

EQUAL OPPORTUNITIES COMMITTEE

Tuesday 12 January 2010

Session 3

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EQUAL OPPORTUNITIES COMMITTEE

1st Meeting 2010, Session 3

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Marlyn Glen (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Malcolm Chisholm (Edinburgh North and Leith) (Lab)

*Willie Coffey (Kilmarnock and Loudoun) (SNP)

*Bill Kidd (Glasgow) (SNP)

*Christina McKelvie (Central Scotland) (SNP)

*Hugh O'Donnell (Central Scotland) (LD)

*Elaine Smith (Coatbridge and Chryston) (Lab)

COMMITTEE SUBSTITUTES

Rhoda Grant (Highlands and Islands) (Lab)

Mary Scanlon (Highlands and Islands) (Con)

Margaret Smith (Edinburgh West) (LD)

Shirley-Anne Somerville (Lothians) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Johann Lamont (Glasgow Pollok) (Lab)

THE FOLLOWING GAVE EVIDENCE:

Sam Coope (Scottish Government Equalities, Social Inclusion and Sport Directorate)

Alex Neil (Minister for Housing and Communities)

CLERK TO THE COMMITTEE

James Johnston

ASSISTANT CLERK

Rebecca Lamb

LOCATION

Committee Room 1

Scottish Parliament

Equal Opportunities Committee

Tuesday 12 January 2010

[THE CONVENER *opened the meeting at 10:00*]

Equality Bill

The Convener (Margaret Mitchell): Good morning and welcome to the first meeting in 2010 of the Equal Opportunities Committee. I wish everyone a happy and healthy new year. I remind all those present that mobile phones and BlackBerrys should be switched off completely, as they interfere with the sound system even if they are switched to silent.

Under our first item, we will take evidence on the supplementary legislative consent memorandum on the United Kingdom Government's Equality Bill, for which the Equal Opportunities Committee has been designated the lead committee. With us today to inform the committee's consideration, we have Alex Neil, the Minister for Housing and Communities; Kay Blaikie, principal legal officer in the Scottish Government legal directorate; Sam Coope, head of the tackling poverty team in the equalities, social inclusion and sport directorate; Valerie Sneddon, team leader of the private housing unit in the housing and regeneration directorate; and—no stranger to the committee—Yvonne Strachan, the head of the equality unit in the Scottish Government.

I invite the minister to make an opening statement.

The Minister for Housing and Communities (Alex Neil): Thank you, convener. I wish you, the committee, the clerks and everyone around the table a happy new year.

I thank the committee for giving me another opportunity to discuss the provisions of the Equality Bill for which we are seeking consent. When I first discussed this bill with the committee in June last year, I outlined the provisions that required the consent of the Scottish Parliament. I very much appreciated the committee's consideration last June and its subsequent report.

Following changes that were made to the bill in December, we are now seeking consent for further provisions, namely the extension of the socioeconomic duty to Scottish public authorities and provisions relating to adjustments to common parts of buildings.

The committee recommended that the Government should consult on the extension of the socioeconomic duty to Scottish public

authorities. We undertook that consultation between August and October, in good time to ensure that the bill could be amended to extend the socioeconomic duty to Scottish public authorities. I am sure that the committee will welcome that move. The proposals make provision within the legislative competence of the Scottish Parliament and alter the executive competence of the Scottish ministers, engaging the need for a legislative consent motion.

A second area that is now triggered and involves the need for Scottish Parliament consent relates to provisions that deal with consent for alterations to common parts of buildings. When the bill was introduced, it contained provisions that were designed around English law and practice for property holding, in which a single freeholder or a commonhold association has control over the building as a whole. We therefore worked with Westminster to achieve an equivalent for the multiple ownership arrangements in Scotland, and the relevant amendments were made to the bill in December. Those provisions trigger the need for consent, because the proposals confer on the Scottish ministers a power to make regulations, thereby altering the executive competence of the Scottish ministers.

The two provisions have been added to the draft legislative consent motion that the committee considered previously. I invite the committee to support the measures that I have outlined, and I am happy to provide further clarification of any points and to answer members' questions.

The Convener: When you gave evidence to the committee previously, you stated that the Scottish Government did not think that the socioeconomic provision would add any value unless there was a plan to abolish poverty and unemployment in the UK. Why have you changed your mind on that?

Alex Neil: The key point that I was trying to make is that the socioeconomic duty is not, in itself, a silver bullet that we can use to tackle poverty and deprivation in Scotland. We should have appropriate expectations. If we are to tackle poverty and deprivation in Scotland successfully, we will require resources to be put in place in addition to any legislative measures. The point that I was trying to make was that we should not expect the socioeconomic duty, which is a general duty, to deliver on its own a revolution in the tackling of poverty and deprivation. That will require much greater effort and much greater resource.

Hugh O'Donnell (Central Scotland) (LD): I am given to understand that the legislative consent motion will convey extensive powers to the Scottish ministers. Given the scope and range of those powers, is a legislative consent motion the most appropriate method for doing that, rather

than primary legislation delivered through the Scottish Parliament? Might it not be more appropriate for primary legislation to be used?

Alex Neil: On the socioeconomic duty, we could have introduced primary legislation to the Scottish Parliament using our devolved powers. However, as you know, an opportunity to do something arose with the introduction of the Equality Bill in Westminster. We listened carefully to what this committee said last year, when it was very much of the view that we should give serious consideration to and consult on having the socioeconomic duty apply in Scotland under that bill. We did so and, as you know, more or less everyone who responded to the consultation—with the exception of the Convention of Scottish Local Authorities, the Society of Local Authority Chief Executives and Senior Managers and the Association of Local Authority Chief Housing Officers—was in favour of having the socioeconomic duty cover Scotland as part of the Westminster Equality Bill. In order for that to happen, we require a legislative consent motion to be passed.

Of course, you are right that we could have introduced primary legislation in Scotland to impose a socioeconomic duty, under devolved powers.

Hugh O'Donnell: Would that not have been more appropriate and more capable of being tailored to the specific needs of Scotland? If not, why not?

Alex Neil: We were faced with two possibilities: passing a bill of our own or using the opportunity that was presented by the UK Equality Bill. Given where we were at the end of last summer and in light of the committee's recommendations, we decided that, rather than start taking an entirely new piece of primary legislation through the Scottish Parliament, we could achieve the same objective, given the responses to the consultation, via a legislative consent motion that would ensure that the socioeconomic duty in the UK Equality Bill covers Scotland.

Marlyn Glen (North East Scotland) (Lab): In the consultation responses, what were the main issues that were highlighted in favour of and against extending the socioeconomic duty to Scotland?

Alex Neil: The main issue that was highlighted in favour of doing so was that it would put in statute a requirement on public authorities to take cognisance of the socioeconomic duty in their policy making, budgeting and so on. Most people saw that as a useful lever—I believe that members of this committee voiced that sentiment when we discussed the issue last year.

Those who opposed extending the socioeconomic duty to Scotland—basically, the local authorities, through COSLA, SOLACE and ALACHO—essentially believed that the duty is unnecessary and could be bureaucratic and costly.

The Convener: Are you aware of the certain vagueness in the provision? It covers education, health, housing and various “other matters”. Do you think that that might make it less effective and, perhaps, just a box-ticking exercise?

Alex Neil: We do not want it to be a box-ticking exercise. We will use the guidance—on which we will consult the committee—to ensure that that is not the case and that the phrase “other matters” will have more definition.

Bill Kidd (Glasgow) (SNP): As you have just said, most local authorities and partnerships that responded to the consultation had various reasons for not being in favour of extending the socioeconomic duty to Scotland. You have mentioned some of those reasons: there were concerns that doing so would increase bureaucracy, duplicate existing work and make local authorities vulnerable to legal challenge and possibly judicial review. Does the Scottish Government have an overall plan for how it would help local authorities to address those factors if any of them came into play?

Alex Neil: If a case reached the stage of a judicial review, it would mean that someone thought that the law justified their taking action against a local authority because it had allegedly not fulfilled its socioeconomic duty. I think that it would be the local authority's responsibility to fund any action or defence if someone took it to court on that basis.

We all know that reaching the point of a judicial review can be a very costly exercise. If a case reached that point, it would suggest that there had been a problem that should be aired in court. However, dealing with the matter would be the responsibility of the local authority or public authority that the individual or group of individuals had taken to court because they thought that it had failed to live up to the socioeconomic duty. I do not think that it would be the Scottish Government's job to fund the defence of a public authority if it failed to live up to the duty.

Bill Kidd: In light of the potential for legal challenges and judicial reviews and the worries about increased bureaucracy and duplication, has a full plan been worked out to advise local authorities about how they could address such things, or would it be left to local authorities to deal with a challenge when it was made?

Alex Neil: Again, we will use the guidance, which will guide all public authorities in Scotland,

including local authorities and the Scottish Government departments, on how to implement the duty and ensure that what will become a statutory duty is fulfilled. Obviously, the guidance can cover complaints against public authorities that have allegedly not complied with the duty. As I have said, we will consult on the guidance once we are in a position to do so.

The Convener: I understand, although perhaps I am wrong about this, that the provisions explicitly say that there would be no recourse in private law if there was non-compliance by a public authority. Is that the case under schedule 1?

Alex Neil: I will take legal advice on private law.

Sam Coope (Scottish Government Equalities, Social Inclusion and Sport Directorate): I am not in a position to give legal advice, but my understanding is that the convener is right. I understand that non-compliance would not be subject to any course of action under private law, but it would be under public law, which means that it could be subject to judicial review.

The Convener: Thank you for clarifying that.

Marlyn Glen: I understand what has been said about the bill not being a silver bullet, but I see it as being at least a big help in helping authorities to prioritise. Minister, does it not need a strong political lead and enthusiasm from you, for example, to ensure that the whole thing is carried through properly?

Alex Neil: I would argue that the Government has provided a strong political lead for the past two and a half years on social solidarity, fairness and equality in our society. We will continue to provide that lead, and the proposal is an additional lever that we can use. We have clearly set out in our national purpose, strategy and performance indicators our desire to see a much fairer and more equal Scotland in which people are treated fairly and equally before the law, and we will continue to provide the leadership that we have provided in the past two and a half years to achieve our objectives.

Marlyn Glen: There is a difference between aspirations and delivery. I see the part of the bill that we are discussing as more than a lever; it is a useful tool, and I would like to think that the Scottish Government is embracing it so that it can properly deliver.

10:15

Alex Neil: The Scottish Government is embracing it—otherwise I would not be here to propose an LCM. I would have thought that a useful tool and a lever are much the same thing. We are committed to the proposal. We are not simply ticking a box by having it included in the

bill; rather, we will use the additional lever or whatever you want to call it to try to ensure that all public authorities in Scotland promote social and economic fairness and equality.

The Convener: Johann Lamont is indicating that she would like to speak. Is it on the point that is being discussed?

Johann Lamont (Glasgow Pollok) (Lab): Yes.

I welcome the minister's conversion. I am pleased that the Scottish Government listened to the unanimous view of committee members that the LCM as it stood was insufficient and that the minister now supports the socioeconomic duty. I understand what he is saying: changes are made through resources. The socioeconomic duty and the other equality duties put pressures on the choices that people make, regardless of the resources that they have. It is not simply a question of having resources and being able to do something or having the duty; the duty shapes spending decisions, regardless of the size of the cake. That is an important point to make.

How will the Government's spending be shaped by the socioeconomic duty? What tests will you apply? What will you do about single outcome agreements? What tests will you apply to single outcome agreements to ensure that you have complied with the socioeconomic duty and other duties?

Alex Neil: As members know, we are mainstreaming equality as part of the budget process, and we are doing so more successfully than it has previously been done in the Scottish Parliament. For the first time, we published a document during the budget period to show how the Government tried to tailor the budget to meet our equality and fairness objectives. Later this year, we will publish a longer-term document on mainstreaming, which will obviously refer to how we are delivering the socioeconomic duty and its intent through the budget process, along with the other duties to which we are committed.

On single outcome agreements and the concordat, it is clear that the Government's overall objective and purpose is to achieve a combination of economic growth and fairness. What has been proposed fits in with what we are doing, including with our local authority partners, to ensure that as far as possible budgets at every level are tailored to achieving economic growth, fairness and equality.

Johann Lamont: Does that mean that the Scottish Government will now not accept single outcome agreements without evidence of an equality impact assessment or evidence that the equality duties have been considered?

Alex Neil: As I have said previously to the committee, we have undertaken equality impact assessments in almost every policy area, including before any major budgetary decisions have been made. Many of the areas that local authorities cover are subject to equality impact assessments. We will continue to take that approach.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): I welcome the inclusion of the socioeconomic duty, but I would like to tease out how it will work in practice. Having that on the record would be useful; it would also be useful for me because I have seen only the original Equality Bill in which, obviously, Scotland did not feature in clauses 1 and 2. I have a photocopy of clause 1 and part of clause 2; perhaps the second part of clause 2 answers my question. How will the socioeconomic duty work in practice? Clause 1 includes a list of English authorities, including Government departments. To whom in Scotland will the new duty apply? Will there be regulations to define which public authorities the duty applies to?

Alex Neil: With the agreement of the Parliament, obviously, we will be able to ensure that the relevant public authorities in Scotland in our area of responsibility are covered by the duty. We must consult ministers of the Crown on that aspect, but I do not see that being a problem. We will ensure that all the relevant public authorities are covered.

Malcolm Chisholm: But will they be the same as the authorities covered by the specific equality duty?

Alex Neil: I cannot think of any authority that would not be covered by this duty but would be covered by the others—or vice versa. By and large, the same authorities will be covered.

Malcolm Chisholm: Clause 1 of the bill refers to “a government department”. Will that be specified as it applies to Scotland?

Alex Neil: I suppose that, as far as the budget is concerned, the whole Scottish Government is, technically, “a government department”. The point is that the whole machinery of the Scottish Government will be covered.

Malcolm Chisholm: Is the consultation with the “Minister of the Crown” merely a formality or do you envisage any problems in that respect?

Alex Neil: In this and a number of other areas, the UK Government originally wanted us to seek the approval of a minister of the Crown, and we compromised on a requirement to consult. Frankly, I do not think that it will be a problem. If the UK Government operates in the spirit of devolution, it will leave the Parliament to decide the list of organisations to be covered.

Malcolm Chisholm: You mentioned guidance. Will the new clause 2 refer to such guidance?

Alex Neil: Once the bill is passed, we will be in a position to issue guidance on implementing the duty. The draft guidance will be the subject of a three-month consultation, and we will obviously solicit the committee’s views and consult all the relevant stakeholders before we submit it for approval.

Hugh O’Donnell: What implications will the combined effect of the UK legislation and this LCM have for cross-border organisations such as Network Rail or British Waterways? If any such organisation is transferred into private ownership, does the responsibility follow? As far as the current status of such organisations is concerned, how will all this hang together?

Alex Neil: Because such organisations, which include Network Rail, the BBC and the Forestry Commission, are UK organisations—although I point out that we do not share responsibility for the BBC—they will be covered by the bill. As for what might happen if a utility is privatised, I should say that Network Rail is, technically, already a private company, although it is what you might call a hybrid. The fact is that some of these issues are matters for the Westminster Government rather than for us, so I cannot give you any guarantees on bodies that are the Westminster Government’s responsibility.

Hugh O’Donnell: Thank you for that response.

Alex Neil: And of course we do not intend to privatise any of our organisations.

Hugh O’Donnell: And thank you for that supplementary.

Willie Coffey (Kilmarnock and Loudoun) (SNP): I wonder whether we can shed some light on the issue of adjustments to common parts of buildings. Why is this issue being addressed through the LCM mechanism rather than through the Housing (Scotland) Act 2006, which I note from the papers contains provision on disabled persons’ rights to modify entries and so on?

Alex Neil: There is a gap in the law in Scotland. If adaptations to assist a disabled person are required to be made to, say, stairwells or closes that are under common ownership and a housing contract exists, those adaptations are covered by the housing legislation, which is the Scottish Parliament’s responsibility. However, if no such contract exists, the issue comes under equalities legislation, which, unfortunately, is reserved. We need to fill that gap through equalities legislation, which means that it has to be addressed in a UK bill. If I introduced such a bill, the Presiding Officer would rule it out as being outwith the Parliament’s competence.

Willie Coffey: I am aghast that what seems such a simple, practical and straightforward measure is deemed to be outwith the Parliament's competence.

I also understand that families who require an additional bedroom to support a disabled child do not attract any additional housing benefit to cover their rent. I would have thought that the Equality Bill would have covered that kind of reserved matter. Can you shed any light on that?

Alex Neil: The Cabinet Secretary for Finance and Sustainable Growth has made representations to the UK Government on certain aspects of housing benefit reform with regard not only to larger families but to situations such as the one that you have just described. Our view is that if a household has more than one disabled person—in particular, more than one disabled child—the amount of housing benefit or, where it is applied, local housing allowance should reflect additional need. At the moment, I am dealing with a constituency case involving a family with three disabled children, and I am greatly worried by their inability to cope financially with the situation and, to be frank, the poor response from the local authority concerned. I am looking at how we ensure that local authority provision takes account of multiple need in such cases and, as I have said, we have made representations to the UK Government on reforms to housing benefit and the local housing allowance. I find it absurd that families with more than one disabled child are not receiving proper treatment from what is supposed to be a Labour Government.

Willie Coffey: I would like to follow that up that, perhaps through the committee. I am a relatively new committee member, but I certainly feel that it is an equalities issue.

The Convener: It might well be an equalities issue, Mr Coffey, but I remind you that we are discussing adjustments to the common parts of properties. Nevertheless, thank you for raising the issue.

Malcolm Chisholm: Inclusion Scotland and the Equality and Human Rights Commission have expressed concern that the proposals do not seem to establish parity of protection between Scotland and other parts of the United Kingdom, claiming that in Scotland the onus would fall on the disabled person to secure the necessary funding, planning consent and so on to carry out adjustments whereas, in England and Wales, the onus would fall on “the responsible person”, which is most likely to be the local authority, the housing association and the commercial factor. Are the proposed powers sufficient to ensure that Scottish disabled people are not put at a disadvantage to their English and Welsh counterparts?

Alex Neil: I do not think that that will necessarily be the case. Indeed, in drawing up the regulations and by applying other forms of support, we will be very careful to ensure that disabled people in Scotland are not disadvantaged. After all, when the legislation is passed, disabled people must have the maximum opportunity in practice to ensure that their rights with regard to adaptations are met. We do not accept the premise behind the concerns that have been raised, but any issue that emerges can be addressed through regulations.

Malcolm Chisholm: Does that mean that the arrangements in Scotland will be exactly the same as those in England?

Alex Neil: The arrangements will not be identical, but I want their net effect to be the same.

Malcolm Chisholm: But they will be identical with regard to the person who is responsible for taking action.

Alex Neil: Yes. We should remember that housing law in Scotland, where there is multiple ownership, is different from that in England, where there is leasehold, common ownership and so on, and our application of the law must reflect such differences. In activating this piece of primary legislation, we will try to ensure that our housing and disabled policies and the supporting regulations do not disadvantage disabled people.

Malcolm Chisholm: In practice, the onus would typically fall on a local authority or housing association.

Alex Neil: We will have to work out the exact detail, but we will consult on the issue when we put together the regulations. However, I am absolutely determined to ensure that the net effect of the arrangements is similar to that in England and Wales and that there is no disadvantage to the disabled person.

Malcolm Chisholm: As with the previous issue that we discussed, you need to consult a minister of the Crown before making regulations. Why is that necessary?

10:30

Alex Neil: It is control freakery at Westminster. In our initial discussions with the Westminster Government, we found that Harriet Harman and her department wanted total control, and that we should go to them for approval, but we have reached a compromise whereby we will consult a minister of the Crown. We should not have had to compromise on that—ideally, the UK minister's attitude would have been much more liberal and more in the spirit of devolution than it has been—but we have had to agree in order to get the legislation through.

Christina McKelvie (Central Scotland) (SNP):

Good morning. I will follow on from that issue. You spoke earlier about a different consultation that has taken place already, and about the regulations that you are bringing forward to make it clear what is acceptable and what is not. What, if any, consultation will you undertake with interested organisations before bringing forward regulations? Could you explain the process? Will you consult Parliament first, before you go back to that controlling minister of the Crown?

Alex Neil: I intend—I have checked that there is nothing in the bill to prevent me from doing this—to undertake the consultation on the regulations in Scotland with the stakeholders and with the Parliament through the committee first. We will be happy to formally consult and hear the views of a minister of the Crown, as the bill requires us to do, but we will do so once the consultation is complete and we have reached a decision on the regulations and the wording that we want to use. We anticipate that there should not be a problem once we have—I hope—built a consensus on the regulations in this Parliament and among the stakeholders. We will then lay the regulations.

The Convener: I wonder about the logistics of that. Can you introduce a regulation, print it and bring it to the Parliament before consulting the UK ministers, or must you go to the ministers as soon as you are considering formulating the regulations?

Alex Neil: The bill as drafted is not definitive. Perhaps we need a concordat to resolve it—I am only joking.

The Convener: I am relieved to hear that.

Alex Neil: With regard to the formal procedure, I intend—and there is nothing in the bill to prevent us from doing this—that we consult the stakeholders and the Parliament through the committee initially, and consult a minister of the Crown once we know the views of the key stakeholders and the Parliament. If I were a minister of the Crown, I would be happiest with that procedure; what would be the point of our consulting the minister on something that might not be acceptable to stakeholders and to the Parliament?

The Convener: Can the legal view be ascertained at this point? I understood that the bill was quite clear that a minister of the Crown was to be consulted before the regulations were issued.

Alex Neil: Before the regulations are laid but not before they are consulted on.

The Convener: Not before the consultation, or not before the guidance is issued?

Alex Neil: We are talking about two separate things. Guidance relates to the socioeconomic duty, and the regulations relate to the adaptations.

The Convener: I understand that it is your consultation but, to consult, do you not have to lay down what you are going to do?

Alex Neil: No, we can just produce—

The Convener: A draft?

Alex Neil: It might not even be a draft—we could consult on the areas that people think the regulations should cover in relation to certain subject areas, and on what they think the objective and the net effect of the regulations should be. Very few organisations would be able to give us precise legally drafted wording. It would be a more general consultation; it would be on specifics, but not on the legalistic wording that would go into a regulation. The bill requires us to consult a minister of the Crown before we lay the regulations, not necessarily before we carry out the consultation.

Malcolm Chisholm: I return to my previous point; I have found that the new clause 42 that has been added to the bill deals with the matter that we were discussing. Subsection (1) of the new clause 42 states:

“The Scottish Ministers may by regulations provide that a disabled person is entitled to make relevant adjustments to common parts in relation to premises in Scotland.”

I accept the intentions that you described in your previous answer, but would it not be safer to try to have that clause amended? On the face of it, the approach that the new clause embodies is different from the approach that you want to adopt in regulations. Somebody might say that you cannot do what you want to do in regulations, because it is not instructed by the new clause 42. An amendment to the new clause would embody the approach that you wish to pursue in relation to that.

Alex Neil: My view is that it is not necessary, as we can address it in regulations, but I am prepared to examine the matter and discuss it with the relevant ministers at Westminster just to be absolutely sure. I will then be able to assure members of the committee that we are not disbarred from ensuring that disabled people are not disadvantaged in any way in Scotland.

Elaine Smith (Coatbridge and Chryston) (Lab): My question is on the back of Malcolm Chisholm's point, and it relates to Willie Coffey's previous question. In response to that question, you said that the matter could not be dealt with as an amendment to the Housing (Scotland) Act 2006 because the Presiding Officer would be likely to rule that it is not competent for this Parliament and

would have to be considered under the Westminster equality legislation.

Given that the issue that we are discussing relates to housing, which is a devolved issue, I am interested in what steps the Government took to explore that route further. In the Equality Bill, there is a provision on breastfeeding that allows the rest of the UK to catch up with the position in Scotland. When I proposed my Breastfeeding etc (Scotland) Bill, it was originally thought that it would be an equalities matter. However, because the bill was drafted in a way that was child centred and focused on child health and nutrition, it was deemed to be competent for this Parliament.

I therefore want to explore what steps have been taken to find out whether it would have been competent for us to deal with the disability issue that we are discussing as an amendment to the housing legislation, rather than through the Westminster Equality Bill.

Alex Neil: We have taken legal advice from our own lawyers and from Westminster lawyers, and both sets agree that it is a reserved matter in these circumstances and that it has to be dealt with in this way. I emphasise that that applies only to cases in which the housing contract does not exist. If a housing contract exists between the various owners or tenants of the property, it is a devolved matter, but if a contract does not exist, it is an equalities matter. The legal advice from both Governments is that it must be dealt with as a reserved matter. That seems ridiculous, and it reveals the failings of the Scotland Act 1998. Such practical matters are supposed to be devolved but, when we come to do something that is highly desirable, we have to go through this complicated procedure because it is a reserved matter.

Elaine Smith: The original legal advice on the breastfeeding legislation was similar but, by pursuing and testing it further, and by putting it to the Presiding Officer, we found that it was possible for the matter to come under the competence of this Parliament. That is why I am asking how far the Government has tested the housing issue.

Alex Neil: As I said, the advice from both sets of lawyers, in London and in Edinburgh, is exactly the same. The time that it would take to draft a primary bill now and put it to the test of the Presiding Officer would involve an unnecessary and unacceptable delay. It would be far preferable if we could deal with the issue under housing legislation rather than as a reserved matter.

Elaine Smith: It would not need primary legislation, would it? Would it not be an amendment to the Housing (Scotland) Act 2006?

Alex Neil: Possibly, but, either way, there would still be some delay, and there would be a legal argument because the views of the lawyers in

London and in Edinburgh are unanimous that this particular gap in the law has to be plugged in this particular way.

Elaine Smith: I am not entirely convinced on that, and there are grey areas, but I will leave it at that today.

The Convener: Our report can reflect those points.

Bill Kidd: The powers in the bill allow the regulations on adjustments to common areas to be prescriptive, and include a provision for a sheriff to make an order that authorises a disabled person to carry out adjustments. Will there be teeth behind that provision? If an owner of a property, whoever they might be, continues to refuse a disabled person the right to make an adjustment to a common area, is there further recourse for that disabled person?

Alex Neil: Ultimately, the issue could end up with a sheriff. Ideally, we would like to get into a situation in which such issues do not have to end up with a sheriff. Obviously, when we draft the regulations, we will consider what provision we can make to ensure that we avoid that, apart from in very extreme cases. I want to ensure that disabled people have the ability—not just on paper, but in reality and in practice—to get adjustments as and when they require them and ideally without having to resort to the sheriff court.

The Convener: That completes our questions. Do the witnesses have anything to add?

Alex Neil: No, thank you. The committee might be interested to know that the bill is currently with the House of Lords and that the appropriate amendments have been tabled. We anticipate that, barring accidents at Westminster, the bill will become law some time in the spring.

The Convener: We now move to item 2, which is consideration of our approach to our report on the LCM. Do members have any comments that they want to be included in our report?

Malcolm Chisholm: The minister gave a guarantee that he would discuss the wording of new clause 42, but perhaps we should flag up the fact that we are unsure whether the wording of the new clause will allow the minister to do what he wants to do in regulations.

The Convener: We will certainly do that.

I think that Elaine Smith wants further consideration of what is and is not possible under the devolved powers. An amendment to the housing legislation might be possible, perhaps as well as the provision in the bill. We could ask for clarification on that.

Elaine Smith: That would be extremely helpful, given the identical situation with the Breastfeeding

etc (Scotland) Act 2005, which we have had for some years in Scotland, and the fact that the bill will introduce similar legislation for the rest of the UK. Because housing is a devolved issue, we should explore further whether an amendment to housing legislation could be made. Perhaps we could do both. It is my understanding that primary legislation would not be required—it would be an amendment to existing legislation and therefore would not involve the timeframe that the minister indicated it might.

The Convener: It is worth recording that point in our report.

Hugh O'Donnell: I wonder whether there is merit in flagging up some of the cross-border implications. I hear what the minister said about that, but issues might arise, particularly in relation to British Waterways, and might be worth flagging up.

The Convener: Do you mean about whether duties transfer?

Hugh O'Donnell: Yes.

The Convener: Absolutely—we can make that point.

Johann Lamont: I have a comment on the equalities issue that Elaine Smith has flagged up. I would be concerned if we were rowing back a bit. In the first two sessions of the Parliament, there was a big debate about the extent to which Parliament can address equalities issues. Amendments were made to several bills saying that regard had to be had to equalities—I cannot remember the exact phrase. It feels to me as though the lawyers are being risk averse when in fact the political process has moved on. Equalities legislation is reserved to Westminster, but having a duty about awareness of equality issues is not a reserved matter. I cannot remember the exact wording, but we have certainly had bills that said that due regard had to be given to equalities.

I would be concerned if we could not address equalities issues in the implementation of housing legislation and if we said that anything that mentions the word “equalities” must inevitably go back to Westminster. That has not been the situation in the past and it is clearly not the position that the minister wants. I would be concerned if we ended up being tied down by risk-averse lawyers.

The Convener: We can make the point that we are unclear about the exact position on devolved issues and whether the issue could be addressed through an amendment to existing legislation, as well as going ahead with the provision on adjustments to common parts.

Are members content for the report to reflect those comments? Are we also content to recommend that the Parliament should consent to the motion, with those comments attached?

Members indicated agreement.

The Convener: The clerks will circulate a draft report, which can be signed off by e-mail if members are happy with it.

Meeting closed at 10:44.

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