further.

James T Brown: Shall we write to you?

The Convener: Yes, although my colleagues will need to read what you write and tell me what you say.

If there are no further questions for the witnesses and if the witnesses have nothing further on which they wish to elaborate, I thank them very much for their attendance.

All life is here. I am afraid it is all auld claes and parritch now.

Executive Responses

Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (Scotland) Amendment Regulations 2002 (SSI 2002/271)

12:30

The Convener: The Executive has given a helpful response, which is wider than we expected or asked for. There are no further points on the regulations.

Extensification Payment (Scotland) Regulations 2002 (SSI 2002/278)

Gordon Jackson: I think that the word "extensification" is made up. Where did it come from?

The Convener: We can write a friendly letter to the Executive asking what the word means.

Gordon Jackson: No, we do not have to do that. I am sure that it is a word.

The Convener: Okay. In general, the response from the Executive is helpful; it acknowledges that there was defective drafting.

Animal By-Products (Identification) Amendment (Scotland) Regulations 2002 (SSI 2002/283)

Gordon Jackson: The regulations are like a sketch from "Monty Python's Flying Circus". The suspect was found dead on arrival at the slaughterhouse.

The Convener: The regulations are about dead hens or parrots or whatever.

Colin Campbell: I suppose that it is possible that "carcase" means the body of an animal, as distinct from the wings and other bits, although those bits would be dead as well.

Brian Fitzpatrick: It is usually a pretty reliable guide that an animal is dead when its head is off.

Colin Campbell: That would be a headless chicken.

The Convener: Let us wrap the matter up. There is a need for consolidation of regulations on the matter as soon as possible.

Bill Butler: You took the words right out of my mouth.

Teachers' Superannuation (Scotland) Amendment Regulations 2002 (SSI 2002/288)

The Convener: The Executive said that it will consolidate the legislation, but it did not say when.

Brian Fitzpatrick: We live in hope.

Bus Service Operators Grant (Scotland) Regulations 2002 (SSI 2002/289)

The Convener: There is still a question whether the regulations are drafted properly, which we should draw to the Executive's attention. We queried the term "local service" and asked the Executive to explain the purpose of the definition in regulation 2. The Executive accepts that the inclusion of the term "local service" is unnecessary, but it asks us nicely why we are bothered about that because it has no real effect.

Advisory Council (Establishment) (Scotland) Regulations 2002 (SSI 2002/293)

The Convener: There is a technical point: the regulations might not be intra vires. We will draw that to the attention of the lead committee.

I remember that we had a fairly long discussion about the appointment of the members and convener of the advisory council. The regulations do not state how the convener is to be appointed. The Executive's answer does not clear up the question greatly. We should draw the matter to the attention of the lead committee—we do not have time to do anything else.

Transport (Scotland) Act 2001 (Commencement No 3 and Transitional Provisions) Order 2002 (SSI 2002/291)

Gordon Jackson: It is nice that there was a convivial meeting on the order.

Brian Fitzpatrick: It was not very convivial, if there was only "one pint".

The Convener: What do you mean?

Gordon Jackson: There is a drafting error in paragraph 42 of the legal brief.

The Convener: Oh dear. So we made a wee mistake.

Brian Fitzpatrick: We cannot trust your typing, Margo.

Ian Jenkins: The official reporter will find it difficult to interpret this conversation.

Colin Campbell: There will be no difficulty if we read out the legal brief, which states:

"The Committee raised one pint with the Executive on this instrument."

That is where the reference to conviviality comes in.

The Convener: As if the committee would do that. There might still be defective drafting in the order, but we can draw that to the attention of the lead committee.

Guess when the next meeting of the committee will be.

Members: September.

The Convener: No. You all have to come back every week during recess. Actually, the next meeting will be on 3 September.

Gordon Jackson: I miss you already.

The Convener: I thank members for attending this and all the other meetings this year.

Meeting closed at 12:36.

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