ENTERPRISE AND CULTURE COMMITTEE

Tuesday 21 March 2006

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

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ENTERPRISE AND CULTURE COMMITTEE

8th Meeting 2006, Session 2

CONVENER

*Alex Neil (Central Scotland) (SNP)

DEPUTY CONVENER

Christine May (Central Fife) (Lab)

COMMITTEE MEMBERS

*Shiona Baird (North East Scotland) (Green)
*Richard Baker (North East Scotland) (Lab)
*Susan Deacon (Edinburgh East and Musselburgh) (Lab)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Karen Gillon (Clydesdale) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

COMMITTEE SUBSTITUTES

Mark Ballard (Lothians) (Green)
Donald Gorrie (Central Scotland) (LD)
Fiona Hyslop (Lothians) (SNP)
Margaret Jamieson (Kilmarnock and Loudoun) (Lab)
David McLetchie (Edinburgh Pentlands) (Con)

*attended

THE FOLLOWING ALSO ATTENDED:

Nicholas Grier (Adviser)
Fiona Hyslop (Lothians) (SNP)

THE FOLLOWING GAVE EVIDENCE:

James Alexander (National Union of Students Scotland)
Col Baird (Scottish Executive Enterprise, Transport and Lifelong Learning Department)
Margaret Burgess (Citizens Advice Scotland)
Yvonne Gallacher (Money Advice Scotland)
John Glover (Registers of Scotland)
Alistair Hamilton (Law Society of Scotland)
Marian Healey (Educational Institute of Scotland)
Mr Stuart Hunter (Society of Messengers-at-Arms and Sheriff Officers)
Tom Kelly (Association of Scotland's Colleges)
Susan McPhee (Citizens Advice Scotland)
Mary Senior (Scottish Trades Union Congress)
Adrian Stalker (Shelter)
Allan Wilson (Deputy Minister for Enterprise and Lifelong Learning)

CLERK TO THE COMMITTEE

Stephen Imrie

SENIOR ASSISTANT CLERK

Douglas Thornton

ASSISTANT CLERK

Seán Wixted

LOCATION

Committee Room 4

Scottish Parliament

Enterprise and Culture Committee

Tuesday 21 March 2006

[THE CONVENER *opened the meeting at 14:01*]

Subordinate Legislation

Further and Higher Education (Scotland) Act 1992 Modification Order 2006 (Draft)

The Convener (Alex Neil): It is 1 minute past 2 and we are is quorate, so I welcome everybody to the eighth meeting this year of the Enterprise and Culture Committee. There are a couple of housekeeping points. First, I ask everybody to switch off their mobile phones. Secondly, we have apologies from Christine May, who is ill, and from Susan Deacon, who is en route from Clydebank, where the Audit Committee met this morning. I welcome Fiona Hyslop, who is not here as a Scottish National Party substitute.

Item 1 is subordinate legislation. We are taking evidence on the draft Further and Higher Education (Scotland) Act 1992 Modification Order 2006. I welcome Tom Kelly, who is chief executive of the Association of Scotland's Colleges; Marian Healey from the Educational Institute of Scotland; Mary Senior from the Scottish Trades Union Congress; and James Alexander, who is becoming well known to the committee, from the National Union of Students Scotland. We have your written evidence. It is extremely helpful, but because you represent different organisations, a brief word of introduction from each of you would be appropriate.

Tom Kelly (Association of Scotland's Colleges): From the ASC's point of view, the draft order is relatively straightforward. It deals with what is undoubtedly a complex problem, but we are comfortable that it is an appropriate and desirable way to proceed. I am happy to amplify that because our key objective is that the charitable status of colleges be retained, not just in the interests of colleges but in the interests of their students and of Scotland as a whole.

Marian Healey (Educational Institute of Scotland): I shall deal with the specifics and Mary Senior will deal with the generalities. Much has been made of the fact that section 21 of the Further and Higher Education (Scotland) Act 1992 has not been used in the past, and that it is therefore considered to be of no consequence, so we should just get rid of it. However, there is plenty of evidence to suggest that it should have been used in the past; indeed, I will call the committee's attention to why it should be used today. Several colleges, particularly James Watt College and colleges in Inverness and Shetland, are in difficulties today. That is not to mention the eight colleges that are, under the university of the Highlands and Islands banner, struggling to cope with the demands of further and higher education. Finally, there is the debacle of the Glasgow estates: £300 million of public funds are languishing in a bank account when that money could be bolstering one of the most underprivileged economies in Scotland. All those issues could be addressed were the minister to exercise his discretion under section 21 of the 1992 act.

Mary Senior (Scottish Trades Union Congress): For the STUC, the ministerial powers represent an important tool in the accountability and governance of the college sector. The committee will be aware that in the next financial year, £602 million of public money will go into the college sector to provide a lifelong service to the people of Scotland; we think that it is therefore important that clear lines of accountability be in place.

My second point concerns the lack of consultation. With due respect to the committee, we think that the matter is important and warrants more time and more consultation; if the ministerial powers of intervention are to be removed, we should know what will replace them. There has not been adequate consultation to date and we do not agree with the Executive's statement that there has been. When the issue came up in the review of Scotland's colleges, the core group of the review agreed that the ministerial powers and charitable status for the sector should both be retained. No ultimatum was ever presented to the review. That is one of the STUC's real concerns.

James Alexander (National Union of Students Scotland): I thank the committee for inviting me to give evidence. As you have seen from our written submission, the National Union of Students Scotland believes that the ideal outcome would be that ministerial powers of control and charitable status be kept. I am quite disappointed that we are even discussing the subject, given that that is an available option under charities legislation. Charitable status is very important for colleges: they are educational bodies and it is clear that they are in the public interest, so they should be able to maximise the resource that is available to them.

Ministerial powers of control are equally important. Although colleges are independent bodies and should set out their own provision in association with the Scottish Further and Higher

Education Funding Council, ministers should provide checks and balances for the further education sector as a whole. We would like the committee to consider checks and balances.

The Convener: Written evidence from the Scottish Council for Voluntary Organisations and the campaign for further education has also been circulated to committee members.

Shiona Baird (North East Scotland) (Green): The NUS Scotland submission says that five other types of public bodies were excluded from section 7 of the Charities and Trustee Investment (Scotland) Act 2005. Unfortunately, I did not have time to find out what they were. The resolution that the NUS presents seems to me to be fairly sensible. To what extent have you investigated the consequences of invoking an exemption for the further education sector?

James Alexander: Do you mean in order that the sector can retain charitable status?

Shiona Baird: I mean in order that the sector can keep charitable status but exclude ministerial powers. Have I got that the right way round? Do you want to keep both?

James Alexander: Yes, we would like to keep both for the reasons that I gave. Other bodies are in the same situation, but colleges are particularly important in that they provide an important service for learners throughout Scotland. Checks and balances that ensure that learners are not at the mercy of a market system in education are important in delivering for learners and for the colleges to achieve their objectives for learners. It is important to have checks and balances to ensure that niches of students are not squeezed out.

Shiona Baird: Mary Senior mentioned that the order appears to have been rushed. If the STUC feels that there should be more consultation, what would it be looking for?

Mary Senior: You will be aware that a review of Scotland's colleges started in August last year. It has four work streams and a core group and most of its work is due to finish early next year. A year's consultation would give us time to think about accountability, governance and a long-term strategy. It would also allow us to be more confident in what we could propose next year. We are in the middle of the review and do not yet have any conclusions.

Shiona Baird: I notice that there was no indication of how the minister could retain the checks and balances that you are considering. One hopes that the legislation would provide checks and balances for most charitable companies.

Mary Senior: Do you mean the 2005 act?

Shiona Baird: Yes.

Mary Senior: The STUC wrote to the Office of the Scottish Charity Regulator about two weeks ago, but we have not yet had a response. That highlights that we have not had time to see what has been put in place. We are not clear whether OSCR has powers merely over finances or over wider issues to do with human resources, governance and accountability, for example. We are not able to say whether what Shiona Baird suggests is the case.

Marian Healy: The year's exemption that we propose as a compromise would be cost neutral to the Executive. We would love to come here and say, "Exempt colleges entirely and fund the gap", but that would suggest that the £640 million that they get would have to be topped up by the additional £20 million. We suggest that one year's exemption would be cost neutral and would allow us all to take time out to review how, if the colleges were to lose their charitable status, they could make up that funding by, for example, investing in other commercial activity as their colleagues in higher education do. We must remember that colleges get 95 per cent of their funding from the public purse and have not explored other avenues of additional funding. We think that the proposed one-year exemption is a compromise with which the committee should be comfortable.

The Convener: Before I pass to Tom Kelly, I want to be clear: is charitable status's being worth £20 million to colleges an official estimate?

Marian Healey: That is what civil servants costed it at.

The Convener: Okay. We had better check that out.

Tom Kelly: That estimate was made by the Association of Scotland's Colleges and is a fairly rough order of cost based on the present situation. If colleges were raising more funds from charitable sources and for charitable purposes, that figure could be considerably larger. The figure was based on the assumption that the amount that might have been payable as corporation tax was low because, to be frank, few colleges made surpluses. We are now moving towards a position in which colleges are making surpluses to set aside for future need. Such surpluses would be subject to corporation tax.

The urgency of the situation is caused by the fact that colleges cannot present themselves as charities if their charitable status is in question. We cannot afford a lacuna. Whatever else is done, we need to know that colleges will retain charitable status. Otherwise, their links with those who give them funds on a charitable basis would be put in jeopardy.

One of the reasons why we are less concerned about the loss of ministerial powers is that although they are sometimes referred to as powers of intervention, they are specifically powers of direction. Powers of direction in an administrative law will always be used in narrow circumstances. Ministers have a strong ability to influence what happens in colleges through the priorities that they set and the instructions that they give to the Scottish funding council, which has the primary supervisory role in respect of funding and other matters for colleges. There is a tight regime that Parliament effectively relegislated for only last year.

There is always awkwardness when there is an overlap of jurisdictions. We are talking about an area in which OSCR's powers to some extent overlap with the duties and responsibilities of the Scottish funding council. We accept that and can make that work, which is why we support the draft order. Although we would like to simplify responsibilities and lines of accountability, we accept that there are several lines of accountability in post-devolution Scotland; in this situation, a college is a charity that is also funded by the Scottish funding council.

Shiona Baird: Marian Healey was shaking her head. How do you respond to what Tom Kelly said?

Marian Healey: Our main concern is about mismanagement, misgovernance—perhaps—and lack of accountability. As I said, the minister has not in the past used the powers of direction; our view is that that is because he was advised against doing so. It is a difficult decision to stand down a college's board on the basis that it has mismanaged public funds—such action would destabilise the future recruitment of boards. Forty-three boards have to be recruited throughout the country and 50 per cent of their membership has to be drawn from industry. I appreciate why ministers and ministers' advisers have found it difficult to take that decision, but several colleges have been badly mismanaged. I have cited three that are dealing with issues of future employability for their staff. It is not good management simply to say, "We're going to sack everybody today and rehire them tomorrow, because that'll sort out some of our financial difficulties."

14:15

I accept that the powers of direction can be used only in extreme circumstances, but the Charities and Trustee Investment (Scotland) Act 2005 gave powers to the Scottish funding council to suggest to boards a particular direction of travel. The minister's power was somewhat bolstered because it was clear not only that the powers of direction would be used only in extreme circumstances, but that the minister was not devolving that responsibility to the Scottish funding council.

Michael Matheson (Central Scotland) (SNP): A couple of you have mentioned concerns about the consultation exercise that ministers conducted in drafting the order; that is referred to in the STUC evidence and, I think, in the NUS evidence. Will you expand on your involvement in the consultation process?

Mary Senior: To be honest, it was not clear that the issue was coming up. A review of Scotland's colleges is taking place—one of the working groups is concerned with accountability and governance. At one of its meetings—possibly in October last year—the consultation was discussed and the group agreed a paper that states that it would prefer that ministerial powers of intervention and charitable status remain. That was endorsed by the core group and at no point did we think that the order would be laid as soon as it was. There has been no official consultation.

Michael Matheson: Was the core group's recommendation passed to ministers? I want to get the chain of events in the right sequence. What feedback did you receive from ministers after you had fed that information up to them?

Mary Senior: The core group did not meet again until the day after the order was laid.

Michael Matheson: That probably says everything.

James Alexander: The review of Scotland's colleges was set up by the Executive with the intention of there being a full review of the further education sector in Scotland. A key one of the five working groups, on accountability and governance, considers everything relating to the internal and external accountability of colleges. It made the recommendation—which was endorsed by the core group—that the ideal scenario would be to retain ministerial powers of direction and charitable status. That recommendation was passed on to the minister. It is disappointing that the order has been drafted without the full findings of the review of Scotland's colleges having been made clear or having been finalised. The review is due to continue for at least another year and we should be making these decisions when it is finished. The order represents fundamental changes to how colleges are governed and to the link between the Government and colleges. It appears to be going through at the stroke of a pen, but it is such a big change that there should be full consultation on it.

Michael Matheson: Just so that I am clear, having made that recommendation to ministers, did the core group receive no feedback from them on that?

Marian Healey: They did not receive feedback directly from ministers, but we received some feedback at a further education round-table meeting. We were advised that ministers were having difficulty delivering the recommendation and that it was likely that if they took the view that the 1992 act needed to be amended, time would be against us in the consultation process.

Michael Matheson: The STUC paper refers to the EIS taking legal advice on whether ministers have the powers to make changes to primary legislation through use of the order. Will you expand on your intentions in that regard and say why you think ministers might not have the powers to exercise a decision under the draft order?

Marian Healey: Unfortunately, we have not received advice from our solicitor—I checked before I left—so I am not in a position to elaborate. We need to be able to appreciate and understand that there was no alternative course of action available to ministers when they make a decision.

Michael Matheson: So, the EIS does not intend to take legal action to try to prevent ministers from taking a course of action.

Marian Healey: I cannot say. Our approach will be determined by advice from our solicitors.

Michael Matheson: The submission from the STUC says that the Scottish funding council will probably not have the appetite to intervene in difficult situations in colleges. Why not?

Mary Senior: We said that the funding council sought last year to revise its financial memorandum, which sets out its relationship with fundable bodies. It wanted to broaden it to include issues of governance, which we supported. However, after the SFC consulted all its stakeholders, it backtracked. Marion Healey has mentioned a number of incidents in colleges. In our experience if someone goes to the funding council about an issue to do with management, the funding council is reluctant to intervene and takes a hands-off approach. We meet the council regularly and try to persuade it of our case, but our experience is that it concentrates on financial management rather than on wider issues of governance.

Michael Matheson: You said that the SFC proposed changes to its financial memorandum and then stepped back from making them. If it consulted people who said that they did not agree with the changes, was not it in fact listening to the people whom it consulted?

Mary Senior: I do not want to judge to whom the funding council was listening; it might have been listening to the college and university authorities rather than to the staff.

Tom Kelly: The funding council is involved directly in all the instances that have been mentioned so far to do with the Glasgow estates and the problems of Inverness College and James Watt College of Further and Higher Education. It has a directorate whose purpose is to enable it to support and guide colleges towards better outcomes when difficulties arise. It is right to say that those difficulties are principally financial, for which there is a good reason. As we say continually, margins of funding in our sector are extremely tight. We are committed to supporting the policy of financial security, but we are doing so within tight margins.

We are comfortable with what is proposed also because there will be clarity about what colleges' responsibilities will be under the charities legislation. One virtue of using the draft order to deal with retention of charitable status is that we will be clear about the roles and responsibilities of colleges under the charities legislation. Removal of the independence element of the charity test would have implications that we have not had a chance to think through. Whatever else we say about the solution, it is relatively straightforward and easy for the colleges.

James Alexander: The charity regulator will apply the charities test and consider colleges individually, which is fine. We have independent colleges that deliver education and which are supported by an independent funding council. However, we must remember that the FE sector is ultimately a public service. As with all public services, checks and balances should be in place to ensure that the sector delivers for the public and for learners. We need to concentrate on the sector as a whole.

Murdo Fraser (Mid Scotland and Fife) (Con): I am trying to get my head round the philosophical approaches to the argument. James Alexander talked about the responsibility for the sector, but surely the funding council exists to allocate public funds. Ultimately, if colleges are not run properly, the funding council will take action.

James Alexander: Yes, but the funding council cannot, for example, tell a college which courses to run, although it can tell it which courses it will not fund. It cannot tell colleges not to run specific courses for which there is a need.

Murdo Fraser: Should ministers tell colleges which courses to run?

James Alexander: It is important to ensure that the sector as a whole runs the courses that will deliver for learners or future learners in each area.

Murdo Fraser: Interesting.

I have a question for Tom Kelly. Obviously, the changes have been driven by concerns about

charitable status. What assessment have you made of the impact on colleges of removal of charitable status? There would obviously be a financial impact, but have you considered wider issues?

Tom Kelly: The impact would primarily be financial. The loss of £18 million to £20 million would mean that more than 300 jobs were at issue and that opportunities for the future would be diminished considerably. Many colleges have ambitious plans for their estates and outreach that depend on partnership funding, but some of the key partners are bodies that donate funds only to other charities, so the sector would lose out in that way. It would be an oddity if, for example, John Wheatley College in the east end of Glasgow was not a charity but the University of St Andrews was; or if all FE colleges in England were charities but colleges in Scotland were not. That would not be supportable, especially given that many larger charitable funders operate on a United Kingdom or global basis.

Fiona Hyslop (Lothians) (SNP): The issue is not new—the committee raised it in January last year during the passage of the Charities and Trustee Investment (Scotland) Act 2005. The issue is how we will resolve the matter. My question is for Tom Kelly. Is the need for colleges to retain charitable status more important than the desire to remove ministerial direction?

Tom Kelly: Undoubtedly, retention of charitable status is more important. That has been our view all along. We were caught on the hop when the Charities and Trustee Investment (Scotland) Bill contained the independence test, because the measure had formed no part of the consultation and we were not aware that it was in anybody's mind. We were just confronted with a bill that jeopardised colleges' charitable status. At that stage, we gave evidence saying that we sought to resolve the matter. As we understand it, there are two possible routes. One is to disapply the independence element of the charity test—that was sought and granted in a proposed order for the national collections. We said that we were not particularly concerned about the method, but simply wanted assurance that charitable status would be retained.

Fiona Hyslop: Would you be happy if Parliament asked the Executive to introduce a statutory instrument that would disapply the independence element for colleges?

Tom Kelly: We have not considered that in detail, to be honest. As I said, using the route that is proposed, it would at least be clear what our position will be vis-à-vis the charities regulator, which is why we regard it as being a straightforward way of accomplishing what we need.

Fiona Hyslop: Are you aware of any other option being on the table? If the draft order is it, does that not mean that you are between a rock and a hard place in that, if you do not support it, you will automatically lose charitable status?

14:30

Tom Kelly: The risk is of a lacuna in that, as I said, we would go into a period in which colleges are unable to operate as charities until something else is put in place simply because of the time that is required. The draft order will come into force on 24 April and there is already a risk that colleges' charitable status will be called into question. The legal advice that we have been given is that, in those circumstances, colleges should not purport to be charities.

Fiona Hyslop: So despite the committee having raised the matter with the minister 12 months ago, we are still up against the wire.

Tom Kelly: Yes. The time constraint is undoubtedly very tight.

Fiona Hyslop: Other members have addressed the SFC and financial management. It has been argued that the SFC could easily exercise the powers that the draft order will remove from ministers. I will ask about a more general policy issue. The school-college review is considering access to college courses for more 14-year-olds, as part of statutory public sector provision. I ask the Association of Scotland's Colleges and the EIS whether the removal of the ministerial powers of direction has the potential to have an adverse effect on that important aspect of public policy.

Tom Kelly: No, I do not think that it has. That initiative is covered amply in the ministerial policy for school-college links, as well as in the letter of guidance to the Scottish funding council about what ministers want to be funded and in what ways and to what scale they want it to be funded. The sector-level guidance is broad, but you must remember that it is for the individual college to determine the appropriate provision in negotiation with its local partners. I do not think that the order would seriously inhibit ministers in saying what they would like to be achieved, as they have already done. It would be up to the Scottish funding council to use funding mechanisms and up to the colleges to use those funds to achieve that purpose. That is the way in which the system is set up.

Marian Healey: For the staff that the EIS represents, the issue would be the perception that the minister had abandoned them—and not for the first time. We are still trying to convince ministers of the need for a professional body for lecturing staff in the further education sector and of the need for every lecturer in the sector to be

registered with the General Teaching Council of Scotland to give the necessary protections, particularly in light of the school-college partnerships initiative. Staff would be disheartened and would assume that the removal of the ministerial powers of direction was another means whereby the minister was stepping back from any directable status for further education colleges.

Fiona Hyslop: The STUC makes quite a strong statement that

"the Further and Adult Education Department of the Scottish Executive would have preferred to retain Ministerial powers of intervention"

because that is what it submitted to the review group when the matter was discussed there last autumn. Did the STUC have no suspicion that those powers were about to be pulled away until the draft order was laid in February?

Mary Senior: As Marian Healey said, the tight timescale was mentioned to us at the further education round table, which took place on 2 February, I think. I am not sure whether there was a failure on our part to appreciate the desperation of the situation.

Fiona Hyslop: In the last paragraph of its submission, the NUS states:

"there has been nothing short of blind panic".

Those are strong words. The submission goes on to suggest how to extend the time that is available to review the charitable status of colleges—I assume that that is the year that Marian Healey referred to. The NUS suggests that we keep charitable status but bat it to the Office of the Scottish Charity Regulator for assessment, which would make more space. Will you explain that proposal? Tom Kelly is not comfortable with that, because that puts charitable status in limbo.

James Alexander: Our point is, as Tom Kelly has said, that the perception is that if the committee does not agree to the order, there is nothing else; there is no alternative but to vote for it. We should not be in such a situation in the first place. The reference to panic was made because we should not be in the scenario of choosing between what we have and nothing. The charity regulator has said that no charity will automatically not be a charity as of 1 April—that is not how the system will work. The status quo will prevail until the charity regulator reassesses charities' status.

Tom Kelly: Colleges are unsafe to assume and practise charitable status when they know that there is a question mark over it because of the application of the Charities and Trustee Investment (Scotland) Act 2005. The matter has been openly debated among the colleges, so they cannot say that they did not know that unless something was done about the independence element of the charity test, they would fail to meet the test. That is the reasoning.

James Alexander is right: in a sense, who would come to get us if we continued to be charities, notwithstanding a lacuna? However, we are public bodies and we are expected to conform to the law as we understand it. We are seeking to do that.

One vital power that is to be retained, although we do not particularly welcome it or invite anybody to use it, is Scottish ministers' power to remove board members from office and to appoint new ones. That power is in section 24 of the 1992 act, which the order will not amend. That is the draconian reserve power that ministers have always had to deal with gross misconduct or gross mismanagement of a college. We have always understood that such reserve powers would be retained under the new regime. The draft order that the committee is considering would remove only the power of direction.

Richard Baker (North East Scotland) (Lab): I will return to James Alexander's point. Many of us might have found an exemption to be an attractive option, but it is clear from the conflicting evidence that the committee has heard that the argument might not have been easy to win, particularly in the debate on the Charities and Trustee Investment (Scotland) Bill.

Surely the key concern for us all is that, when it is felt that a governance failure has occurred in a college, the ability to intervene at the right level should exist. The point has been made strongly that the funding council is reluctant to intervene. It is not enforcing the requirement to have student members of management boards, which is a good example of a matter in which it should intervene. The absence of the power of direction might put more pressure on the council to exercise its power to intervene. It has been put to me that the Further and Higher Education (Scotland) Act 2005 gave the council significant powers. Would your fears be allayed if the funding council made it clear that it was prepared to use those powers if necessary?

Mary Senior: I am not sure what powers the 2005 act gives the funding council. It gives the council the right to attend college board meetings and to address college boards. The ministerial power of direction underpins the 2005 act. If a funding council representative attends a board meeting, the board will be aware that behind that lies the ministerial power of direction. We are uncomfortable with that power going if we are left with nothing else.

Marian Healey: If it were in the committee's gift to amend the Further and Higher Education (Scotland) Act 2005 to give us the type of structure that we need and to give that power to a body that is accountable to the Parliament, we would

welcome that. For three years, we have waited and waited for the funding council to encourage the five principals in inner-city Glasgow to get their act together so that we can have significant state-of-the-art further education infrastructure in Glasgow—I am sure that the situation has been similar here. We trade unions have told the funding council that we will support whatever it takes to make that structure happen. After three years, we are no further forward, yet more public money is being spent on investigation after investigation. That shows clearly that the powers that the 2005 act bequeathed to the funding council are insufficient.

Richard Baker: Marian Healey makes a strong point. Perhaps we can ask the minister how he envisages the funding council stepping in to what may prove to be a void if the Parliament decides to revoke the power. If we agree to do that, surely there will be the opportunity to examine the impact after a certain amount of time and to recommend not only to the funding council but to the committee that the funding council should use more of its powers. The committee could examine the issue if that proves to be the case.

Tom Kelly: We are clear that those powers of direction would not be used to enable or insist on a particular estate solution in Glasgow. That is a separate issue. There has been a delay, but I do not think that a ministerial power of direction would be used to resolve such genuinely difficult issues.

Richard Baker: Is there not a power in the 2005 act that enables the funding council to advise institutions on studies or to merge? Therefore, technically, is the power not there?

Tom Kelly: Yes. The funding council is fully involved. One can argue about why the process has taken so long, but there is a huge opportunity, so it is necessary to get it right.

Richard Baker: So there is scope for the funding council to intervene; the issue may be at what level it should intervene and what the timescale should be.

Tom Kelly: The problem is the word "intervention". The funding council is involved in the process and would provide a major part of the funding through grant funding, which is the major lever.

The Convener: Have any of you consulted or had legal advice from the Office of the Scottish Charity Regulator about the fact that, for an institution to meet the criteria of independence under the Charities and Trustee Investment (Scotland) Act 2005, it is necessary to remove the power of ministerial direction, but it is not necessary to remove the power to dismiss the board or appoint a new board? I would have thought that the latter power in itself means that the institution is not independent. I fail to see why it is necessary to remove one power but not what is probably a more important power. Why is it that one contradicts the 2005 act and the other one does not? Has anyone consulted OSCR or taken legal advice on that apparent contradiction?

Tom Kelly: We have taken legal advice, on the basis that the specific provision—we are calling it the independence test—is about the power of ministers to direct or otherwise control activities. It is the power of direction of what institutions do that would be at odds with the charity test. The question of who does it and how competently they do it is not addressed by the Charities and Trustee Investment (Scotland) Act 2005, so our view, which is based on our legal advice, is that section 24 of the Further and Higher Education (Scotland) Act 1992 stands because it serves a different purpose.

The Convener: The other apparent contradiction is that my understanding is that the funding council has the power to direct activities.

Tom Kelly: The power is not expressed as the power to direct. The funding council has the power to set conditions of grant and to establish a relationship with the college through the financial memorandum and the other legal documentation that underpins the grant, but that is not expressed as a power to direct.

The Convener: So legally there is a distinction.

Tom Kelly: And semantically it is different.

The Convener: With all due respect, we perhaps need to check the issue out ourselves. That is the legal advice that you have received, but the committee should perhaps seek its own advice. We can discuss the matter later.

We have had a fair old whack at the issue. I hope that everybody feels that they have had their chance to get across their point of view. All four of you have left us in no doubt about your point of view. Thank you very much for your written and oral evidence.

Item 2 is on the same subject. We have with us Allan Wilson MSP, the Deputy Minister for Enterprise and Lifelong Learning—although your name-plate appears to suggest that you are George Reid.

The Deputy Minister for Enterprise and Lifelong Learning (Allan Wilson): No, George Reid is one of the officials who is with me today.

14:45

The Convener: On behalf of the committee, I welcome the minister. Before inviting him to answer questions, I should point out that this is the more formal part of our proceedings on the order.

First, we can ask the minister technical questions. After that, I will invite the minister to speak to the motion. Then, those members who wish may have their say. Members should not ask the minister questions at that stage, as it is a debate. At the end, I will ask the minister to sum up, and we will then take a decision.

Michael Matheson: First, could you clarify what would be defined as a technical question?

The Convener: I usually interpret that fairly widely. I am sure that the minister, who I think has listened in the committee anteroom to our previous deliberations, will be more than happy to answer legal questions in particular. We can hear from the Executive officials at this stage but, when we move into the debate, I will not be able to call the officials to speak.

I will repeat a question that I asked earlier, minister. You will have heard about the Association of Scotland's Colleges' legal advice that, under charities legislation, the power to direct activities appears to endanger the criterion of independence, as is required by the Office of the Scottish Charity Regulator, whereas the power to dismiss a board, or indeed appoint one, does not contravene that. Furthermore, it is said that the funding council's power in relation to colleges does not contravene OSCR's definition of independence.

Allan Wilson: The power to dismiss a board would be exercised by order, through the Parliament, rather than by ministerial direction.

The Convener: Whereas we are talking about pure ministerial direction—

Allan Wilson: To the "independent" institution concerned.

The Convener: Is it your advice that the legal position is that the powers of the funding council in relation to colleges do not contradict the independence criterion?

Allan Wilson: No. However, as you might imagine, we are in direct contact with the regulator to ensure that all relevant pieces of legislation are compliant with the independence test when it comes to be applied.

The Convener: Is there any particular reason why the colleges could not be given the same status as the national collections and be exempt from that criterion? That would allow ministerial direction and charitable status to be maintained at the same time.

Allan Wilson: I do not think that the same circumstances apply. In response to representations from the Parliament's Communities Committee, we considered exemption as a potential solution to the issue, but we concluded that the credibility and integrity of the Charities and Trustee Investment (Scotland) Act 2005 were paramount, and that to exempt all of Scotland's colleges—or at least those over which we have powers of direction, which is not all of them—would interfere with and damage the integrity of the act that the Parliament passed.

The Convener: Was that an Executive decision, or was it the result of advice from OSCR?

Allan Wilson: Ministers took that considered view. As we have heard, the option was considered by the core group that was reviewing Scotland's colleges. We believe that there were particular reasons, which we outlined to the Parliament following representations from the Communities Committee, that warranted the exemption of the collections under the care of non-departmental public bodies, which did not apply in Scotland's colleges.

The Convener: I cannot remember whether the charity regulator is a he or a she. There are so many regulators these days.

Allan Wilson: The regulator is a she.

The Convener: I thought so. Has she been invited to give her views on whether the colleges could legally be given the same status as the national collections?

Col Baird (Scottish Executive Enterprise, Transport and Lifelong Learning Department): Legally, the answer is yes. We could exempt them if ministers decided to go to the Parliament and suggest that route.

The Convener: So there is a legal option that would exempt the colleges and allow them to retain their charitable status.

Col Baird: That is correct.

The Convener: The question why ministers have not done that is probably not a technical question; it is a political question, so I will exercise my usual self-discipline and rule that out. Are there any other technical questions?

Fiona Hyslop: If the committee does not support the order, what would be the consequences? Is there a plan B along the lines that have been suggested—that is, another route to provide charitable status for colleges?

Allan Wilson: As you heard, the immediate consequence would be that £18 million to £20 million of further education college funding would be put at risk. Earlier, we heard that X hundred jobs are sustained by that funding. I would tend to put the emphasis on the 15,000 to 20,000 learning opportunities that are sustained for students in further education colleges throughout Scotland. Failure to approve the order would put the funding at risk.

As I said, we did not enter into the course of action lightly or without consultation both with the sector and more generally. After much deliberation on what was, as you can imagine, a difficult decision, we came to the conclusion that the optimum course of action was to provide for withdrawal of the power of direction. We made that decision on the basis that the power of direction had never been used and was unlikely to be used in the future. We also took the view that we have sufficient latent powers that we can exercise in a range of ways to deal with any circumstance that might arise in further education colleges without moving to direct them by applying the power.

Fiona Hyslop: Given that ministers have known about this for some time, that the Executive's further and adult education division was in favour of retaining the ministerial power of direction in its submission to the review group in the autumn and that the guillotine under the 2005 act falls shortly, why was it left so late to lay the order? If it fails, there is no other option.

The Convener: That is not a technical question, but I will leave it to the minister to decide whether he wants to answer it.

Allan Wilson: It is not as if nothing was happening between October and February. Consultations were going on—you heard references to those. Obviously, we have a system of Cabinet government. You will be familiar with how that works. Different departments had different views on the optimum course of action and those discussions did not conclude until we were in a position to make the order.

Fiona Hyslop: Can I ask—

The Convener: Is your question technical?

Fiona Hyslop: Was it a Cabinet decision or was it two ministers—

The Convener: Fiona, that is definitely not a technical question.

Fiona Hyslop: If the minister is saying that it was a Cabinet responsibility, that is different from two ministers—

The Convener: I am being advised that your question is not technical and I have to follow the advice so that we keep ourselves right. I am sure that the minister will answer the question in his opening remarks.

Susan Deacon (Edinburgh East and Musselburgh) (Lab): I am not sure whether this comes within the bounds of a technical question either, although it is still to do with process. The word "consultation" is widely used in this place and has been widely used in the various representations that we have heard today and in the papers before us. Minister, will you elaborate factually on what discussions there have been during the period that you touched on? Who was involved in the discussions that informed the Executive's decision-making process?

Allan Wilson: What discussions are you talking about, specifically? There has been a range of discussions in the core group and in the work streams with stakeholders and other partners. There have also been internal ministerial discussions about the optimum course of action.

Susan Deacon: I worded my question such that it could be seen to constitute a technical question. In essence, I am interested in hearing more about who gave the advice that helped to shape the Executive's final decision.

The Convener: I suppose that the technical way of asking that would be to ask whether the Executive went through a formal or informal consultation process.

Susan Deacon: Actually, no. To be fair, the kind of dialogue that I am asking about can take many different forms apart from what we would recognise as a formal consultation process.

Allan Wilson: That was a distinction that I was trying to draw myself. As you have heard, there has been considerable consultation with external partners through the core group and the accountability in governance work stream, which advised the core group—I think that there were four meetings at which the relevant options were discussed.

Internally, the decision is one that requires to be made between two departments and involves the Minister for Communities and the Minister for Enterprise and Lifelong Learning. Ultimately, they agreed the policy that I put before you today.

The Convener: We will not shoot the messenger.

Michael Matheson: Some concern has been expressed about the fact that if ministers remove their power of intervention, the responsibility for intervening in governance and management issues in colleges will fall to the funding council. What powers does the funding council have to intervene in such issues?

Allan Wilson: Are you asking about powers under the Further and Higher Education (Scotland) Act 2005? Section 9 of that act defines the funding that Scottish ministers can provide to the council and ministers have discretion to impose certain terms and conditions on funding to the council.

Section 12 sets out the terms and conditions under which the council can make grants to fundable bodies, including the conditions that might be imposed in relation to the recovery of said grant.

Section 13 puts a duty on the council to secure provision for the assessment and enhancement of quality in the activities that it funds. That extends the existing duty to assess quality in higher education institutions to cover colleges and introduces a new statutory duty to enhance quality for both sectors.

Section 16 gives the council a power to attend any meeting of the governing body of a fundable body, if the council has concerns about any aspect of the funding that it provides, and to address the meeting on those matters.

Last, but by no means least, section 25 allows ministers, if it appears to them that the financial affairs of a fundable body have been or are being mismanaged, to give the council such directions about the provision of financial support for the activities carried out by the fundable body as they consider are necessary or expedient by reason of the mismanagement. It requires Scottish ministers to consult with the council and the body in question before issuing directions and covers all fundable bodies.

Those provisions were all introduced by virtue of the Further and Higher Education (Scotland) Act 2005, which the Parliament approved relatively recently, and stipulate the role and influence of the funding council in matters relating to its responsibilities for fundable bodies, which are not all colleges over which we had powers of direction.

15:00

Michael Matheson: I do not think that there is any doubt about the funding council's financial responsibilities. I wanted to know what powers the council has if it has concerns about the governance or management of a college, which are not necessarily linked to the funding. Does it have powers to intervene in such circumstances?

Allan Wilson: You do not see any correlation between funding and management.

Michael Matheson: I acknowledge that there is a correlation, but there is not always a direct relationship.

Allan Wilson: Section 3 of the Further and Higher Education (Scotland) Act 1992 enables ministers to close a college by order and to amend the constitution of boards of management. Ministers' consent is required to change the name of a college. Section 12 allows ministers by order to amend the powers of a board of management and requires colleges to gain the consent of ministers before borrowing money or changing materially the character of the college. That power is delegated to the funding council, which I think is in part what you asked.

Section 24 provides that a minister may by order remove all or any of the members of the board if it appears that a college is being, or has been, mismanaged.

Section 25 allows ministers by order to dispose of the assets of a college that they have closed. That power was amended subsequently to provide that assets must be used for a charitable purpose, as you might imagine.

Sections 3 and 27 allow ministers to make regulations that prescribe how boards of management will discharge their functions.

All those powers remain extant in the Further and Higher Education (Scotland) Act 1992, in addition to the powers that the funding council has over fundable bodies in relation to management and governance, which I have explained.

The Convener: I will allow a final, technical question from Shiona Baird, which I hope will be short.

Shiona Baird: Does the Executive have any proposals to plug the gap in the provision of courses that might be less popular but which provide skills that are more in demand in a growing Scottish economy?

Allan Wilson: I do not dictate to further or higher education institutions which courses they should provide. That would be a wholly retrograde step. I value their independence—academic and otherwise—and would not wish in any way to impinge upon that.

The Convener: I want to move on. I ask the minister to introduce the order and to move motion S2M-4020.

Allan Wilson: I listened carefully to the contributions that were made. It has to be said that the STUC and the NUS are valuable partners of ours and, if they raise concerns, we take them very seriously indeed.

The effect of the order is fairly straightforward. It seeks to revoke all the current powers that the 1992 act gave ministers to issue a direction to the board of management of a college of further education. A key point that was drawn out in previous evidence is that the power of direction has never been used in anger since it was introduced in 1992, which is roughly 14 years ago.

As the committee is aware, the impact of the Charities and Trustee Investment (Scotland) Act 2005 has caused us to consider carefully the continuing need for the power. We now have a policy that charities should be independent of Government, for good reasons, with which the Parliament agreed. It is important to us to maintain the integrity of our charities policy.

The draft order has aroused some concerns, which the committee has heard, despite the fact that the power has never been used. The power was introduced in different days 14 years ago, which the convener will remember. The political climate was different and we were in the early days of the incorporation of colleges. Substantial sums of public money were being handed over to new boards for the first time. Those boards comprised people who were all entirely new to the task. College boards were untested and untried and even the board members who had made the transition from the former local authority control found that they had to cope with substantially increased responsibilities compared with what they had been asked to do previously.

A key point in the difference between those days and now is that those were the days before the creation of the Scottish funding council, which can now deploy a formidable range of powers and sanctions should that ever be judged necessary. I went into those powers in some detail and I am sure that the committee appreciates—collectively, even if not individually—that the Scottish funding council's ability to influence the management and governance of a college should not be underestimated, as it is the body that effectively holds the college's purse strings.

I will highlight another important consideration; it has not arisen in the debate, but it is fundamental and is part of the college review. I refer to parity of esteem. It is now right that we demonstrate genuine parity of esteem between our further education colleges and our higher education institutions, particularly our universities. Ministers have never had the power to direct universities—that is as it should be, as it is never considered necessary or appropriate—and Scotland's colleges no longer constitute a fledgling sector. They are a vital part of our desire to build a knowledge-based economy and have a great deal of maturity, experience and integrity. Our confidence in the sector was demonstrated by our recent decision to merge the Scottish Further Education Funding Council and the Scottish Higher Education Funding Council.

Parity of esteem between our further education sector and universities is an important consideration that has not been mentioned in the context of the draft order but ought to be. We can no longer find any convincing reasons why we should continue to treat the two sectors differently with regard to ministerial direction. Perhaps some people still think of colleges as second-class institutions that are less deserving of independence and our trust than universities are. I do not know whether that is the case, but I do not see Scotland's colleges in that way and I hope that the committee does not either.

It would be wrong of me to say that the draft order has been laid simply because we have suddenly concluded that the power is unnecessary, but I am not saying that. If a power is unnecessary, we do not have to revoke it; we just do not use it. Ministers collectively had to make quite a difficult decision, to which the committee referred, about how to safeguard the integrity of our policy on charities while ensuring proper control and accountability in the college sector. We had to choose between two courses of action: whether to treat Scotland's 39 incorporated colleges as special cases and use our power to exempt them from the standard requirement that a charity should be independent of the Government, or to take a good look at whether it would be possible to ensure proper control and accountability through other measures.

We took the latter course of action—as is self-evident—because we are sure that we can exercise that proper control and accountability through the various other statutes, measures and influences that I mentioned. I ask members to consider the issue from the other way round. If I were indiscriminately and unilaterally to exercise powers of direction to Scottish colleges or institutions of that ilk, it would not be long before I was called before the committee to explain why I was trying to micromanage the sector.

Ministers will retain the power to dismiss a college board or members thereof by laying an order before the Parliament in cases of mismanagement. Some of the evidence that the committee received contained the misconception that we also proposed to give up that power, but I assure the committee that that is not the case. Consequently, some of that evidence does not apply.

On the involvement of partners and stakeholders in the steps that led up to the laying of the order, I will say a few words in response to the questions that were raised both by the Subordinate Legislation Committee and in today's oral evidence, which I listened to. To an extent, I can understand why the Subordinate Legislation Committee commented that the wording of the Executive note could have been more explicit, but the note sought to explain the specific steps that we took in obtaining an assurance from the funding council that removing the powers of direction would not cause other problems. We needed to be clear on that point, as we would have been subject to criticism—rightly so—if we had failed to seek that assurance.

Ultimately, I accept that views will vary on what constitutes adequate consultation, especially given the tight timescale that we faced. For our part, we genuinely believe that we proceeded in a way that was understood by partners even if it was not

seen as ideal. However, in the many discussions that we had, we made it clear that some different and difficult policy issues had to be reconciled within a tight timescale. We were always clear that, if ministers concluded that such an order was necessary, it would need to be introduced quickly. I think that there was never any misunderstanding about that. At the end of the day, I accept that, if an organisation feels that it was not consulted properly, it probably was not consulted properly. However, that is quite different from an intention on our part to ignore or otherwise not seek to involve valued partners in the decision-making process.

However, consultation is a two-way process. Had we known three or four months ago about some of the concerns that have now been expressed, it is arguable that we could have addressed them sooner. However, those concerns were not expressed at that time.

The effect of the order will be to safeguard an estimated £18 million to £20 million annually. That sum supports a great deal of learning and translates into between 15,000 and 20,000 enrolments. It was never an option to us to deny that funding to our colleges. We are not in the business of turning away from our college doors people who want to use those learning opportunities to improve their employment skills and to progress in their personal and professional lives.

We place great value on the integrity of our charities policy, especially the paramount requirement that charities should be independent of Government control. In essence, that is what led us to conclude that the power to direct colleges should be revoked.

Finally, I want to offer words of assurance in response to the concern that the order might have an adverse impact on the continued smooth payment of financial support to students. At the moment, the power of direction is used for administrative purposes to provide a basis for the payment by colleges of FE bursaries and education maintenance allowances.

15:15

Directions set out the powers to award payments and other conditions surrounding the awards, such as eligibility and residence criteria. In the face of the removal of the power of direction, our intention is to create new regulations that will serve the same purpose. My intention is that there should be, in practice, no change in the way that the Scottish funding council and the colleges deliver bursaries or EMAs. We intend only to change the legislative mechanism that is used to achieve that to ensure that it will be acceptable to the Office of the Scottish Charity Regulator. I hope that that provides assurance that the smooth provision of student support, which is obviously an important matter, will continue uninterrupted as a consequence of the order.

The order has been laid against the background of the growing maturity of Scotland's colleges and the need to bring together the Executive's different policy priorities. We see no reason why we cannot now place colleges on the same footing as universities. That will safeguard a substantial sum of college income and maintain the integrity and credibility of our charities policy, which Parliament endorsed only last year when it approved the Charities and Trustee Investment (Scotland) Act 2005.

I am sorry to have gone on, but the order represents an important step and it is right that we ensure proper scrutiny—I accept that entirely. We take seriously the concerns that have been expressed; it is important that they are addressed in their entirety. I hope that what I have said has been helpful to the committee. I have set out the background to the draft order, the circumstances in which it was laid and the difficult decisions that ministers had to take on the various options and courses of action that were open to them.

I move,

That the Enterprise and Culture Committee recommends that the draft Further and Higher Education (Scotland) Act 1992 Modification Order 2006 be approved.

The Convener: Thank you, minister. I invite members to indicate whether they want to speak. We have up to 90 minutes for debate, but I hope that members will not take up anything like that.

Richard Baker: I will take one hundredth of it.

I imagine that there were difficult choices to be made on the issue. The key issue of £20 million funding for the sector certainly weighs heavily on the minds of the committee. I would not be willing to sacrifice that level of investment if there were alternative ways, beyond the ministerial powers, in which the correct level of intervention in colleges could be provided. However, I take on board strongly what the NUS, the STUC and the EIS have said, particularly about seeking reassurance from the minister that the single funding council has significant powers in the areas in question. Those organisations wanted to be reassured that the powers will, in fact, be used; there was a clear and strong desire for further reassurance.

I hope that the minister can give assurances that the impact of revoking the powers will be scrutinised clearly and that there will be liaison with the single funding council over the way in which it uses its powers. In a year's time, perhaps the committee could seek evidence about what the impact of the order has been; the key stakeholders

who gave such helpful evidence for today's meeting, given their fears, could be consulted.

Given what the minister said, I am optimistic that the Executive is determined that any fears will be allayed. However, the committee should take this opportunity to ensure that that proves to be the case. With the assurance that the committee will continue to monitor the situation and that we can revisit it, I am happy to accept the indication that the minister has given us that the powers are adequate and that nothing will be lost in terms of intervention. That might well be required in governance issues for colleges and on that basis I accept what the minister has said.

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD): I was much taken by the minister's argument about the grown-up nature of our colleges and the parity of esteem. I think that that is important. If colleges are to have the freedom to operate in the manner in which they must to address the issues and the needs out there, not least in relation to our economy, independence of manoeuvre is important.

Like Richard Baker, I am persuaded at this stage by what the minister said about the powers. I believe that the necessary powers are in his back pocket—with a future minister, it might be her back pocket—to take action if necessary, sad though that might be.

I hope that the committee will approve the order, but it would be responsible for the committee to retain a watching brief during the months and years ahead. We have heard opinions and warnings from our witnesses and we have to watch developments carefully. On balance, I am persuaded by what the minister has told us and I will support my colleague Richard Baker.

Murdo Fraser: It is perhaps unusual for me to support the Executive, but I speak in support of the order for three reasons. First, I do not believe that ministers should have the power to direct the sector. I disagree with the evidence that we heard from NUS Scotland that ministers should have the right to tell colleges which courses to provide. I simply do not believe that; I believe that colleges are independent bodies and it should be a matter for them to decide which courses to provide. Colleges are probably in a far better position to make such decisions than are ministers—I say that with all due respect to the minister's undoubted talent.

Allan Wilson: No offence taken.

Murdo Fraser: Colleges are far closer to their customers and local economic circumstances and are therefore in a better position to make such decisions. Ultimately, if there are concerns about funding and finances in colleges, the funding council, which disburses public funds, should be responsible for intervening if required. I support the approach philosophically.

Secondly, the issue of charitable status is important. I was interested to hear what Tom Kelly said about the importance of charitable status to the college sector in relation to its financial impact and its implications for potential future development. It is vital that colleges retain their charitable status, which should not be put at risk. I am not persuaded by the argument that we should wait and see on this issue. The matter requires to be dealt with now and the instrument is the right way to do that.

Thirdly, it is instructive to know that the ministerial powers that are being removed have never been used since the colleges were incorporated. It is therefore hard to see how their retention can be justified.

Fiona Hyslop: I was interested to hear the minister's explanation, but I have concerns about why we are being presented with the instrument—why now and why so late? If the arguments about parity of esteem are so strong—I agree that they are strong—why were they not considered to be strong enough less than a year ago when the committee and the Parliament considered the Further and Higher Education (Scotland) Bill? The Executive could have removed the ministerial powers then, had it wanted to do so. When the review group on governance considered the issue last autumn, the minister's department argued that the ministerial powers should be retained. I agree in principle with the arguments about parity of esteem, but the evidence is that there has not been an overwhelming desire by the Executive to make the changes that it now proposes.

The issue is how we protect the colleges' charitable status. The committee must consider whether it is a question of all or nothing. Is it a case of our backing the order or the colleges will lose charitable status, or can we say that there is another way to go? That other way is explicit. The Communities Committee has before it a statutory instrument on the assets of, funnily enough, colleges, universities and other non-departmental public bodies. There are, therefore, other mechanisms by which the Parliament could ensure the defence of colleges' charitable status.

Last year, Jim Wallace—the previous Minister for Enterprise and Lifelong Learning—made great play of the fact that the issue should be resolved in the review of the governance of colleges. He said:

"Depending on the outcome of the review, I hope that further actions can be taken to ensure that colleges will also be able to retain their charity status."—[*Official Report*, 20 April 2005; c 16189.]

The review group said explicitly last autumn that it wanted to keep charitable status and retain

ministerial direction, so the review, to which Jim Wallace referred, has now been rejected.

There is an issue about the Executive's genuine motivation. If the Government is in a hole about charitable status, it is important that the Parliament provides an out. However, it would be irresponsible of us to tell the Government that in the future it can introduce an order at the last minute, say, "Back us or it all falls" and expect us to comply. It is right that the committee gives vigorous attention to the issue.

The colleges' charitable status must be retained and we should ask the Executive to consider introducing a statutory instrument with an exemption clause, as has happened in relation to other bodies. Unless you can argue that the floodgates will open and other people might try to exploit the situation—although I have not heard of any bodies other than colleges being identified in this way—the responsible thing would be to send a statutory instrument to the Communities Committee and argue for an exemption similar to that which operates in relation to other bodies.

If you respect the sector and support the idea of parity of esteem, you must accept that changes in the governance system should come from the sector and the people who are involved, in partnership, in the review. To pre-empt that would be unfair and would question the level of the esteem in which the sector is held.

The Convener: I will exercise my right to speak as a member of the committee rather than as the convener. I agreed with James Alexander, from the National Union of Students, who said that the ideal position would be to retain the power of ministerial intervention as well as ensuring that the colleges get charitable status. From what the minister has said, it is quite clear that that is perfectly achievable. If the colleges had been given the same status as the national collections, they would have retained charitable status in conjunction with the retention of the ministers' power of intervention, which was introduced by a Tory Government—I believe that Michael Forsyth was the relevant MP.

We should be clear that the power of intervention is not exclusively about courses; it is about many other activities in which the colleges are involved. Although the power has never been used, circumstances might arise in which it could and should be used. Certainly, I have major concerns that, given the amount of taxpayers' money that is going into the college sector, we do not have sufficient power to intervene in exceptional and difficult circumstances.

The Glasgow estates review issue has been raised a few times. Frankly, that has been utterly botched. I have not been impressed by the way in which the funding council has handled the Glasgow estates review, although it is beginning to get the thing sorted out. We might have reached a situation in which ministerial intervention would have been required.

The fact that the power exists does not mean that it has to be used. Ministers hold in reserve many powers that often enable them to resolve issues without having to use those powers. Arriving at such a resolution might well be much more difficult if the power is not there to be held in reserve.

I think that it is pre-emptive to withdraw the power at a point in time when we have a colleges review that will affect accountability and governance. Why set up a review of accountability and governance if that review will not address the issue of what the powers of the funding council and the ministers are, as well as the powers of the colleges themselves? I think that that should have been part of the review that is taking place.

The minister referred to the powers of the funding council. However, the power of the funding council comes from its funding responsibilities, not from its statutory powers. There is a fundamental difference between those two things.

I am unhappy with the statutory instrument. Ministers have taken the wrong decision. As James Alexander outlined, they could have achieved the best of both worlds. However, I do not think that anyone will move against the statutory instrument, simply because we are all behind the 8-ball in that, if anyone does that, there is a risk that the colleges will lose their charitable status, the consequences of which we have heard about.

I am not happy that we have been put in that position. The Executive could have handled the matter much better, even if it had reached the same decision in the end. I record my extreme unhappiness about the way in which the matter has been handled and the decision that has been made. We are now behind the 8-ball because there could be substantial consequences for the colleges if we do not allow the order to go through. That is my personal view.

15:30

Shiona Baird: I echo that view. I have serious concerns about the order and I would have liked more time to consider alternative options. We are being bounced into making a decision on the order and, to my mind, that is unsatisfactory. Is there any mechanism by which we can gain more time? I realise that the deadline is 24 April, but perhaps we can get around that. Is there any mechanism by which we can delay the order and investigate alternative options?

The Convener: I will consult the clerk and answer your question after we have heard from Susan Deacon.

Susan Deacon: The minister made the point that we have Executive Government in Scotland. It is often important to remember that. Let me clarify what I mean. It is clear to me that ministers have spent a considerable time thinking about how to square the circle and deal with a complex mix of policy issues, detailed legislative provisions and their various consequences. To that extent, I accept at face value what the minister said about the time, effort and energy that has been put in and the fact that the proposed solution was carefully considered.

That said, there are questions, not so much about how things are consulted on—as I said earlier, the word "consultation" is much overused these days—but about how things are communicated and how a shared understanding is developed, particularly among the key stakeholders, on how and why certain decisions are reached. As the minister acknowledged, it is clear that there are questions about that. I will not go any further than that because I am not in a position to do so. I merely make that observation.

I have a couple of other points to make about the substantive issues. It is important to note that, in many sectors, ministerial powers are often debated at length, almost in inverse proportion to how often they are used, which is virtually never. It is important to distinguish between the signal that they send out and whether they are or are not used in practice. I note that there are some mixed messages from the Executive in that respect. Approaches have been taken in other sectors to place more emphasis on ministerial powers rather than less, although I have to say that, in practice, I do not think that it is ministerial powers of direction that will resolve the problems that the sector faces.

My position is that we should distinguish between, on the one hand, supporting the proposal in front of us for what it is intended to do and, on the other hand, identifying the important wider issues about the sector that have been pointed out today and that require to be addressed elsewhere. To that extent, I enthusiastically support some of the points that Marian Healey made about management and governance in the sector. I hope that there will be further opportunities for this committee or other committees in the Parliament—it would be this committee, I guess, given its various hats—to return to the real issues of management and governance. However, I do not believe for one moment that the proposal before us today will make or break those weighty issues.

For what it is intended to do, the instrument is worth supporting. However, it could have been handled better and the wider issues that have arisen in today's debate merit further consideration.

The Convener: Having consulted the clerk, I advise Shiona Baird that, because the order has been laid, we have to vote on it today. It can be delayed only if the minister withdraws it and introduces an amended order. I am sure that the minister will let us know his intention as he sums up.

Allan Wilson: It is decision time. I explained that ministers have had to take difficult decisions in complex areas to ensure that the Parliament's will in respect of the independence test for charities is applied without damaging our further education sector. Our conclusion is reflected in the order and members of the committee will have to make up their own minds and accept or reject the proposition.

Richard Baker put the matter well. It is undoubtedly perverse that we are talking with such angst about revoking a power that has never been used. Susan Deacon mentioned that in her comments, too. I assure Jamie Stone that, like the committee, we will monitor the situation after the power is revoked—if it is revoked—to ensure that the sector continues to function as we wish it to.

There has been a bit of misinformation. We talked about powers of direction over individual problems of individual colleges. I do not intend to go into that, but, for example, Shetland College was mentioned in that context. In fact, we do not have powers of direction over Shetland College. It is important to get the facts right.

I suppose that I should be worried when Murdo Fraser tells me that he is philosophically inclined to our point of view, but perhaps not, given that historically both the left and the right have defended academic independence and freedom, except for those at the extreme left and the extreme right. There is a common purpose and philosophy between us in that regard.

With respect to Fiona Hyslop, I do not see how she can support my arguments in favour of parity of esteem and then argue that we should not act to give colleges parity of esteem in this important area. I accept that the policy was not driven by that primary consideration, but ultimately I would defend the decision that we made—which was a complex one because it had to take account of the 2005 act and the needs of the sector—on the ground of parity of esteem. Some people ask why colleges should be given the same independence as universities, but that mentality has pervaded the sector for far too long. It is about time that we shook off all that stuff and moved on.

The convener made some interesting points, but does he genuinely want ministers to determine

college estate problems in Glasgow? I think not. It is important that the Scottish funding council works with the colleges to make important decisions in the process. It is equally important, or perhaps more so, that colleges and their employees are able freely and fairly to come to agreements on conditions of service and other such considerations. Those matters are not ripe for ministerial intervention, far less ministerial direction.

Susan Deacon made some important points about consultation and communication. I tried to explain the efforts that my officials made to ensure that stakeholders and partners were aware that the decision was pending. Yes, there was an optimum solution, but what if it was not available? There was a discussion of that scenario, but no one claimed that retaining the ministerial power of direction was more important than maintaining the charitable status and independence of the sector.

Consultation is a two-way street and we want to maintain the dialogue. We value the important contributions of the STUC and the NUS, which play a vital part in the accountability and governance working group and, of course, in the core group itself. They will take forward the policy on that basis.

It is important that we decide to support the order so that the sector can prosper.

The Convener: Thank you, minister. The question is, that motion S2M-4020, in the name of Nicol Stephen, on the approval of a draft instrument, be agreed to. Are we agreed?

Members *indicated agreement*.

Motion agreed to,

That the Enterprise and Culture Committee recommends that the draft Further and Higher Education (Scotland) Act 1992 Modification Order 2006 be approved.

The Convener: I should have noted the report from the Subordinate Legislation Committee, which has been circulated to members and is self-explanatory.

I suggest that we have a five-minute break.

15:40

Meeting suspended.

15:50

On resuming—

Bankruptcy and Diligence etc (Scotland) Bill: Stage 1

The Convener: I apologise to those who have been kept waiting. However, as they will have gathered, the previous item was extremely important and controversial—in some circles, anyway.

We have apologies from Michael Matheson, who has had to leave to attend a constituency engagement.

Item 3 concerns the Bankruptcy and Diligence etc (Scotland) Bill at Stage 1, which is the talk of the steamie. I ask Nicholas Grier to give us some advice prior to our hearing the evidence that is being presented today.

Nicholas Grier (Adviser): I hope that members have before them the note that I prepared.

The Executive is minded to introduce a new type of diligence, known as land attachment. It would replace the current diligence, which is known as adjudication, which has been little used in the past few years, mainly because it takes a long time—about 10 years—to be carried through and is not seen as being particularly fair.

The idea is that land attachment should replace adjudication and should be a useful weapon in the hands of creditors. Scotland is unusual, in that it has not had an effective diligence against land for a long time, while most jurisdictions do. It is surprising that we do not have one that works—we have yet to see whether land attachment will work.

Land attachment should be particularly useful with regard to the "won't pay" debtors, who are those debtors who are in a position to have their property sold in order to pay their creditors. The alternatives to land attachment that have hitherto been used by creditors are sequestration and inhibitions.

A creditor can use an inhibition to prevent the sale of some property until the debt has been repaid. Once an inhibition has been put in place, it lasts for five years, which can mean that it can take quite a long time until creditors get their money. Inhibition is extremely effective, however, which is one of the reasons why adjudication has not been much used.

The alternative that has sometimes been used involves putting the debtor into sequestration or the company into liquidation. As part of the process of sequestration or liquidation, the trustee in sequestration or the liquidator can sell any

heritage that there might be and divide the proceeds among the creditors.

Some might ask whether, if inhibition has been working well, it is necessary to have a further diligence of land attachment. Obviously, that is a matter for people to consider.

There is also an argument that it might be a little excessive to sequestrate a debtor or wind up a company just to enable the creditor to get his hands on land and buildings. On the other hand, one has to remember that a company with a lot of property might be refusing to pay its bills for some reason and that, in such a situation, it would not be unreasonable to expect that that company might be forced to sell property to pay a bill that is justifiably due. Part of the difficulty with this legislation is that one has to remember that land attachment is not only for private individuals but can be for companies, partnerships and limited liability partnerships as well.

Another point is that it might be a bit much to put a debtor into sequestration if they are running a business. All the other creditors may be perfectly happy with the business and to put it into sequestration destroys it for everybody. Perhaps selling one house that is owned by the debtor might solve the problem for the creditor without destroying the business.

The proposed land attachment might be welcomed by some creditors. It is unlikely that banks will be interested in the new form of diligence because in many cases banks and building societies will have standard securities over debtors' properties. However, other creditors, such as local authorities and unsecured creditors generally—small tradesmen or anyone who has been carrying out work for debtors or providing services—will probably be glad that they can use a further diligence, particularly against debtors who are in a position to pay but will not do so.

Not every debtor will be happy about the introduction of the new diligence of land attachment. As some of the organisations present have pointed out, it is possible that the exercise of the new diligence of land attachment could lead to homelessness. That could be harsh.

A major question is the level of debt at which a property could be sold. The bill suggests that the figure should be £1,500. That figure was chosen because that is the amount that is required to put debtors into sequestration under the current bankruptcy legislation and the Executive wanted to marry the two figures.

The Executive is aware of the danger that the land attachment could be used oppressively, so it has drafted the legislation in such a way that there are checks and balances to limit the opportunities for its oppressive use. The Executive suggests that, at least for non-corporate debtors, there should be special advice and information packages. The registration of the land attachment order would place the creditor at a relative advantage compared to other creditors, but it would also allow the debtor six months in which to pay. Before the property could be sold it would have to be decided that the circumstances justified a sale. The matter would have to go before a sheriff and there would be a good deal of scrutiny.

The Executive's view is that the sheriff's overseeing of the process will ensure fairness for the debtor and for the creditor.

The Executive is aware that the registration of the land attachment order may cause conveyancing problems and it is considering the mechanics of the matter. I have no doubt that it will liaise with the Law Society of Scotland and other bodies to ensure that there are no difficulties.

The committee may be interested to know that in England the equivalent of land attachment can be introduced for the lesser sum of £750. Until recently the mechanism was not much used, but in the past couple of years creditors have started to use it slightly more. We do not know whether they will continue to use it more, but I imagine that that is a possibility.

I have mentioned some of the potential difficulties with the legislation. The major one is that land attachment is a one-size-fits-all type of diligence for all sorts of different types of debtors. It could apply to the poorest debtors and to the wealthiest companies. Any such diligence—in common with all diligence—can have harsh effects at the bottom end of the scale. On the other hand, one must remember that some debtors are in a position to pay their debts but refuse to do so and have plenty of heritage. It can be argued that there is no reason why they should not have to sell their property, provided the right procedures are followed.

Various concerns need to be highlighted and I have no doubt that they will be discussed today. If members want to ask any questions, I invite them do so.

The Convener: As there are no questions, I thank Nicholas Grier. As usual, his comments have been extremely helpful.

Item 4 is also on the Bankruptcy and Diligence etc (Scotland) Bill.

I welcome Susan McPhee and Margaret Burgess from Citizens Advice Scotland; Alistair Hamilton, who is on the diligence committee of the Law Society of Scotland; John Glover from Registers of Scotland; Adrian Stalker, who is principal solicitor at Shelter Scotland; and Yvonne

Gallacher from Money Advice Scotland. I will give each of you the opportunity to make a few introductory comments. Land attachment is the only element of the bill that has made the front page of *The Herald*—there is even an editorial in today's edition—and we can understand why that is.

16:00

Susan McPhee (Citizens Advice Scotland): Our written submission sets out our view on land attachment, but I take the opportunity to set the context by talking about the people who will be affected by the proposed new form of diligence.

Most members know that consumer debt is the largest issue that is brought to the citizens advice bureau service in Scotland. Last year we dealt with just fewer than 75,000 new debt inquiries, which represented debts of £163 million; that figure does not include on-going debt cases and it is £32 million more than the figure for the previous year's new debt cases.

We carried out research that showed that the average debt of our debt clients is £13,500, if mortgages are excluded from the figure. Nine out of ten of those clients have a consumer debt, the most common of which is credit card debt, followed by bank loans and catalogue debts. According to our research our clients incurred debts as a result of a change in circumstances such as a drop in income, a job loss, an illness or a disability, or as a result of low incomes and chronic poverty. The research therefore demonstrated that we have two streams of clients: people who borrow money at a time when they think that they can afford to do so but who then suffer a change in circumstances such as a job loss or illness; and people who cannot live on their low incomes and juggle credit cards and cash loans to get by.

The average monthly income of our debt clients is £801. A third of our debt clients are home owners, whose average monthly income is slightly higher at £1,870 and who have an average of five debts each. The research indicated that more than half of all our debt clients had taken on further borrowing to try to resolve their debt situation. One in four had been threatened or pressured by creditors to pay up and, more worrying, one in six had been threatened with formal debt recovery procedures, even though the creditors had not gone to court and had no authority to instigate such procedures.

Land attachments would operate in the same way as do poindings and warrant sales in that people would respond to the threat of a land attachment before that stage was reached. People will do anything to save their house, including borrowing further. We therefore want the bill to exclude the main dwelling house from the sale aspect of the proposals on diligence.

Margaret Burgess will talk about the type of person that the proposals would affect.

Margaret Burgess (Citizens Advice Scotland): The committee's adviser said that the proposals would have a harsher effect on people at the lower end of the spectrum and I will talk about such people. Home owners on a low income might be struggling for a variety of reasons. They are often people with children who have been struggling to make ends meet, robbing Peter to pay Paul and trying to get by, when something happens that means that they cannot pay a creditor. People do not immediately seek advice; they try to resolve the problem by themselves. People want to pay their debts, but they often make the situation worse while they try to resolve it, by borrowing a sum that they cannot afford to repay and by taking out consolidated loans, sometimes from creditors who will behave more harshly than their previous creditors would have done.

If the proposals to allow the sale of the family home are agreed to, people would be encouraged to borrow more to try to eliminate the threat of losing their home, even though their borrowing would intensify the threat, because if they could not manage the additional repayments the new creditor would also have the right to threaten them with the sale of their home. The threat of a sale would be the major problem. People who are in debt struggle; they can hardly cope with life and they just get by from day to day. The worry about the debt is always in the background and the fear of losing the family home is too much for some people. Such worry leads to the break-up of relationships and medical problems such as depression.

Whether people own their home or live in rented accommodation, they say time and again that they will do anything to stay in their house—they do not want to lose it. Because the bill will allow every creditor to be, in effect, a secure creditor or give them the rights of a secure creditor, the fear is that if a creditor threatens to use the power, people will have to borrow more from other places. They might even not pay their mortgage to get rid of the threat. However, that will not alleviate the problem. The situation could go on for years, with each creditor having the rights of a secure lender. The Executive says that it does not expect the power to be used very often, but there will be a fear of it, as there was of warrant sales. The measure will have a disproportionate effect on the people who use the CAB service. We say simply that the family home should be exempt. I do not want to talk about dwelling-houses, because we are

talking about the roof over people's heads and their family home, which should not be under threat.

Alistair Hamilton (Law Society of Scotland): When the Law Society was at the committee previously, we discussed striking a balance between creditors and debtors. However, this time, our principal point is nothing to do with either creditors or debtors; it is about the rights of innocent third parties in relation to the powers in sections 88 and 89, about which we are exceedingly worried. I do not take anything away from the points that were made about the harshness of the measure on people's dwelling-houses.

Section 88 is headed:

"Protection of purchaser under contract where creditor applies for warrant for sale".

Most members will be aware from their constituencies that nearly all major developments start with an agreement to buy land that is subject to a suspensive condition on planning permission. We are all familiar with that process. The reason for it is that people are not prepared to pay big prices for a piece of land when they do not know whether they will get planning permission to develop it. They therefore enter into a contract to buy that is subject to a suspensive condition, which means that they do not have to pay and settle the transaction until planning permission has been obtained.

The same applies to domestic purchasers. The biggest legal transaction that individuals make is buying a house. If somebody buys a house subject to a suspensive condition—for example, one that relates to the availability of other land or the possible use of the house as an office—they want to be protected. If they pay in advance of getting the title, by instalments or while the house is being built, which is a frequent occurrence, they want to know that they will ultimately get the title.

Unfortunately, under the present wording of sections 88 and 89, people in that situation will not be sure that the transaction will not be defeated by a land attachment. This may sound an oversimplification, but the reason is that section 88(2) states that, if the sheriff is satisfied about all the conditions, he "may" suspend the application for sale. As members will know, that means that he may not do so. If he chooses not to, he will destroy any transactions of the type to which I referred. We request a simple one-line amendment so that section 88(2) reads "must" instead of "may". We would be relieved if that were done.

The matter is worrying, because we cannot think of any other method of securing the position of purchasers of land for big developments or purchasers of houses. Planning appeals are expensive. A person could pay a lot of money but then find that, if a land attachment intervenes and takes priority, the property is sold to satisfy a creditor. As the diligence is new—creditors do not have it at present—it would be unfair if it interfered with existing rights that people of all kinds have as purchasers under missives. The issue may seem technical but, as I said on another matter during our previous visit to the committee, although it is technical, it is right that we seek an amendment from the committee or the Executive.

There are other provisions in sections 88 and 89 under which the sheriff will have the option to do things to facilitate the resolution of a difficulty that has arisen over a land attachment. We have no objection to that, but in cases in which the purchaser agrees to buy before a land attachment is imposed and lodges what is called a caveat to warn people that he is a purchaser under missives, his right should be protected.

I have a few smaller points, but I will not trouble the committee with them at the moment. I have identified the main issue for us.

John Glover (Registers of Scotland): I am grateful that the committee has given Registers of Scotland the opportunity to give evidence. Our interest is rather different from that of other witnesses in that our concern is about our ability to make the process work if the bill is passed and the provisions come into force.

Nicholas Grier explained in his advice that the diligence of adjudication is rarely used. I checked yesterday and found that in the financial year that is about to end only one notice of adjudication has been registered in the register of inhibitions and adjudications and that in the previous year none was registered. It is clear that we do not have an effective diligence against heritage. It is not appropriate for Registers of Scotland to express a view on whether we should have such a procedure, but we have been fully involved with the Executive and the Scottish Law Commission in working up the bill's provisions on land attachment. At a process level, we think that, unlike adjudication, the proposed diligence is workable.

Adrian Stalker (Shelter): I do not think that anyone disagrees that it would be appropriate to replace inhibition and adjudication with land attachment because land attachment is a more effective form of diligence. No one disagrees that what we have at the moment is unsatisfactory because it cannot be used effectively and therefore tends to favour debtors over creditors.

Shelter's concern is that the proposals in the bill represent a lurch from one extreme to the other. We will end up with a system that favours creditors

over debtors and gives creditors an additional weapon that will be powerful and draconian. It seems to me that what crops up in the bill is often the result of the Executive's desire to have a system that is internally consistent and logical and that little regard has been paid to how other social policy issues might be affected by the bill once it is enacted.

Nicholas Grier referred to the fact that charging orders, which are the equivalent diligence in England, have become more popular in recent years. In fact, their use has gone up by 178 per cent in the past five years, according to the figures that are reproduced in annex 2 of Citizens Advice Scotland's submission. Those figures show that 149,000 charging orders have been issued in England over that period. Many of those charging orders will have been imposed at the instance of commercial lenders in England who also operate in Scotland, so if land attachment orders were adopted here, it is not the case that there would be a long bedding-in period or that people would not use the new form of diligence or would not come to rely on it for some time. People will cotton on to, and will start to use, land attachment very quickly. Nicholas Grier implied that the bill will be used by local authorities and tradesmen, but the people who will use it most and who will be the prime beneficiaries of the policy of land attachment will be commercial lenders.

We are concerned about the level at which land attachment can be sought. The Executive seems to think that if the level of debt at which land attachment could be triggered were higher than £1,500, that would not be consistent with the rest of the system and people would seek what are described in the policy memorandum as "inappropriate sequestrations". The Executive does not seem to have had an eye to the fact that the setting of the threshold at that level could lead to inappropriate land attachments or inappropriate evictions, which have significant hidden costs.

16:15

When people get evicted, they apply as homeless to their local authority. That has hidden costs—in terms of the local authority housing and social work budgets and housing benefit—which can run to many thousands of pounds. Those costs vastly outweigh the amount of money that the creditor recovers. In effect, taxpayers are being asked to underwrite this super-efficient form of diligence under which creditors will get back only small sums of money.

The convener alluded to the press attention that the issue has received today. My understanding of what the Executive has said is that it does not need to be concerned because the measures that are in place for the courts to examine the process are robust. However, they are not at all robust. A comparison can be made between the measures in the bill and those that are used for court proceedings in equivalent situations involving repossession of the family home in cases of bankruptcy or of mortgage or rent arrears. As we outlined in our submission, the measures that are proposed in the bill are much more favourable to creditors.

Yvonne Gallacher (Money Advice Scotland): Thank you for hearing our evidence. We share many of the concerns that Citizens Advice Scotland expressed. Way back in 2000, we undertook research that showed that council tax is one of the main contributors to overindebtedness. As we mention in our submission, representatives of the local authority council tax departments were included in our seminar on the bill. They told us that, although land attachment is a useful tool, it would be used as a last resort. As yet, we do not know the degree of confidence that we can place in that.

As other panel members have said, the creditors with whom we deal are UK creditors. We will have to wait and see how they behave. If the experience of our colleagues in England is anything to go by, their behaviour will become much more robust. Following the introduction of the Enterprise Act 2002 and the one-year bankruptcy period, creditors moved to using much more assertive forms of diligence. We will need to keep our eye on that; such behaviour should be kept in check.

The measure has been described as warrant sales by the back door—a point that was also made at our seminar. In fact, the situation that is proposed is much worse than that. The Debtors (Scotland) Act 1987 gave debtors and their families rights in terms of the goods that could be taken. Those rights do not apply to the land attachment proposals; innocent people will be affected. For example, we are concerned that families who are living in rented accommodation could suffer as a result of their landlord's financial problems.

Obviously, we are pleased that money advice is at the heart of the process and that the provision of information booklets and so on is emphasised. In common with Citizens Advice Scotland, we were involved in the debate on the new debt arrangement scheme regulations. One result of that discussion is that mobile homes are exempt under the Debt Arrangement and Attachment (Scotland) Act 2002. Notwithstanding the fact that there are people who will not pay as distinct from those who cannot pay, in common with Citizens Advice Scotland, we want people's main residence to be exempt under these provisions. We have to find legislation that gives people some form of

consumer protection. Our experience is that many people wait too long before they seek advice. For someone to lose their goods is one thing; for them to lose their home is a completely different matter. That is our concern.

Murdo Fraser: I have a couple of questions. Adrian Stalker talked about the need for a change in the law and said that we could end up with a system that favours creditors over debtors. I question whether that is correct. In my days in legal practice, I acted in such cases, usually for the creditor. Everyone thought that inhibition was a useful tool and accepted that adjudication was a complex and involved process; they knew that it took a long time to get back money using the latter route. I think that I instructed only one process of adjudication in my time. The great advantage of inhibition was that people knew that they would eventually get their money and that, under the scheme, interest was still running. I wonder therefore whether there is a need for a new diligence against heritage.

When they lend money, creditors have the choice whether to seek security. If they have chosen not to seek security for the money that they lend, then a system of land attachment gives them a second bite of the cherry. I wonder whether that is correct in terms of equity. I appreciate that no one on the panel is here to represent the creditors, but Mr Hamilton might like to express his professional opinion on that.

Alistair Hamilton: As you know, an inhibition is negative. It stops the debtor selling, but it does not get the creditor the property itself. It takes 10 years to do an adjudication, so it is no wonder that it is not popular. When we were first consulted by the Scottish Law Commission, we congratulated it on discovering the most popular diligence ever, which was land attachment. We are sure that commercial creditors will think that threatening to sell debtors' houses will concentrate their minds. That is exactly what Margaret Burgess and Susan McPhee are talking about.

There are a lot of provisions about what the sheriff has to consider, but none of them asks him to decide whether it is reasonable to grant the power of sale. There is power to refuse to sell a dwelling-house if the diligence would be "harsh". We are waiting for the first cases to decide what the sheriff thinks "harsh" means. He might decide that the diligence is inconvenient or difficult, but not harsh. There is no provision that it must be reasonable to grant the warrant to sell, nor that the creditor must prove to the sheriff that they have attempted other forms of diligence. The Executive says that that will be the last resort, but nothing in the bill says that it has to be. They can go to the sheriff and, if they meet the conditions, they will get the power of sale.

We said to the committee that we did not want to come in on an issue that is mainly social; that is exactly what the Law Commission said when it produced its report. The commission said that it would not draft a section on this because it is for Parliament to decide what is in the interests of the public and to maintain a balance between creditor and debtor. As happened in England, there will be a great rush to lodge land attachments, or to threaten to do that, which will have the same effect. From the commission's point of view, it is logical to say that we should not have an asset that cannot be realised to pay debt. The logical conclusion is that if adjudication is not satisfactory, something should be introduced to take its place. The Executive has introduced that something, but it does not safeguard the rights of the public.

Murdo Fraser: Thank you for that. I invite anyone who wants to come in to do so in a second. My response to what you have said is that I have not detected a queue of creditors complaining about the lack of opportunities to do diligence in other ways; perhaps you have, Mr Hamilton?

Alistair Hamilton: That is correct; there is no such queue. I appreciate that the Law Commission has introduced the idea because it thinks that there is a gap in our law. The commission says that adjudication is no good, but it was only ever used to make up title in difficult cases. A title could be made up by doing adjudication if someone had 10 years to wait for it to be fulfilled. Once people hear how land attachment is going to work, there will be a queue.

Susan McPhee: We have some evidence that English creditors often do not know what rights they have to enforce debts in Scotland. We have had evidence of English creditors threatening clients with a charging order, even though they cannot do that here. So we know that they will try to do it. Debtors should have the right to consider whether they want to take out a secured loan. However, we are concerned that clients will take on credit card debt on which interest rates may be 35 per cent plus. If they had a secured loan, the interest rates would be much lower than that. Creditors are getting the benefits of high interest rates plus access to the debtor's house.

Yvonne Gallacher: From a consumer protection point of view, when someone takes out credit card debt, they know that it is unsecured. There is no wealth or health warning with it and that will never come, until the creditor gets to the point of land attachment. Is there any balance? We talk about transparency, particularly in the light of debates in the Westminster Parliament about the Consumer Credit Bill, which have emphasised the need for transparency, but the system that is proposed in the bill would be quite opaque. People who might

have a relatively small debt to begin with would not be aware of the consequences of their borrowing.

People are increasingly consolidating their debts, so the proposed £1,500 debt level would not be an issue and debts would be ripe for a land attachment if creditors did not enforce the debt in other ways. As Susan McPhee said, we know what English creditors are doing to enforce diligences and we know that English creditors are not aware of the debt arrangement scheme, whereby they could accept proposals for repayment. We have a long way to go to make people much more aware of the peculiar system that we have.

Murdo Fraser: Adrian Stalker said that the measure would be draconian—I share that view. If the main dwelling-house were exempt from land attachment, would the proposed new diligence be acceptable to the witnesses?

Adrian Stalker: Yes.

Margaret Burgess: Yes.

Yvonne Gallacher: Yes.

John Glover: There is a question about who would make the judgment that a property was the main dwelling-house. The sheriff could make that judgment at the sale stage, but the judgment could not be made through an administrative function such as that of the keeper of the registers of Scotland at the registration stage.

Karen Gillon (Clydesdale) (Lab): Forgive me for arriving slightly late and missing part of the discussion.

The proposal is bizarre. If I bought a car with a loan that I paid back at a rate of £300 a month, but then wrote off the car in a crash and injured myself so that I could not work and subsequently ran up a debt of £1,800 because the payment protection insurance did not kick in for the first six months, could my house be subject to a land attachment under the proposed arrangements?

Alistair Hamilton: Yes.

Karen Gillon: That is ridiculous.

Yvonne Gallacher: If the car had been bought through a hire purchase agreement, the creditor would have had the right to repossess the car, after following due process. However, if the car had been bought through a consumer credit agreement and not hire purchase, the situation that you describe could arise.

Margaret Burgess: Under the proposed arrangements, any creditor would have the right to apply—or threaten to apply—for a land attachment if the debtor defaulted on the debt, whatever had been borrowed. That would be a major issue for people who have more than one debt, as our clients do, because all their creditors could apply for a land attachment. A creditor would understand that if they applied first, they would be in a priority position. Any debt could in effect become a secured debt if the creditor applied for a land attachment.

Susan McPhee: In the scenario that Karen Gillon set out, the debt would not need to be as high as £1,800; an attachment could be sought if the debt was £750 or even less. When payments were missed, charges would start to accumulate and interest would be applied and when the debt reached £1,500 the creditor could sell the house, as long as six months had passed.

Karen Gillon: I was just thinking about the missed payments.

People who take on credit should be in a position to repay their debts, but circumstances such as I described can be completely outwith someone's control. A person who could not work and pay off their debt could lose their house.

I assume that the Executive has discussed the proposals with the witnesses. I have received a huge number of e-mails—you can stop sending them, because I have got the point.

The Convener: We all echo that sentiment.

16:30

Karen Gillon: Seriously, guys—we have got the point.

In a world in which the lowest price for a house runs at about £80,000, £1,500 seems an inordinately low amount. Even if it is accepted that the main dwelling-house could be attached, in the grand scheme of things, £1,500 is inordinately low. To go through the selling process would probably cost more than that.

The Convener: There is also stamp duty.

Karen Gillon: I understand and probably agree with your principled position that the main dwelling-house should be exempt, but even so, if the Executive's position is that it would like to have the provision, the amount at which the process can begin seems inordinately low, especially in the current climate of house prices. That was more of a statement than a question.

The Convener: I call Jamie Stone.

Mr Stone: Murdo Fraser asked my question for me.

The Convener: By design?

Murdo Fraser: I am glad to be of service.

Mr Stone: It is worrying when he is clairvoyant, but there we are.

Shiona Baird: I do not know whether the panel can answer my question, which takes more of a business angle. If we keep the land attachment provision but exclude the main dwelling-house, we are still left with the scenario that a business debt could be called in, which would result in land attachment to buildings or residual property that belonged to the business. We still need to consider raising the threshold of £1,500 for such cases, because it is even more inappropriate to business debts. What would be a reasonable minimum level?

Alistair Hamilton: Ten years ago or more, when the Law Society was asked about the matter, we suggested a threshold of £5,000, which would equate to £10,000 now. As you say, if I were a creditor, I would threaten to sell a shop or workshop if the debtor did not pay for the goods that had been supplied. I could proceed with that even if the principal dwelling-house were exempted. People would not be homeless, but the business would go bust, as the committee's adviser said.

I see the logic to having a diligence against land, because a man could have three holiday houses but not pay his debts. A creditor could obtain a land attachment and sell one of those houses to make him pay. However, having a decently high threshold is essential.

I talked about development plans, under which land could be sold for £3 million. If somebody who was owed a debt of £1,500 could come along and ask the sheriff for permission to sell that land at agricultural value, can we imagine what that would do to development, never mind anything else? Such issues are a matter for the Parliament to decide. We have done our bit by drawing them to Parliament's attention.

I would like to mention a couple of small points to which I referred earlier—I will not take long.

The Convener: Before you do that, I will clarify whether Shiona Baird has asked all her questions.

Shiona Baird: I have.

Alistair Hamilton: I repeat that our principal issue with sections 88 and 89 is that they strike a balance not between debtors and creditors but between the creditor who is trying to get his money and the chap who agreed to purchase the land before the creditor came along with his land attachment. We think that the prospective purchaser should have absolute preference. In all other circumstances—for example, if land attachment happens before the purchase—we agree that the sheriff should have discretion to decide what to do. In many cases, it is in the creditors' interests to allow a transaction to proceed, planning permission to be obtained and a huge price to be paid, which would go to them all.

I make a second point that has not been made today. A second and third land attachment can be lodged and, if there is enough money, they will be paid. However, the chap who puts his on first has an absolute advantage over the others and can be defeated only if the debtor is sequestrated. Once again, the bill will produce more sequestrations. Within six months of sequestration, all land attachments are cut down by the sequestration. If someone objects to another chap getting ahead of them—getting in first and getting everything—sequestration is the answer. Once again, a business will be closed down when there is no need for it to be closed down as it has entered into a very effective sale of its assets.

The other thing—I just mention this and leave it to your legal adviser—is that there is a section about pro indiviso owners. I do not want to go into that unless I have to. We are not sure whether a wife who is a pro indiviso proprietor is covered by the protections against sale of a dwelling-house. It is enough that I raise that point. It is in the drafting. The bill does not say whether the wife who is a pro indiviso owner—which is the way many lawyers take titles to houses nowadays—is sufficiently protected.

There is a provision that, if the person who has been appointed to supervise the sale does not report what he has done at the end of it, he should be denied his fees. We actually think that he should be shot, because he destroys the whole transaction. Our answer is to suggest that that should be contempt of court. That is the way that is provided elsewhere for those who do not do what they are supposed to do. Saying that he will not get his fees might not be cheap at the price if he has made off with the price.

The Convener: We will record that the Law Society wants to bring back hanging.

Alistair Hamilton: No—shooting, convener.

I say again that there is nothing in the protection that is offered in the bill that talks about whether what the creditor is asking is reasonable. There are many things that the sheriff can say or insist on, but if the creditor has done all the right things and intimated to all the right people, he will get the power to sell unless it is "harsh", and we do not know what "harsh" means because it does not appear anywhere else.

I make it clear that we cannot think of any other way of protecting the purchaser under missives. The seller will not be prepared to convey the property to him so that he can make up title because he is not going to be paid. He will not agree to convey his property and we cannot think of a system that would enable us to contract our way out of the problem in some way. We think that our suggested amendment is the way out of the problem.

The Convener: Thanks very much. That was very helpful and will add to our report. Does Adrian Stalker want to add anything?

Adrian Stalker: Just to take up the point that was made about the court having to find that it is reasonable to grant a warrant for sale. In the policy memorandum, the Executive refers specifically to there being an apt comparison between this procedure and the procedure under the Mortgage Rights (Scotland) Act 2001. A debtor can ask the court to consider whether they ought to be put out of their house or whether they should get more time to pay. Those situations are analogous. The court has to decide whether a debtor should be put out of his house because he cannot meet his debts to the creditor, and the considerations that are listed in the 2001 act are similar to the considerations that have to be taken into account in the bill. However, there is a big omission in the bill in that, when the sheriff has to decide whether it is reasonable to grant the order, he is limited in what he can take into consideration and is therefore restricted.

We give an example of that in our written submission. If a person was suffering from severe mental health problems and they had medical evidence that losing their home would cause their condition to deteriorate, the court could not take that into account in deciding whether an order should be granted because it is not one of the listed considerations. As we say in our submission, we cannot understand what policy reasons dictate that it should be easier for creditors to force a sale of a family home through a land attachment than through a mortgage repossession or a bankruptcy. Surely common sense dictates that it should be the other way round. It should be more difficult to get someone out of their home if they do not pay their car loan than it is if they do not pay their mortgage. The bill seems to have got things the wrong way round.

The Convener: I think that that concludes our evidence session—

Alistair Hamilton: I realise that I missed one point. Lawyers always want one more chance to speak.

The Convener: Until they have sent out their invoices.

Alistair Hamilton: I thought you might say that.

Karen Gillon: There goes another £50 on the bill.

Alistair Hamilton: I make two further points. First, I do not know how much members of the committee know about planning applications, but most conditional missives stipulate that if planning permission is not granted by the planning authority, an applicant can appeal to the Scottish ministers. I am sure that everyone knows that that can take a couple of years. The proposed six-month period that would have to elapse before a creditor could apply to sell a house would therefore not be nearly enough in the circumstances that I described.

Finally, according to section 88(3)(b), in relation to the protection of prospective purchasers, the sheriff can prevent a sale by the creditor only if

"the debtor undertakes to proceed with the purchase under the contract without undue delay."

The Law Society's view is that the debtor should have no part to play in that context. If the debtor decided not to give that undertaking, the sale by the creditor would have to proceed immediately. As we said in our submission, the provision should be replaced with a statutory obligation on the debtor to proceed without undue delay. None of us fancies asking a debtor whether he wants to give an undertaking to proceed if the debtor has realised that by refusing to do so he would suddenly be in command of the whole operation.

The Convener: Have you made all your points?

Alistair Hamilton: I had better say that I have done so.

The Convener: Thank you. The written and oral evidence was extremely helpful. I see that Susan McPhee wants to say something.

Susan McPhee: I want to make a final point. We talked about raising the proposed £1,500 limit. However, that would not be acceptable to us. Even if the figure were increased to £10,000 or £25,000, the threat of land attachment would remain the most important problem for our clients.

The Convener: We heard that message loud and clear—not least from the e-mails that we received.

The session has been extremely helpful and we appreciate the witnesses' help. We have finished taking evidence on land attachment and at next week's meeting we will consider money attachment. Item 5 is a summary of the evidence that we heard, which should be fairly straightforward.

Nicholas Grier: I will try to draw together the threads of the discussion. We can boil the discussion down to simple matters that the committee must decide. Do we need the form of diligence that we have been discussing? Would it provide anything significant that we do not already have? If that form of diligence is to be introduced, should the dwelling-house be excluded? Members will recall that the Debt Arrangement and Attachment (Scotland) Act 2002 provides for different types of attachment order according to the degree of pressure that the creditor can apply.

Notwithstanding Susan McPhee's final comment, if land attachment is to be introduced, a level of debt—not necessarily £1,500—would have to be fixed.

A matter that should be considered, although it did not emerge in the discussion, is whether land attachment should be used only as a last resort when all other diligences have been exercised, given that many members of the committee regard the measure as draconian.

Much would depend on the sheriff, who would be in the invidious position of defining those difficult words, "harsh" and "reasonable", which are slippery at the best of times. Such matters must be considered much more deeply as we proceed. I am sure that members have similar views on the matter—at least I hope that you do.

The Convener: Do members want to add anything?

Members: No.

The Convener: We should move into private session to take item 6, but we cannot do justice to the draft report in the time that is available. Do members agree to postpone the item until next week's meeting? If we do so, we will all have more time to read the paper.

Members *indicated agreement*.

Meeting closed at 16:44.

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