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Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 8 September 2015

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE

24th Meeting 2015, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

Richard Baker (North East Scotland) (Lab)
*John Scott (Ayr) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jill Clark (Scottish Government)
Angela Constance (Cabinet Secretary for Education and Lifelong Learning)
Caroline Drummond (Scottish Law Commission)
Charles Garland (Scottish Law Commission)
Kevin Gibson (Scottish Government)
Nigel Graham (Scottish Government)
Gerry Hart (Disclosure Scotland)
Ailsa Heine (Scottish Government)
James Kelly (Rutherglen) (Lab) (Committee Substitute)
Kathryn MacGregor (Scottish Government)
Ros Wood (Scottish Government)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 8 September 2015

[The Convener opened the meeting at 10:14]

Decision on Taking Business in Private

The Convener (Nigel Don): Good morning and welcome to the 24th meeting in 2015 of the Delegated Powers and Law Reform Committee. As always, I ask members to switch off their mobile phones. I inform the committee that Richard Baker has rejoined the committee in place of Margaret McCulloch. However, he has sent his apologies for being unable to attend this meeting, so I welcome James Kelly in his capacity as substitute.

Agenda item 1 is a decision on taking business in private. Do members agree to take in private items 8 and 9 to allow us to consider the evidence that we will receive on the draft Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 and the Succession (Scotland) Bill, to which we are just about to turn?

Members *indicated agreement.*

Succession (Scotland) Bill: Stage 1

10:14

The Convener: Agenda item 2 is two oral evidence-taking sessions on the Succession (Scotland) Bill, first, with the Scottish Government and, secondly, with the Scottish Law Commission.

I welcome from the Scottish Government Jill Clark, team leader, and Frances MacQueen, policy officer, civil law reform unit; and Kathryn MacGregor and Ros Wood, both of whom are solicitors in the constitutional and civil law division. We have a few questions for you, and I ask John Mason to begin the questioning.

John Mason (Glasgow Shettleston) (SNP): Good morning and welcome to the committee. Given that two pieces of legislation on succession are around at the moment, are you comfortable that there will be no confusion among practitioners and members of the public? Do you think that we will need to consolidate the law at some stage?

Jill Clark (Scottish Government): I will set out the background on why we have taken the approach of having two separate workstreams.

As I explained when I met the committee previously, the Scottish Law Commission's 2009 report on succession is very large and substantive, and we knew from early consultation that some of its recommendations, particularly on disinheritance, would attract polarised views. We knew that we would have to do a lot more work, including further consultation, on those recommendations.

In comparison, many other aspects of the report were uncontentious, and we considered that they were worthy of progression at an early opportunity. That is why we have introduced the Succession (Scotland) Bill but are continuing to consult on provisions for another bill. Progressing the recommendations in this way makes the work more manageable and ensures that the provisions in the present bill are not unduly delayed.

There is the potential for confusion, which is why we were keen from the outset to signal what we were doing. In the consultation on this bill, we set out that we would be taking forward a second workstream, and we have done the same thing in the consultation on the second bill. On the timing, we were anxious to ensure that, while the present bill was being considered by the Parliament, the consultation on the second bill was in the public domain so that the demarcation between the two, and how they fitted together, became clear.

Whether we should have a consolidation bill is an issue for further down the line and will be a matter for the next Scottish Government. At that point, it will be necessary to consider the succession law landscape and whether consolidation is necessary; it would be premature to do so at this time.

John Mason: That is fair enough.

The Law Society of Scotland's view is that it should be possible to amend the bill, once enacted, only by primary legislation. Do you have a view on that?

Jill Clark: We think that there are good reasons why we should not be able to amend it only by primary legislation. My colleague Ros Wood will respond more fully on that point.

Ros Wood (Scottish Government): We do not agree that amendment should be possible only by primary legislation. The powers to modify contained in section 25 are in keeping with the powers that are normally considered appropriate for legislation in case there is a need for fine tuning to ensure the workability of an act. It would be unfortunate if an element of fine tuning to ensure workability could not be taken forward because primary legislation was required.

There are appropriate constraints on the power to amend the act by subordinate legislation. It can be used only to give full effect to the act; if more substantive changes were in prospect, they would have to be made by primary legislation.

The Law Society's concern was that practitioners might not pick up on changes that are introduced through subordinate legislation. It is, however, part of practitioners' professional responsibilities to advise on the most up-to-date version of the law as a matter of course. Also, the Scottish Government is likely to publicise any use of the amending power that is particularly relevant for practitioners.

John Mason: So is your key argument that there is no reason to make an exception for this bill?

Ros Wood: Yes, that is correct.

John Mason: That is fair enough.

A question has been raised in relation to the dates on which the provisions become applicable and whether the bill will have any retrospective effect. Is that an issue?

Jill Clark: We will deal with the application of the provisions by way of a commencement order, and generally there is no intention to make any of the provisions retrospective. Again, Ros Wood will go into more detail.

Ros Wood: The Scottish Law Commission recommended that the provisions should apply in relation to death occurring on or after commencement, and that sections 6, 7, 8, 19 and 20 should apply to documents executed on or after commencement. The Scottish Government is content with the commission's proposed application, except in respect of section 5.

Under the current law, a will that is revoked by a subsequent will will revive if the subsequent will itself is revoked. Section 5 reverses that position so that an earlier will no longer revives. The Scottish Law Commission recommended that section 5 should apply in relation to all deaths occurring after commencement, irrespective of when the revocation takes place.

However, the Scottish Government takes the view that section 5 should apply only in respect of wills that are revoked after commencement to ensure that, where a person revoked their will on the basis that their old will would revive, the old will would not be invalidated under the bill. A person who revokes their will after the provisions in the bill come into force will do so on the understanding that their old will will not apply unless they re-execute it. That is the only change in application that the Scottish Government recommends.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): We will come later to the general subject of simultaneous death or uncertainty of order of death, but I wonder what would happen where one party to that simultaneity or uncertainty has a document that was written before the passage of the bill, which would therefore not be captured under the new law, while the other party has a document that was written afterwards. Would any difficulties arise in such circumstances? I cannot imagine what those difficulties would be, but I would like to hear your answer.

Ros Wood: On the basis that they are both treated as having failed to survive, each person's will would have no effect on the other person, so that question would not arise—it would be headed off at the pass, if you like. The nature of the provision means that, when two people both die the same time, it is as if each had never made any will in respect of the other.

Stewart Stevenson: Right. That is helpful—thank you.

John Mason: I accept that the witnesses have already made the point that practitioners and other stakeholders should be up to speed with what is going on in the Delegated Powers and Law Reform Committee and in Parliament, but I wonder about members of the public, who perhaps do not follow the proceedings of this committee

with avid attention. Assuming that the bill is passed, are there plans to communicate the changes and get them out into the wider public domain?

Jill Clark: As you say, we are quite comfortable that the legal profession is engaging in the process through consultation and with the DPLR Committee as the bill progresses, and it will therefore be kept up to speed.

There is an issue with regard to the public, but it is worth putting the situation in context. Many of the circumstances that are outlined in the bill will occur infrequently, and in some cases only very rarely, and the number of members of the public that they will affect will be small. That is not a reason not to disseminate information, of course. Several situations—concerning forfeiture or rectifying a will, for example—would involve a court process, so the legal profession, which would have that knowledge, would inevitably be involved.

We have a very useful and well-used publication that we supply free to hospitals, hospices, citizens advice bureaux and the public, entitled, "What to do after a death in Scotland: practical advice for times of bereavement", which outlines the main legal provisions. At present, there is not much in it regarding the provisions, but we will see whether we can add something to it that would at the very least signpost some of the changes. We also have a website with information on succession that we will update. We are trying to think of providing information in an accessible and easy-to-understand way—as opposed to what is in the bill itself, perhaps.

John Mason: It has been argued that the bill brings the law more into line with what the public might naturally have expected, so in fact you might need to explain the new situation less than the present one.

Jill Clark: Yes. Ignorance is a wonderful thing, you might think, and perhaps we should leave that undisturbed. However, we need to ensure that people are clear where there needs to be clarity.

In the future, if we end up changing the fundamentals of succession, there may be a much bigger public dissemination and the matter can be highlighted again at that point.

The Convener: Thank you. We move on now with John Scott on the effects of divorce.

John Scott (Ayr) (Con): Good morning. I want to ask about the policy rationale for including guardianship in the scope of section 1 and whether the panel agrees with the Law Society that there are potential drawbacks to that approach.

Ros Wood: Section 1 gives effect to recommendation 52 in the Scottish Law Commission's report. Under section 1, if a testator's marriage is terminated, testamentary provision in favour of the former spouse is effectively revoked; that includes any appointment.

As John Scott said, one of the Law Society's concerns was that guardianship that was conferred on an ex-spouse would fall. We considered with policy colleagues whether there should be an exception. However, on the basis that a guardian can also be appointed by the courts, there would be nothing to prevent the ex-spouse from going to court and asking to be appointed afresh.

In addition, and probably more importantly, the testator can make provision in their will to override the presumption that guardianship will fall. Where the testator does not make that provision, we think that it has to be assumed that the testator did not intend that the former spouse should be appointed. That was the policy rationale.

John Scott: There is an implication by omission.

Ros Wood: Yes.

John Scott: How long would the process take if someone had to go through the courts for guardianship?

Ros Wood: I do not know. I propose that I write to the committee when I have found out exactly how long it would take.

Kathryn MacGregor (Scottish Government): The provision will apply only where one of the parents has accepted a child or children as part of the family and does not have parental rights and responsibilities over them. We do not imagine that it would be common for an ex-spouse not to have parental rights and responsibilities over the children that are within the family. However, as has been noted, such a situation could arise.

The Convener: I observe on behalf of the committee that the fact that something is not very common does not mean that we do not need to get the law right. It does not matter if there is only one case. Even if we are not sure that the issue will arise, we still need to make sure that the law says what we think it should say.

Kathryn MacGregor: I refer back to Ros Wood's comments. The policy in respect of the provision is that it should be the testator's intentions that are given effect.

John Scott: Thank you.

I now refer to TrustBar's evidence to the committee relating to section 1(1)(d) where marriage or civil partnership ends. Do you think that there is merit in TrustBar's suggestion that

section 1 should operate at the point when the marriage or civil partnership ends instead of at the point when the testator dies?

Ros Wood: The Scottish Law Commission recommended in recommendation 48 in its report that section 1 of the bill should apply only where the deceased is domiciled in Scotland. Section 1(1)(d) gives effect to that. The Scottish Government does not agree that the testator requires to have been domiciled in Scotland at the time of the divorce, dissolution or annulment in order for that provision to apply.

10:30

We agree with the Scottish Law Commission's recommendation that, in order to provide an appropriate link to Scotland, the rule in section 1 should apply when the testator dies in Scotland regardless of where the termination took place; requiring the testator to be domiciled in Scotland at the date of termination rather than at the date of death would produce anomalous results. For example, if a person of Scottish domicile whose estate fell to be distributed according to Scots law got divorced in France for some reason, Scots law would not apply, and we think that that would be an undesirable result. Ultimately, the view is that the Scots law of succession should apply to those who die in Scotland.

John Scott: Okay. You are aware of the concerns.

The Convener: That takes us to page 6 of our question paper.

John Scott: Is there merit in TrustBar's view that the protection in section 2(4) for people who acquire property in good faith is unnecessary because property that is subject to a special destination passes automatically without any need for an executor?

Ros Wood: TrustBar has submitted that a third-party purchaser could never purchase property in good faith because they would always be aware of the special destination in the property title, but we submit that that section is not really designed to deal with that situation.

There are situations in which a third party could purchase property in good faith—for instance, in the case of an unworthy spouse. It is foreseeable that title could pass to a former spouse, perhaps from an executor, without knowledge that the couple had been divorced or that the marriage had been annulled. The unworthy spouse could then pass the property on to a third person and, under the law of unjustified enrichment, the unworthy spouse would have to return that property, or the value thereof, to the estate.

Section 2(4) protects the third party by saying that their title will be protected and they will not have to give the property back. That replicates the provisions in section 19(3) of the Family Law (Scotland) Act 2006 and section 124A(3) of the Civil Partnership Act 2004, which also currently afford that protection. The bill combines those in a way that makes the provisions easily accessible in one section.

John Scott: Okay. Thank you.

Stewart Stevenson: Let us be absolutely clear: is that an unqualified protection for the third-party purchaser or acquirer? I ask that because I have a devious mind. There could be an arrangement between the—to use your phrase—"unworthy spouse" and a third party to minimise the benefit that the unworthy spouse would acquire, knowing that there might subsequently be doubt about the whole transaction to the unworthy spouse in an attempt to protect the asset. That third party might be somebody with whom the unworthy spouse now had a relationship. I am sure that there could be lots of other examples. Is an unqualified right being created or is it a qualified right? Would such examples be caught by other legal provisions?

Ros Wood: That is a foreseeable situation. The right is a qualified right. It would depend on the third party acting in good faith.

Stewart Stevenson: So the test is whether the third party is acting in good faith.

Ros Wood: Yes.

Stewart Stevenson: That is helpful. Thank you.

The Convener: Sections 3 and 4 are on rectification of a will. I note what is in the bill, but I also note that the Law Society of Scotland and TrustBar commented that there might be other ways of doing this. They suggested at least that they could see alternatives and are, maybe, not terribly happy with what is proposed. First, given that level of discussion, is it appropriate that what has been proposed is in a bill that is in front of this committee? Are we dealing with a bill that is sufficiently non-contentious?

Jill Clark: Yes—I think that the bill is sufficiently non-contentious. Many of TrustBar's comments are on the detail; they do not suggest that the provisions would have a different legal effect, but are about how the aims would be achieved. We have only very recently—yesterday—written to both TrustBar and the Law Society about the detail of their submissions to the committee in order to outline our position on some of their comments and to seek clarification on others. We hope to have a dialogue with them, as things progress. I do not think that their comments take the provisions out of the realm of what is suitable for the committee to consider.

The Convener: I am grateful to you for that advice.

I note that Michael Kusznir and—I think—TrustBar commented on the date of the application for rectification. The particular suggestion that I want to pick up on is related to the fact that confirmation can sometimes take a very long time. Might the timetable for rectification be set at the date of death rather than the date of confirmation? Otherwise, things could run on for an almost open-ended period.

Jill Clark: That is one of the points that we have included in our letter to TrustBar, because we—like TrustBar—are of the view that, whatever happens, the process should not be unduly delayed and should be as quick as possible. TrustBar has suggested a period of two years, but we are not sure that that would meet the criterion of being within reasonable time limits. That is something that maybe needs to be worked out and considered. As I said, we have picked up that issue with TrustBar.

The Convener: So, as you have flagged up the issue, we can expect you to come back on that at some stage.

Jill Clark: Absolutely.

The Convener: That is fine. Thank you.

I turn to the effect of revocation on a will and the possibility that the second or subsequent will might be struck down, for example because of incapacity. There is the possibility that it might have been the testator's wish that the earlier will would have been revived, because it might be the only extant testament that makes any sense. Has anybody considered whether there should be an exception or whether the decision should at least be within the court's discretion?

Ros Wood: Yes. Section 5 would apply only when a will revokes another will; it would not apply when a court reduces a will. If a will revokes an earlier will and that will is itself reduced by the court, there is nothing to revoke the earlier will, so the earlier will would remain as it is and section 5 would not apply; the bill will not affect such situations.

The Convener: Are we sure that that is what we want to happen? I am sorry, because that sounds like a policy statement—I am questioning whether that is what we want the policy to say.

Jill Clark: I think that, in the circumstances, that sounds right.

The Convener: I do as well, but I am conscious that we might need to think about that exceptional and rather rare circumstance.

Ros Wood: If a person revokes their will, they do so knowing that they will revive or not revive, whereas if a court reduces a will, the testator may already have died and a court would not want to revert to a position of intestacy, so I think that there is a policy justification for not revoking the old will.

Stewart Stevenson: Forgive a layperson's question, but I want to be clear that I understand what reducing a will means. In effect, it means taking bits of the will out so that they do not have effect. Is there a difference when the reduction in the will takes us to a position of nullity of the will, or is it all the same?

Ros Wood: What generally happens is that an application is made to the Court of Session. Usually, when the court reduces the will, the whole will will fail. However, there is case law in which part of a will was deemed to have been reduced but the rest has subsisted. I cannot remember the case's name off the top of my head, but I can write to the committee with it.

In answer to your question, the whole will would generally fall.

Stewart Stevenson: In essence, there is, in fact, no distinction between a partial reduction and a total reduction.

Ros Wood: Generally speaking, the whole will will be reduced.

Stewart Stevenson: Forgive me, but "Generally speaking" sounds like weasel words. You are saying that there is a little bit of uncertainty and that it would be up to the courts to determine the matter.

Ros Wood: Yes—it would be up to the Court of Session.

Stewart Stevenson: At the end of the day, that is not an unreasonable position.

I do not think that you need to give us the legal reference that you mentioned.

The Convener: Any reduction in work is welcome at this stage.

James Kelly has questions on legacies.

James Kelly (Rutherglen) (Lab): TrustBar and the Law Society made specific comments about sections 6 and 24. TrustBar had concerns about the position in section 6(2) in relation to a testator deciding that they do not want section 6 to generally apply to them, and about how that interacts with the other provisions in section 6. What do you make of those comments?

Jill Clark: Is the question about how section 6 interacts with somebody who wants to renounce their legal rights?

James Kelly: Yes.

Ros Wood: Section 6 would not apply in that situation, because it deals with the legacy, not legal rights. Section 6 places on a statutory footing a conditio that, where an individual dies between the legacy being granted and that legacy vesting, their issue can step into their shoes and take their share of the legacy. That would not apply to legal rights. The equivalent provision would be section 11 of the Succession (Scotland) Act 1964, which says that issue can step into the shoes of an individual, where they are not able to take their legal rights through predecease.

James Kelly: So, with regard to section 6(2), the testator has to be absolutely clear that they do not want section 6 to apply.

Ros Wood: Section 6 would not apply in respect of legal rights. In terms of the legacy, the testator could make provision in the will that overrides the statutory presumption in section 6. In the common law previously, that would not have been allowed, and the issue would have been presumed to be favoured over whomever the testator had made an alternative. Now, the situation will be that when alternative provision is made in the will, that will override the statutory presumption. Is that clear?

James Kelly: Yes.

On section 6(6), the Law Society felt that the definition of "issue" should be made clearer to ensure that how it relates to adopted children and stepchildren is clear. You said that you have had some interaction with the Law Society and TrustBar. Is that something that you have discussed with them and taken on board?

10:45

Jill Clark: We do not think that much needs to be done because the term "issue" means direct descendants of every degree, whether that is a child or a grandchild, and it covers descendants by adoption by virtue of section 23 of the Succession (Scotland) Act 1964. The definition of "issue" already includes adopted children and excludes stepchildren. That was the view of the Scottish Law Commission and that is our view, so the answer is there already. Whether it needs to be made clearer is something that we will certainly reflect on, but that is the position. Issue would include adopted children but would exclude stepchildren.

James Kelly: Right—so that is your policy position, which is at odds with the Law Society of Scotland.

Jill Clark: That is what the law provides. The question is whether it is necessary to make that clearer.

James Kelly: Thank you.

The Convener: Stewart Stevenson has questions about survivorship.

Stewart Stevenson: Some questions have been raised about simultaneity of decease and the use of the word "uncertain". I suppose that the first question is how we decide that we are uncertain and how that works in practice. TrustBar criticises the use of the word "uncertain". I can posit for myself that one can be certain that one is uncertain in some circumstances, but in other circumstances one could remain uncertain as to whether one is uncertain.

Ros Wood: The order of death is uncertain if it is not possible to prove a particular order on a balance of probabilities. That was discussed in the case of Lamb v Lord Advocate, so that is the standard. It is the balance of probabilities.

Stewart Stevenson: I am content with that answer. Who determines the balance of probabilities? Is it the trustees or is it the courts?

Ros Wood: It would be the trustees in the first instance, but if the beneficiaries were unhappy, the case would go to the court.

The Convener: Forgive me, but I have to observe that that is one of the most worrying things about the whole subject—not just about the bill, in particular. Every single one of us in this room could find ourselves being the executor of a will, and we are ordinary folk, as are most executors who find themselves in the position of being a trustee. Of course, we would have to take legal advice, but if we are not sure what "uncertain" means, how on earth is an ordinary trustee supposed to make that judgment? How can an ordinary person who suddenly finds themselves having to do that—they certainly do not choose the timing of it—make a judgment that they might then have to defend in court against litigious potential beneficiaries? The practicalities of getting the appropriate legal advice that a lay trustee would need in order to get a defensible position worry me enormously. What is your response to that?

Jill Clark: That is something that we will need to reflect on. You are right: we assume that people in the legal profession are aware of certain terms, but your point is well made, so we shall reflect on that and write to the committee.

The Convener: That would be helpful.

Earlier, we were talking about lawyers understanding the bill, which is fair enough. I have a great respect for lawyers. However, if there is one thing that we all need to do as adults, it is write a will. That is a pretty basic message, so the bill affects every single adult member of our society. Ensuring that people understand what they should do is a pretty important part of

governmental action, because it is difficult to see who else's responsibility it might be.

Stewart Stevenson: You are perfectly correct, convener. In 1912, at the age of three, my mother was the executor for her grandfather, according to his will. Her father undertook the role, but I have to wonder why her grandfather named her. Let us move on, however, to a more fundamental matter before we leave the subject of survivorship and uncertainty.

There is potentially a need to address the issue of cases, where there is deemed to be simultaneity or uncertainty, in which the estate falls to the Crown. Is that a satisfactory position to be in, rather than the estate passing to other relatives?

Jill Clark: That is the point that TrustBar made, and it is one that we are going to reflect on. I take the point that we are talking about very small numbers—probably tiny numbers—but nevertheless we need to think it through. We have decided that we should reflect on that point, because the position that you describe is probably not the best outcome.

Stewart Stevenson: In particular, if the will refers to other relatives or other people, it would seem perverse that the law should deprive them of their right to inherit simply because of uncertainty about whether there is simultaneity or because there is unresolvable uncertainty about the order of death. Speaking as an individual, I would encourage you to think carefully about that. We—or I, anyway—will come back to that point if I do not like what I hear subsequently.

The Convener: In considering that point, you might like to reflect on whether there are circumstances in which such decisions should be down to the discretion of a court. I recognise that generally that is what we are trying not to have, because then there could be a large number—up to the total population number—of cases in court. However, in the situation, for example, of an entire branch of a family dying in a car crash—which will be rare—perhaps it should be open for a court to decide what is reasonable, instead of looking at testamentary documents that would bear little resemblance to what anybody thought should happen in those circumstances.

Ros Wood: To clarify one thing that Stewart Stevenson mentioned earlier, if there was provision in the will, that would take effect. It is where there is no provision in the will—

Stewart Stevenson: It is where we have run out of implementable provisions.

Ros Wood: Yes.

Stewart Stevenson: That is helpful.

Ros Wood: Also, as you say, convener, the court would be another option.

The Convener: It would plainly not be the preferred option most of the time, or everybody would finish up in court, which is exactly what we want to avoid. I will leave you to reflect on those exceptional cases.

That takes us to forfeiture.

Stewart Stevenson: I would like to know why we are abolishing the Parricide Act 1594 at this stage rather than simply leaving its provisions.

Jill Clark: Back in 1990, in the report that was the precursor to its 2009 report, the Scottish Law Commission recommended that the common law of forfeiture should be put on a statutory footing and that at the same time the Parricide Act 1594 should be abolished. By the time of the 2009 report, the SLC had shifted its position and considered that it was not necessary to abolish the common law of forfeiture, because it was used very rarely and it worked very well when it had to. However, the SLC still recommended that the 1594 act be abolished. Therefore there is no recommendation in the bill to put the common law of forfeiture on a statutory footing, which I think the respondent thought should happen in order for the 1594 act to be abolished. We are content that the common law of forfeiture works fine and that the 1594 act is unnecessary because the common law covers what was previously in the 1594 act.

Stewart Stevenson: The working of the law subsequent to the passage of the bill that is before us would be that the legal fiction is created that the person who benefits has, in succession law terms, died before the person who provides the benefit.

Jill Clark: Yes, that is the change that the bill would introduce.

Stewart Stevenson: It is an interesting legal concept—that one is simultaneously alive and dead. As I said last week, Edgar Schrödinger would be interested, if he were still alive.

The Convener: Perhaps he is.

Stewart Stevenson: I do not think that he is; he has indeed passed on.

The other issue that has been raised is why you think that it is appropriate, in policy terms, for the court to be able to grant an unlawful killer 100 per cent relief from the effect of forfeiture. I have in mind the example of people who assist people to travel to the Dignitas clinic in Switzerland, which might be an unlawful act but is what the person who eventually dies wants to happen. I can see that, subject to the courts looking at it, there might be circumstances where 100 per cent relief might be appropriate. Is that the sort of thing that the Government had in mind when contemplating

having 100 per cent relief, or were other circumstances considered?

Jill Clark: The granting of relief is discretionary. In a way, the court is hampered at the moment. There was a case in 1987 involving a petitioner called Cross in which the judge felt that they could grant 100 per cent relief on the heritable property but only 99 per cent relief on the moveable property. That is an artificial divide. If we are giving discretion to the courts, they should be able to exercise their discretion right to the limit.

The sort of circumstances in which courts have granted relief but not total relief, as they felt that they could not do that, include, for example, when a suicide pact went wrong; and when someone who had been abused in an abusive relationship accidentally killed the abuser in self-defence. That sort of circumstance might chime with Mr Stevenson's example. The bill's intention is to open up the full percentage to the court so that it does not have the artificial line that I described.

John Mason: Section 18 refers to "Estate administration" and "errors in distribution" with regard to the protection of trustees and executors in certain circumstances. I seek clarification about the duty to make reasonable inquiries about the existence of potential beneficiaries. Do we expect that duty to be interpreted as being a duty to advertise? The bill does not specifically mention a duty to advertise, but it might be assumed that such a duty would almost automatically become the case. If it was the case, would that delay the whole process of administering estates?

Ros Wood: The term "reasonable inquiries" is a commonly understood one, which would not involve advertising. If there was a duty to advertise, it would be set out in the legislation. What constitutes reasonable inquiries is commonly understood, but if there was any dispute about its meaning, it would fall to the court to consider in a particular case whether somebody had acted reasonably within their professional responsibilities.

John Mason: If it is going to fall to the courts, will people play safe and just tend to advertise more often than we would expect them to need to?

Ros Wood: I do not think so, because the term "reasonable inquiries" is a commonly understood one. Advertising about whether someone was adopted, for example, would probably not receive many answers, but making reasonable inquiries about it would involve speaking with family members and checking what the family relationships were. I do not think that advertisement would be particularly helpful in such circumstances.

Kathryn MacGregor: The Scottish Law Commission considered in 1990 whether there should be a specific duty to advertise as part of making reasonable inquiries and determined that there should not be a specific duty, because it could give undue weight to that form of reasonable inquiry and people might think that they would require only to advertise rather than make further reasonable inquiries. The commission also stated that it felt that "reasonable inquiries" was a commonly understood term, as my colleague said, and that therefore there was no merit in defining it further. In fact, I think that the commission felt that defining "reasonable inquiries" further in legislation could hamper it, which is why we have not defined the term.

11:00

Stewart Stevenson: In this narrow and specific context, it would be interesting to know what it is thought might constitute reasonable inquiries. I give two suggestions as to what it might be—the employment of private inquiry agents to track down missing people and the employment of professional genealogists to find unknown parts of a family. Is that the sort of thing that reasonable inquiries might be thought to include?

Ros Wood: Again, it would probably depend on the circumstances of the case. It is high-level work to compile the sort of reports that you mentioned. However, if a member of the family said to the executor, "We think that there is an adoptive sister," it would be for them to make more extensive inquiries than they might usually make. It would be context specific and it would depend on the circumstances of the case.

Stewart Stevenson: I suggest that families do not know of relatives more often than you might imagine. In the past two years, our family discovered a cousin that we had absolutely no knowledge of, who was born in 1943 and is still living.

The Convener: I entirely accept that such things happen, but can I move us on? I wonder whether John Scott has another question.

John Scott: I do. I take you to section 22 and private international law. In the generality, is it desirable that reforms to this complex subject will be split between two separate succession bills? Is that reasonable?

Jill Clark: Yes, to the extent that the recommendations will apply, as far as they can, to the bill and any future legislation. There is no tension in that. They just apply to the extent that they do—no more and no less.

John Scott: Okay. Recommendation 50 appears not to be completely implemented in the bill. Can you explain that, please?

Ros Wood: I mirror what my colleague Jill Clark said. It is implemented in so far as it relates to the bill provisions. Where, perhaps, a provision requires a testator to be domiciled in Scotland, we only need to note the grounds of jurisdiction where a person is domiciled in Scotland. It applies in so far as it relates.

John Scott: Thank you.

The Convener: James Kelly has the last question on the proposals.

James Kelly: The Law Society of Scotland made the point in its submission that two issues were consulted on but not included in the bill: bonds of caution and the effect of the birth of a child. Will you explain your rationale for not including those?

Jill Clark: Yes. Actually, four or five things that we consulted on have not appeared in the bill: bonds of caution, the conditio about the child, temporary aliment, aliment jure representationis and recommendation 46, which was about jointly held foreign moveable property. None of those features in the bill because we got a mixed reaction on them.

There was a lot of support for abolishing bonds of caution, which were the subject of the main question, but there was a lot of uncertainty about what safeguards we needed instead. In general, people were against the conditio proposal—there was a majority against that—and it was similar with the two alimentary provisions, which were grouped with mournings. The mournings proposal is the only one that we progressed into the bill.

We are consulting again on all those things. They are being consulted on now in the second consultation. Some of them have moved on a bit because we have been able to take an initial view. We are just looking at what safeguards we need for bonds of caution, for example, as opposed to the principle. Recommendation 46, on joint foreign moveable property, does not feature in the second consultation, but we will keep it in mind as that progresses.

In general, the reason is that there was mixed support and there were mixed views, so we decided that the provisions needed another examination.

James Kelly: Thank you.

The Convener: That is, of course, entirely consistent with the committee's remit and the legislation that should be in front of us, slightly strange though that might seem from the outside.

That brings us to the end of our prepared questions and the end of this session. Thank you very much. I will suspend the meeting for a couple of minutes, not least in order to allow the witnesses to change over.

11:05

Meeting suspended.

11:09

On resuming—

The Convener: I welcome our witnesses from the Scottish Law Commission. We have Caroline Drummond, who is the commissioner for the bill, and Charles Garland, who is the project manager for the bill. Welcome back, Mr Garland. I think that this is Caroline Drummond's first formal appearance before the committee.

Caroline Drummond (Scottish Law Commission): It is.

The Convener: It is good to see you.

Our questions will roughly follow those that we just asked the Scottish Government. They will therefore be led by John Mason.

John Mason: My first question is about the fact that two succession bills are around. Is that causing or could it cause confusion for practitioners or for those who are less involved in the area?

Caroline Drummond: As our initial report on the matter was produced in 1990, we are absolutely delighted to see any bill taking it forward. As far as we are concerned, it would be good if the bills were consolidated and brought together so that there is one place not just for practitioners to see clearly but for the public to consult. That is our preferred option. However, it is understood that the Government has to look at that once the current consultation is finished.

John Mason: You are happy that the Government has gone with two bills rather than waiting and dealing with it all later.

Caroline Drummond: Yes. We are happy that the current bill is going ahead, because we think that it is non-controversial.

John Mason: The Law Society feels that, if we were to amend the act once the current bill is passed, that should be done by further primary legislation rather than by regulations. Do you have a view on how that should happen?

Caroline Drummond: The legislative timetable is busy and it is difficult to get primary legislation through. We have heard the Government's explanation on amendments. It has said that there are appropriate constraints, so we are happy with that.

John Mason: Section 25's scope seems quite wide, but you are satisfied with it.

Caroline Drummond: Yes.

John Mason: My next question is on retrospection. People are concerned that parts of the bill could be commenced that would affect people who have already died or put their will in place. Are you comfortable with the way in which the Government has dealt with that?

Caroline Drummond: Yes. In our view, it is always better if we can tell from a bill when it will come into effect. However, the Government policy is to have a commencement order and to deal with the issue in that way. As we will have a chance to look at that in advance, we are happy with the position.

The Convener: On retrospection, are you comfortable that all the provisions have been translated in the best way? There are some things on which we want to change the general law of the land and to affect every will that is thereafter brought into effect but, on other matters, we would not want somebody who has drawn up a will to have to change it because the law has been changed under their feet. Is the balance right?

Caroline Drummond: We think that it is.

John Scott: What is the policy rationale for including guardianship in the scope of section 1? What is your position on that and what are the drawbacks of that approach?

Caroline Drummond: The SLC included guardianship in its 1990 report and again in its 2009 report. The issue has been considered in detail on two occasions, so we are happy with that and we are happy with the bill as it stands. As the Scottish Government said, it would be quite unusual for a spouse without parental responsibilities to be appointed as a guardian. We are happy with the approach.

11:15

John Scott: You are happy, so you do not think that the Law Society has a point in thinking that there are drawbacks.

Caroline Drummond: No—if the spouse has parental responsibilities, I do not think that there is an issue, so I was quite surprised by the Law Society's point. However, I was heartened to hear that the Government is in discussion with it to get to the bottom of that point.

John Scott: Is there merit in TrustBar's suggestion that section 1 should operate when the marriage or civil partnership ends and not when the testator dies? We have had a pretty full explanation on that from the Scottish Government, but I am interested in your views.

Caroline Drummond: We do not agree with the TrustBar proposal, which would introduce concerns. There would be multilayering of where a person was when they married; they could get married again and then die. We are looking at the law of succession and we feel that we need to look at the situation when someone dies.

John Scott: Is there merit in TrustBar's view that the protection for people who acquire property in good faith, which section 2(4) covers, is unnecessary, because property that is subject to a special destination passes automatically without any need for an executor? That point has also been discussed already.

Caroline Drummond: There is merit in having all the provisions that relate to succession in one place for people to look at, so we do not think that the protection is unnecessary. We are happy with it and happy that it relates both to heritage and moveable property.

The Convener: I move on to the power of rectification. The Scottish Government made it clear that it feels that the comments about rectification from the Law Society and TrustBar do not concern the general principle, so the provisions are not sufficiently contentious to be put in another bill. I would be interested in your comments on that, if you have any.

A further point is whether the time limits to apply for rectification should come from the point of confirmation or the point of death. The fair comment was made that confirmation can take a long time, so the period could become open ended.

Caroline Drummond: I understand that section 3(2) gives the court the ability to extend the time limits.

The Convener: Would you be happy with a relatively short time limit that was subject to the court's discretion, as many things are?

Caroline Drummond: Yes.

The Convener: That seems to be a fair way forward.

James Kelly: My question pertains to section 6, which deals with death before legacy vests. There were a couple of comments on that from TrustBar and the Law Society. TrustBar was getting at the provision in section 6(2), which allows section 6 generally not to apply to a testator. Will that result in any confusion and does anything need clarification there?

To be clear, I note that section 6(2) gives the testator the right for the provisions in section 6 not to apply to them. TrustBar has concerns about whether that is clear enough and whether it would override other comments.

Caroline Drummond: I do not share TrustBar's concern in that respect. We are perfectly happy with the drafting as it stands.

Do you have anything to say about section 6(2), Charles?

Charles Garland (Scottish Law Commission): The issue is covered in the Scottish Government's letter to TrustBar. TrustBar's members have details and practical experience, and any examples that they can point to of typical ways in which wills might be drafted that might give rise to concern will need to be taken into account. The concern seems to be about the definition of a residue clause, but it is only right that TrustBar is given a chance to explain the possible doubt.

James Kelly: The Law Society has made a point about the definition of "issue" in section 6(6). As the Scottish Government told us in the previous evidence session, the Law Society is concerned about the impact of that definition on adopted children and stepchildren and believes that those people are not included. The Scottish Government has explained that the policy approach that it wants to take is for the provision to apply to adopted children but not stepchildren. Do you have any comments on that?

Caroline Drummond: No. We are perfectly happy with that approach and with the Government's explanation.

Charles Garland: The approach seems right, given that adopted children lose the right on adoption to claim any rights against their natural parents. The same is not true for stepchildren, and including them in the provision would in effect give them two bites of the cherry.

Stewart Stevenson: In response to the question about simultaneity of death or uncertainty about the sequence of death, the Government said that the matter would be determined on the balance of probabilities, which is a standard thing to say. Is the Scottish Law Commission content that trustees and executors will be able to operate on that basis, particularly if they do not have legal advice, without getting into any difficulties?

Caroline Drummond: We are perfectly happy with that. We do not share TrustBar's concern about the law being uncertain on uncertainty. It seemed clear to us what the word "uncertain" meant in the case that it quoted, and certainly the word "uncertain" has been in the Scottish Law Commission's reports throughout.

As for what happens in practice, it will be useful to discuss with practitioners their experience, because I suspect that there is generally accepted practice. However, we have no difficulty and are perfectly happy with the word "uncertain".

Stewart Stevenson: So the use of the word "uncertain" in this context is not in any way novel in relation to previous uses of the word in Scots law.

Caroline Drummond: No.

Stewart Stevenson: That is sufficient.

The Convener: I will take the opportunity to raise an issue that I raised with the Scottish Government, which is that most executors of wills are laypeople—sometimes with a very small "l". To what extent did the Scottish Law Commission consult laypeople who have experience of doing this—those who have no experience would have nothing much to say—to ensure that the law that we are promoting can be effectively worked by those who will come to it suddenly, unwillingly and without any legal background?

Caroline Drummond: As I understand it, our original consultation, which culminated in the 1990 report, involved members of the public. We also have handwritten submissions from that time in our old files.

Charles Garland: Indeed. There was also consultation in 2007, although most of the topics that were consulted on then are not in the bill. Nevertheless, members of the public have had an opportunity to respond, and some of them—particularly those who have found themselves in a situation in which they felt that the law treated them unfairly—have made strong representations.

The Convener: Are you in a position—clearly you cannot do this now—to help the Government to produce the guidance that will surely be necessary, once we have got both bills through the process and possibly once the law has been consolidated, to ensure that the man or woman in the street can read up on this without having to talk to a lawyer about how to be an executor? Our job as MSPs is to ensure that lawyers deal with what they have to deal with and not with what they do not have to deal with, which tends to be expensive. That is how we protect our constituents.

Caroline Drummond: Indeed. The Government's guidance notes are very good, but we would be absolutely delighted to help with that.

Charles Garland: I hope that this will not sound like too much of a plug, but I point out that in Scots law executors are generally and for almost all purposes treated as trustees. The law of trusts is complicated in its own right and is antique in a way that makes succession law look relatively modern. Our report on trust law was published last year and I hope that it will come to Parliament before too long, so that the law that applies generally to trustees but also to executors is reformed. There would be a number of clear benefits in doing that,

one of which is that the law on trustees and therefore executors would be brought together and expressed in modern language.

The Convener: That heartfelt plea has not fallen entirely on deaf ears. Let us hope that the Government is listening.

Stewart Stevenson: In its evidence about the situation when a family perish together and the destination of assets is, broadly speaking, the Crown, the Government indicated that it is going back and thinking further on the matter. What might the Scottish Law Commission, if asked, advise the Government on that subject?

Caroline Drummond: Our two reports—the original 1990 report in particular—make excellent reading on that. I do not think that we have anything more to add.

Stewart Stevenson: In essence, the advice is that we should read your previous reports.

Caroline Drummond: Again.

Stewart Stevenson: Right—I am perfectly content with that.

To move on to parricide and forfeiture, the key point is probably the provision for 100 per cent relief. Does the Scottish Law Commission have any issues with the existence of 100 per cent relief or any belief that the courts will have difficulties in dealing with it?

Caroline Drummond: No—we are content with the provision. We believe, as the Government does, that it seems artificial that a court can award only 99 per cent relief. Our view is that, if a court has discretion, it should have full discretion.

Stewart Stevenson: On the subject of artificiality, the legal mechanism for depriving a beneficiary of the fruits of their illegal act is to legally decide that, for that purpose, the beneficiary was dead before the person was killed. It sounds very odd that a person will die twice in law. Is there not a better legal mechanism by which that result can be achieved? I understand the practical effects, but it must sound to the layperson a distinctly odd approach to take, given the common understanding of the term "death".

Caroline Drummond: It is death only for a particular narrow purpose. Such a provision appears not only in section 12 but in sections 1 and 2, and it is, for the purpose that you describe, a useful assumption.

Stewart Stevenson: I understand that. I am saying only that to be both dead and undead simultaneously sounds a little odd. While atomic physicists would be perfectly content to deal with such an example of Schrödinger's cat, the legal profession in all its manifestations might think of more useful terminology—in the future, perhaps, as we are clear where we are on it at present.

Caroline Drummond: I think that the legal profession would struggle to do so. There have been attempts in the past to avoid using the terminology, and they have all failed.

The Convener: On the basis that the situation does not occur very often, I suggest that we move on, although we need—as I have said—to ensure that the law is right even for such rare events.

John Mason will take us on to protection for trustees, which I am sure is a common concern.

John Mason: I think so. Section 18 refers to protection of trustees and executors in certain circumstances in which there have been errors in distribution. It states that there will be no blame if the trustees have acted

"in good faith and after such enquiries as any reasonable and prudent trustee would have made in the circumstances of the case".

How will that approach work in practice? If it becomes the norm, will there be advertising? My fear is that advertising would delay procedures in concluding an estate.

Charles Garland: The measure in the bill is the same as the existing law, so we hope that there is an established body of practice. The fact that the provision consolidates the existing law may be less significant than the fact that there are differences in the ways in which people's relationships may be established or in which people may be traced.

Putting an advert in a newspaper might once have been a reasonable precaution that would attract immunity from liability, but it is possible that more may now need to be done to track people down through the use of electronic means or electronic advertisements. We hope that the existing practice would simply carry on, but it would need to be adapted to what is considered reasonable in view of the kinds of tracing that can now be done. It is now much more simple than it once was for somebody to take those measures in hand themselves.

11:30

John Mason: That is a reasonable answer. I accept that established law is in place and that the issue does not seem to have been a problem up to now. You have pointed out that the means of communication are changing; it seems to me that relationships, too, are changing and that the traditional family unit is perhaps less common. I have to say that the position seems vague to me but, if you are satisfied with it, that is fair enough. The fear is that, as a result, we will end up with delays in concluding matters.

Charles Garland: We do not think that this will give rise to additional delays.

Stewart Stevenson: You will forgive me but, as someone who has been involved in genealogy for more than 50 years, I can tell you that having information online merely makes it easier to confuse things. The records that one looks at are all informed by what people believe to be correct rather than by objective fact. Off the record, I could give you lots of examples in which what is on a birth, death or marriage certificate is not correct, although it was given in good faith.

The Convener: Would you like to take us forward, John?

John Scott: With regard to section 22, is it desirable for reform of the complex subject of private international law to be split over the two succession bills? Are you content with that approach?

Caroline Drummond: Yes. The approach will apply only in so far as it relates to this bill and the one that is to follow.

John Scott: That is all I wanted to hear.

The Convener: James, I think that you are the tail gunner again.

James Kelly: I have a quick question to finish off with, convener. In the previous evidence session, the Scottish Government witnesses indicated that five proposals were consulted on but not taken forward in the bill and outlined some of the reasoning behind that. Are you content with that approach?

Caroline Drummond: Yes. Although it would be great if all our recommendations were enacted, we appreciate that the proposals in question were contentious. The Government is reconsulting on them, which is great news.

The Convener: That brings us to the end of our questions. Thank you very much for your succinct and lucid answers.

I suspend the meeting to allow the witnesses to depart.

11:34

Meeting suspended.

11:36

On resuming—

Instruments subject to Negative Procedure

Reservoirs (Scotland) Amendment Regulations 2015 (SSI 2015/315)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No 3) (Miscellaneous) 2015 (SSI 2015/283)

11:36

The Convener: This instrument contains a minor drafting error. In form 70, which is inserted by schedule 1, provision on the signing of the form has been omitted. The Lord President's private office has acknowledged this omission and has undertaken to lay an amendment to correct it in due course.

Does the committee agree to draw the instrument to the attention of the Parliament on the general reporting ground, as it contains a minor drafting error?

Members *indicated agreement.*

Reservoirs (Scotland) Act 2011 (Commencement No 4) Order 2015 (SSI 2015/314)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Higher Education Governance (Scotland) Bill: Stage 1

11:37

The Convener: The purpose of this item is for the committee to consider the delegated powers provisions in the Higher Education Governance (Scotland) Bill at stage 1 and to agree the questions that it wishes to raise with the Scottish Government on those powers in written correspondence. We will have an opportunity to consider the Government's response at a future meeting in order to inform a draft report.

Section 1 provides that the chairing member of the governing body of a higher education institution—HEI—is to be appointed in accordance with a process set out in regulations made by the Scottish ministers. The appointment of chairing members is a key policy in the bill and is understood to be a matter of considerable controversy among HEI stakeholders.

Does the committee therefore agree to ask the Scottish Government: to explain why it is considered appropriate for the basic framework for the appointment of chairing members to be postponed to secondary legislation; and to consider whether the basic framework for the appointment of chairing members could be set out on the face of the bill and therefore be made subject to full parliamentary consultation and debate, with the detail of the process to be set out in regulations?

Members *indicated agreement.*

The Convener: Section 2 provides that the Scottish ministers may by regulations make provision for remuneration and allowances to be payable by an HEI to the chairing member of the governing body of the institution. The principle of remuneration for chairing members is a new concept for HEIs and has met with some opposition among stakeholders.

Does the committee therefore agree to ask the Scottish Government: to explain why it is considered appropriate for the principle and basic framework of remuneration for chairing members to be postponed to secondary legislation; and to consider whether the principle and basic framework of remuneration for chairing members could be set out on the face of the bill and therefore be made subject to full parliamentary consultation and debate, with the detail to be set out in regulations?

Members *indicated agreement.*

The Convener: Section 8 gives a power to the Scottish ministers to modify section 4 of the bill,

which sets out the requirements for the composition of the governing body of an HEI. The proposed requirements as to the composition of governing bodies as set out in the bill have met with opposition among HEIs.

Does the committee therefore agree to ask the Scottish Government to consider whether a requirement could be included on the face of the bill for the Scottish ministers to consult affected HEIs before making regulations under section 8 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the bill?

Members *indicated agreement.*

The Convener: Section 13 gives a power to the Scottish ministers to modify sections 9 and 10 of the bill, which set out the requirements for the size and composition of the academic board of an HEI. The proposed requirements as to the size and composition of the academic board of an HEI as set out in the bill have met with opposition among HEIs.

Does the committee therefore agree to ask the Scottish Government to consider whether a requirement could be included on the face of the bill for the Scottish ministers to consult affected HEIs before making regulations under section 13 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the bill?

Members *indicated agreement.*

The Convener: Section 15(1) sets out the definition of an HEI for the purposes of part 1 of the bill. HEI has the same meaning as in the Further and Higher Education (Scotland) Act 2005: a university or an institution providing higher education designated by the secretary of state. However, a university or designated institution falls within the definition only if it is also listed in schedule 2—"Fundable bodies"—to that act. That schedule lists the bodies that may receive funding from the Scottish Further and Higher Education Funding Council. The Open University is specifically excluded from the definition.

Section 15(2) provides that the Scottish ministers may by regulations modify the definition set out in section 15(1) so as to include or exclude a particular institution. Given that the definition of "higher education institution" determines which institutions are subject to the Government's requirements as set out in the bill, changes to the definition to include or exclude a particular institution could have a sizeable impact on the institution.

Does the committee therefore agree to ask the Scottish Government for clarification as to why a power to include a higher education institution in the definition is required, since it appears that the definition in the bill will already catch all universities and designated institutions, other than the Open University, that may receive funding from the Scottish Further and Higher Education Funding Council by virtue of being included in schedule 2 to the Further and Higher Education (Scotland) Act 2005?

Does the committee also agree to ask the Scottish Government: for examples of when a power to include a higher education institution in the definition might be used; why the negative procedure is considered appropriate in this case, given the potential impact on a higher education institution of a modification of the definition so as to include it; and to consider whether a requirement could be included on the face of the bill for ministers to consult affected HEIs before making any regulations under section 15, again given the potential impact on affected institutions, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the bill?

Members *indicated agreement.*

Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill: Stage 1

11:42

The Convener: This item of business is for the committee to consider the Scottish Government's response to its stage 1 report. Do members have any comments—or are we content to note the response and, if necessary, reconsider the bill after stage 2?

Members *indicated agreement.*

The Convener: That ends agenda item 6. Again, I suspend the meeting; we will resume with item 7 relatively soon.

11:42

Meeting suspended.

11:49

On resuming—

Instruments subject to Affirmative Procedure

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 [Draft]

The Convener: I reconvene the meeting and we move on to agenda item 7. Members have before them the draft order and a draft of the associated Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015. The draft order was laid yesterday and was provided to members along with the draft of the remedial order shortly after it was laid. We have before us the Cabinet Secretary for Education and Lifelong Learning to enable us to scrutinise the draft order.

The proposed approach to the draft order, which we expect Parliament will be invited to agree this afternoon, does not allow for any detailed scrutiny of it. In the limited time that is available to the committee, we will do the best that we can to scrutinise it, but as we received it only yesterday afternoon and we have only this morning in which to consider it, it is clear that there are limits on the level of things that we can do.

The approach to the consideration of the draft order is, of course, a most unusual one, and we do not expect it to happen again very soon. Although we will do what we can in the time that is available to us to scrutinise the draft order, the committee recognises that we will have an opportunity to reflect further on it in scrutinising the remedial order, and we envisage taking that opportunity.

I welcome the Cabinet Secretary for Education and Lifelong Learning, Angela Constance. With her from the Scottish Government are Nigel Graham, who is a policy adviser in the criminal law and sentencing branch; Kevin Gibson, who is a solicitor in the criminal justice, police and fire division; and Ailsa Heine, who is a solicitor in the food, children, education, health and social care division. That sounds like a pretty wide remit to me. I also welcome Gerry Hart, who is head of protection services at Disclosure Scotland.

I understand that the cabinet secretary has a statement. I always wish such statements to be short, of course, but under the circumstances, I understand that it might not be. I invite the cabinet secretary to introduce the subject to us, please.

The Cabinet Secretary for Education and Lifelong Learning (Angela Constance): Thank you, convener. I will do my best to be brief.

Good morning, colleagues. Thank you for the invitation to attend the meeting to answer your questions about the draft affirmative order—the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015—which we propose will form part of the amendments to the system of higher-level disclosures in Scotland. Before I briefly explain some of the background, I put on the record my thanks to Parliament, including a number of parliamentary officials and the business managers, who have been very accommodating as we have dealt with the unusual parliamentary scrutiny process for the draft affirmative order.

Let me explain the background. "Higher-level disclosure" is the phrase that is used to describe the overall system that allows for additional scrutiny of a person's criminal convictions. Among other purposes, it is used where someone wants to work with vulnerable groups, such as in a nursery, as a medical professional or in a school, or where someone wants to work in a sensitive area, such as in offering financial advice. Those are just some of the areas in which higher-level disclosure is used.

The system operates, first, through the responsibilities of individuals to disclose conviction information, and secondly through Disclosure Scotland being able to issue certificates that contain conviction information that is held on central police records. Under that system of additional scrutiny, the information that must be disclosed by the individual and Disclosure Scotland includes convictions that have become spent under the Rehabilitation of Offenders Act 1974. That information would not ordinarily be disclosable to an employer, but it is disclosable under higher-level disclosures.

The operation of the two areas of disclosure can be seen as mutually reinforcing, with information that is given by the individual in, for example, completing a job application form able to be checked by an employer against the information that is contained in a higher-level disclosure, such as a standard or enhanced disclosure certificate or a protecting vulnerable groups—or PVG—disclosure that is issued by Disclosure Scotland.

It is helpful to place the higher-level disclosure system in context. For less sensitive roles—for example, supermarket checkout staff—Parliament has decided that a different level of scrutiny is merited, with people being required only to self-disclose any recent or serious convictions. Once a conviction has become spent under the terms of the Rehabilitation of Offenders Act 1974, it will not be disclosed in relation to less sensitive roles. The proposed changes affect only the higher-level disclosure regime, with no impact on disclosure relating to less sensitive roles.

Case law through various court judgments has found that the point at which someone's conviction becomes spent is the point at which the information becomes part of the person's private life. The system of higher-level disclosure, therefore, which requires disclosure even of spent convictions, requires the disclosure of private information about an individual.

In June 2014, the United Kingdom Supreme Court found that the system of higher-level disclosure as it operated in England and Wales breached a person's article 8 rights under the European convention on human rights. Although the court fully accepted the need for additional scrutiny of a person's background if they want to work with vulnerable groups or in a sensitive role, it indicated that the automatic indiscriminate requirement for disclosure of all spent convictions was not proportionate as no assessment was undertaken of the relevance of the information to the need for the disclosure.

The court suggested that a proportionate system of disclosure required the necessity for the disclosure to be assessed with reference to its purpose, and that assessment could include, among other matters, looking at factors such as the age of the conviction, the nature of the offence and the age of the offender. An amended system of higher-level disclosure that takes account of those factors will be partly delivered by the affirmative order, which amends the requirements for self-disclosure by individuals of their spent convictions.

As members will be aware, the reforms to the system of disclosures issued by Disclosure Scotland will be delivered in a forthcoming remedial order under the Convention Rights (Compliance) (Scotland) Act 2001, and that remedial order will be subject to separate consultation and parliamentary scrutiny in accordance with the procedure set out in that act. The amended system will restrict the requirement for disclosure so that not all spent convictions will require to be routinely disclosed. Moreover, certain spent convictions will become protected convictions, which will not be disclosed. Other spent convictions will still require to be disclosed because they will still be relevant for the purposes of the disclosure.

The Scottish Government is focused on ensuring that our system for checking the background of people who want to work with vulnerable groups or in other sensitive roles continues to protect the public. However, we must balance that public interest with the rights of individuals to have their private life respected, and we consider that the legislative package achieves that necessary balance.

Once again, I put on the record our thanks for the Parliament's assistance and guidance in taking forward the draft affirmative order and, in due course, the remedial order. I am aware that you are likely to have questions about the legal and procedural issues surrounding the orders, and we are happy to answer any questions that you have.

The Convener: Thank you, cabinet secretary. I think that your opening remarks probably answered my first question, which was about the problem that you are seeking to solve.

It is probably helpful if I say on the record and to my colleagues that we do not normally consider the policy behind the instruments that come before us—that is for the relevant policy committees. However, it is not just because, on this occasion, there is no policy committee, but because the entire purpose of the instruments is to satisfy the European convention on human rights that I suggest that everything that we would want to ask about falls within this committee's remit. This has to be made to work, which means that every policy consideration is relevant to us.

On that basis, I hand over to John Mason.

12:00

John Mason: Good morning, cabinet secretary. Can you explain the timing of the amendment order? I think you said that the UK Supreme Court ruling came out in June 2014. Why have you chosen to introduce the order in September 2015?

Angela Constance: It is a fair question. It is important to stress that, although the UK Supreme Court's remit goes across the UK, its judgment related to a situation that had arisen in England and Wales in relation to the indiscriminate disclosure of cautions. In Scotland, we have alternatives to prosecution and not cautions, so there was no direct, easy read-over between the judgment and the law in Scotland. Furthermore, the judgment did not make any comment about Scots law. Therefore, we wanted to take the appropriate time to understand the UK Supreme Court's judgment and to look at other case law in England, Wales and Northern Ireland.

I stress that, irrespective of how long our considerations took in getting to this point, because of the unique nature of what we are dealing with and trying to do, we are seeking Parliament's co-operation in pursuing matters through this unusual scrutiny and expedited process. If we refine the higher-level disclosures system, we will have to cease the operation of Disclosure Scotland. It provides 1,000 higher-level disclosures a day, so we will need to minimise the disruption that will be caused by ceasing its activities.

The matter is urgent, but we wanted to have full deliberations to ensure that we understood the case law and the UK Supreme Court's judgment in order to make all necessary adjustments to our policy and practice.

John Mason: I totally agree that we should think things through and not be precipitate in our action. However, have there not been 15 months during which issues about people's private lives may have been disclosed in contravention to the court ruling?

Angela Constance: As I said, it is entirely appropriate for the Government to look closely at the UK Supreme Court judgment. There was not a direct read-over into Scots law. It is complex to change the higher-level disclosure system, and it must be done very carefully.

Gerry, would you like to add anything from a Disclosure Scotland perspective?

Gerry Hart (Disclosure Scotland): The issue that was raised about the time that it has taken to understand comprehensively the implications of the UKSC judgment for Scots law is important. Because the Scottish Parliament is not competent to act outside the ECHR, we could not simply look at the disclosure aspect of the judgment; rather, we had to look at and review the policy across the Protection of Vulnerable Groups (Scotland) Act 2007, the Police Act 1997 and the ROA act to identify potential areas for incompatibility right through the depth of the legislation, and that took time.

It also took time to devise and implement an operational solution in Disclosure Scotland that was capable of applying the amended regime and generating disclosures safely for the public so that the right information is disclosed to employers and other interested parties, as well as balancing fairness and making sure that the disclosures are accurate for individuals who request them. That took a number of months and it involved some quite complicated work at Disclosure Scotland. All of that added up to the period that was taken.

John Mason: Do you know when England and Wales changed their system?

Gerry Hart: They changed their system prior to the UK Supreme Court judgment. However, there has been case law since then, particularly in Northern Ireland recently, which suggests that there may be question marks over whether the English and Welsh system is as compliant with ECHR as we would certainly want the Scottish system to be. Therefore, we have had to take cognisance of the developing case law and ensure that the Scottish system was fully compliant.

The Convener: Stewart Stevenson has a further question.

Stewart Stevenson: It is on a technical point. Will the cabinet secretary repeat her statement about higher-level disclosures and give the per annum figure?

Angela Constance: Yes. Do you mean in terms of the daily figure?

Stewart Stevenson: Yes. I heard you say something that took me by surprise and I want to be clear what the number is.

Angela Constance: For every day that Disclosure Scotland is not issuing higher-level disclosures, 1,000 disclosures are not being issued. The parliamentary process means that Disclosure Scotland will not be issuing higher-level disclosures for three days, so that is 3,000. You will appreciate why we have pursued a more expedited parliamentary scrutiny process for what are—I hope the committee agrees—good and practical reasons.

Stewart Stevenson: Thank you. The number was higher than I expected, and I wanted to hear it again.

The Convener: Indeed. The number seems surprisingly high, but if that is the case, so be it. John, do you want to pursue that?

John Scott: Yes—I want to develop that question. Are there any other reasons for making the process such a swift one? There have been 15 months for consideration and two days for scrutiny. I appreciate the figure of 3,000 disclosures, or 1,000 a day, but are there any other reasons why this has to be done swiftly, or is that the sole reason?

Angela Constance: It is important that we have public confidence in our disclosure system, and that is why it ceases to operate while we move to a more refined system of higher-level disclosures. While we are making changes, it would not be appropriate to issue disclosures on the basis of the system before it was amended or refined.

The committee might be interested to know that Disclosure Scotland handles 1.2 million disclosures a year. I note the committee's questioning on the 15-month lead-up to this point, but it might interest members to know that the UK Supreme Court expressed in its decision some surprise that legislation for England and Wales had been made in advance of the court's decision.

Given the complexities, the fact that the case in question did not have a direct read-over into Scots law and the fact that the judgment by the UK Supreme Court did not make any recommendations or comment on Scots law, we had to undertake a complex piece of work and a period of investigation to review our current system, as I and my officials have outlined. As a result of that review, we are now coming to the Parliament with proposed changes.

Although the affirmative order is going through a three-day process, as I intimated in my statement, there are two mutually reinforcing aspects of the disclosure system—the responsibilities of the individual, which is what the affirmative order is about, and the compliance order, which will be laid on Thursday, and which relates to the responsibilities of Disclosure Scotland. In essence, the responsibilities of the state and the responsibilities of the individual have to be complementary and married up in terms of the disclosure system.

The proposed new system cannot come into place until both the affirmative order that we are discussing today and the compliance order come into force, and they have to come into force on the same day.

The point that I am getting to—I apologise for the length of my answer, convener—is that, once the compliance order is laid, there will be a scrutiny period of 120 days. There will be a period for written considerations and the opportunity for the relevant policy committees to write reports, and then a statement will have to be laid in Parliament. If changes are deemed necessary after that point, they can be made. We would then have to amend the affirmative order. There is a process of scrutiny.

James Kelly: How will the figure that the cabinet secretary quoted and also outlined in correspondence, of 1,000 higher-level disclosures a day, be affected by the changes that are being proposed? Has any assessment been made of the number of disclosures that can be expected with the new proposals that are before us?

Angela Constance: We do not expect the number of disclosures to change. The proposals are about moving to a system in which the decision-making process about what should be disclosed to an employer is more proportionate and reflects the learning that has taken place following the UK Supreme Court judgment.

Stewart Stevenson: I note what the cabinet secretary said about the decision-making process. It appears that, depending on the circumstances of the request for a higher-level disclosure, there will now need to be some assessment of what is put in it, particularly in relation to schedule B1 to the order. We will come to that in more detail later.

My question is very simple, but it is important to get this on the record. How well prepared is Disclosure Scotland for what, at least at this stage of the committee's questioning, appears to be a more complex environment that may increase its workload? Has the preparation for those changes

been part of what has justified the amount of time that it has taken to get to this point?

Angela Constance: That is a pragmatic point. The system as it stands is that all spent convictions are disclosed under higher-level disclosures; there is a simplicity to that. We are moving to a system in which some very minor issues will not be disclosed. There will always be some spent convictions that will be disclosed and there is a list of offences that may—

Stewart Stevenson: Forgive me, cabinet secretary. We will come to that data a bit later. I would like to hear that Disclosure Scotland is prepared for the additional complexity in its decision making.

Angela Constance: Yes. Just now there is a standard—a target, if you like—for 90 per cent of correctly completed disclosure applications to be completed within 14 days. We are confident that, given this amended or more refined system, that standard can still be met.

The Convener: Thank you. We will come back to that, if we may. Now we have Mr Kelly with a question on alternatives.

James Kelly: I will come to my substantive point in a minute, but I want to return to the answer that the cabinet secretary gave previously regarding the 1,000 higher-level disclosures a day. She said that that figure would not change. I understand that there is a balance to be struck between complying with the ECHR and ensuring the protection of the rights of the organisations to which Disclosure Scotland has to provide the disclosures. However, if the effect will be that a number of spent convictions that are currently disclosed will not in future be disclosed, how can the cabinet secretary be confident that there will still be the same number of disclosures?

Angela Constance: As I intimated, the issue is the decisions in and around what is disclosed to an employer. People will still have to make their applications. Gerry Hart will say a bit more about the Disclosure Scotland process.

12:15

Gerry Hart: The number of disclosures is driven by the activity in the marketplace for new workers coming into regulated work or changing jobs; there is a frictional movement. That drives the number of applications that Disclosure Scotland receives for disclosure. Currently, and for the past couple of years, we have been doing a thing called retrospection, which is bringing on the existing regulated workforce into the PVG scheme in large numbers. That period will come to an end very shortly.

That is the main drumbeat that is driving the number of applications. A distinct point concerns what is actually in the disclosure, which is what is being affected. The incidence of disclosure should not be affected. After the change is made, employers might expect to see less information disclosed in relation to minor, aged and irrelevant convictions than would have been the case under the previous regime.

A balance must be struck—we have tried to do this in policy—between providing information that an employer really must see under the safeguarding imperative, which continues to drive the ethos of the disclosure regime, and taking into account an individual's rights concerning their past conduct where it is no longer relevant to the kind of work that they are seeking to do.

The Convener: We will come to that point in a minute—probably in some detail, because it is obviously relevant—so I wonder whether I can persuade James Kelly to leave it for the moment.

James Kelly: Sure—I will come back to some of those points.

It has been 15 months since the Supreme Court ruling. What was your logic in not going down the route of primary legislation?

Angela Constance: I ask Ailsa Heine, as the lawyer, to answer that.

Ailsa Heine (Scottish Government): One of the main reasons for not opting for primary legislation was that the provisions in relation to the Rehabilitation of Offenders Act 1974 and the amendments to the 2013 order could not have been addressed in a bill because of the powers that we have under the 1974 act.

There is a Scotland Act 1998 order that gives us powers to make provision in the 2013 exclusions and exceptions order in relation to reserved areas, and that is the only way in which we can make those changes. It would not have been possible for us to do so in a bill, because it would have been outside our competence.

Although it would perhaps have been possible to address in a bill the provisions that are in the remedial order, there would still have been a requirement for two pieces of legislation that would have to operate and come into force in tandem. Given the powers that exist in the Convention Rights (Compliance) (Scotland) Act 2001, it was felt that that would be the appropriate way of making changes in relation to the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007.

James Kelly: I understand your point about process, but primary legislation would have given Parliament much more time to scrutinise what is

clearly a significant piece of work. Was that taken into account?

Ailsa Heine: It was taken into account. In considering a bill, we felt that it would have required a fairly expedited process because of the requirement to maintain public confidence in the system of disclosure as the changes were being made. We considered that, with a remedial order, the changes could be made and there would then be certainty as to what the law required. There is still a period of public consultation afterwards, after which we can reflect and consider whether any changes need to be made to the remedial order.

John Scott: The approach that has been adopted will mean that the processes for higher-level disclosures will change as soon as the order and the remedial order are made. Presumably, cases that are as yet unprocessed and require a disclosure will be dealt with under the new scheme. Can you confirm that that will be the case?

Angela Constance: Yes. Disclosure Scotland will cease operation of higher-level disclosures for three working days. The 3,000 applications that have not been processed will be processed under the new scheme. There are arrangements in place for Disclosure Scotland to work outwith its normal working hours to ensure that our standard of having 90 per cent of correctly completed applications dealt with within 14 days is met.

John Scott: Forgive me for asking, but is it just 3,000 applications? For three working days we envisage that there will be a blank space. Are there other applications in the pipeline that will add to the 3,000 figure?

Gerry Hart: I checked this morning and the numbers that await processing are well within the parameters that we set out, so the backlog will not be bigger than we said it is. We will process it efficiently and as quickly as we can do. We have resources lined up, in place and ready to go when the law changes.

The Convener: Before we move on to questions on the substance of your proposals, may I go back to the process of disclosure and the unit's operation? As the cabinet secretary indicated, what is in which category and must or must not be disclosed has in essence been quite clear up to now, but once the orders that we are considering go through, there will still be outliers and there will be a group in the middle for which some kind of judgment will require to be made. You said that Disclosure Scotland provides 1,000 higher-level disclosures a day, and it is clear that 1,000 cases cannot come to the head of the unit every day for a discretionary view—that will manifestly not happen. I presume that somewhere there is a flowchart or paradigm that sets out the basis on which you will operate, in the hope that only a very small number will need managerial discretion. Will you share such a document with the Parliament?

Angela Constance: I would not describe the system as involving "managerial discretion". We are seeking the Parliament's approval to agree a set of rules under which higher-level disclosures will operate, and when the compliance order has been laid there will be a 120-day period in which people can express their opinions on the rules that the Scottish Government has proposed.

I highlight that the police currently have the power to disclose information that they regard as relevant and pertinent, even if it has not led to a conviction, and that that power will remain unchanged. We are revising a system of rules in relation to disclosures, and that is what requires parliamentary scrutiny and approval.

John Mason: Further to the convener's question, am I correct in thinking that relevance to employment will become more of an issue than it has been? I would have thought that in that regard there will be some kind of managerial input. For example, in the financial area, there will be decisions about whether something is relevant to the role of finance director, mid-tier accountant or cashier. Will not more judgment be required in that context?

The Convener: I probably used the wrong word when I said "managerial". "Administrative" is the legal term; I think that in essence we are dealing with administrative law. Nonetheless, surely somebody in Disclosure Scotland will have to make an administrative decision about the relevance of something.

Angela Constance: Operational processes and administrative decisions are based on the rules as laid down by the Parliament. Under certain circumstances, individuals can of course challenge the application of the rules via the sheriff court, but we are talking about a regulated process.

On Mr Mason's question about types of job, the Parliament already recognises that different jobs require specific levels of disclosure. For example doctors, teachers, social workers and nurses require to be part of the PVG scheme; prison officers, people who work in young offenders institutions and members of prison visiting committees are subject to an enhanced disclosure scheme; and people in financial services are subject to a standard disclosure scheme. That part of the system already exists.

John Mason: So it is not becoming more complex.

Angela Constance: It is becoming more complex, which is why we are coming to the

Parliament with a series of rules. I do not know when you want to explore this further, convener. There will be a list of offences that will always be disclosed and there will be a list of offences—

John Mason: I am about to ask you about that.

Angela Constance: —that will be disclosed depending on the age at the time the conviction was received and how long ago the conviction was. Obviously the nature of the offence is also reflected, in that there are two separate lists. There are a small number of very minor offences that would not be disclosed but are always protected, such as littering, motoring offences related to the lights on your car or drunkenness; when those are spent, they would not be disclosed. There are two substantive lists: offences that are always disclosed; and those that may be disclosed, depending on the age of the offender at the time, how long ago the conviction was received and what the offence was.

The Convener: You have just taken us to that part of the agenda, and John Mason will take the questioning forward.

John Mason: This is the real question: the last one was supplementary.

Would you give us some background as to the consideration that was given to the choice of offences? We have schedule A1 of offences that must always be disclosed and schedule B1 of offences to be disclosed subject to the rules. Would you give us the reasoning for what is in each group?

Angela Constance: As the committee will appreciate, this is a complex area to which we had to give great thought.

A murder conviction is never spent and must always be disclosed. Offences that will be in schedule 8(a) of the remedial order and offences that are in schedule A1 of the affirmative order are offences such as assault to severe injury, assault with intent to rape or ravage, culpable homicide, extortion and rape.

In the other list, there are offences such as breach of the peace and culpable and reckless conduct. Depending on the age of the offender at the time of the offence and how long ago the conviction was received, those offences may not require to be disclosed. If someone at the age of 19 was convicted of a breach of the peace and 15 years had elapsed since the time of that conviction, that spent conviction would not have to be disclosed. If the person was under the age of 18, seven and a half years would have to elapse before that spent conviction would not have to be disclosed.

John Mason: We are clear that offences such as murder and rape are obviously serious, and that some of the others mentioned, such as breach of the peace, might not be so much. It is the dividing line that is tricky. I see that one of the offences that must be disclosed is uttering threats and one of the offences that may not have to be disclosed is perjury. For a lot of people, perjury is a pretty serious offence. How did you distinguish between offences?

Angela Constance: Obviously, we have looked at a wide range and multiple sources of information. You will see that we have been busy since the UK Supreme Court judgement. We have looked at the classification of crimes and offences, at every type of offence recorded in the children's hearings system and the police national computer, at the disclosure and barring service, and at AccessNI, Northern Ireland's filtering system.

We are looking at offences that have resulted in serious harm to a person or a significant breach of trust and responsibility; that have demonstrated exploitative or coercive behaviour or dishonesty against an individual; and in which people have abused a position of trust or displayed a degree of recklessness. That is why we have two lists of things that either will be disclosed or may be disclosed. Our thinking is informed by those factors, all of which are potentially of relevance to the offences on both lists.

12:30

Ultimately, there are 120 days of post-compliance order scrutiny, and stakeholders and parliamentarians may well have views about the rules that we are trying to establish. Therefore, a very important part of the process will be receiving written considerations and committee reports. A further statement will have to be made in the Parliament and, if necessary, further changes will be made. We believe that we have a solution to the issues at hand, but that does not mean that there cannot be further reflection on whether the detail is exactly as it should be.

John Mason: Given the timescales and everything, this is the proposal that we are going along with, but that does not mean that it is fixed in stone for ages and ages.

Angela Constance: No. We have taken the time to explore the matters inside out, from a policy perspective and operationally in terms of the demands of Disclosure Scotland, and we are confident that this is the right solution. However, you are correct in saying that it is not set in stone. There is an important part of the process yet to come, and I assure you that there is a willingness on the part of the Government to listen acutely to the concerns of parliamentarians and stakeholders.

The Convener: It is worth putting it on the record that, although we respect the judgment that you have just made, the law will change on Thursday and that will be the law for the time being—as it always will be.

Angela Constance: Yes.

James Kelly: Given that there has been no public consultation or consultation with parliamentarians, how confident are you that you have got the balance right between the public interest and the rights of private individuals?

Angela Constance: We are confident. As you highlighted, we have taken 15 months over our considerations. However, as I said to Mr Mason, we will listen acutely to parliamentarians' views tomorrow and in the 120-day post-legislative scrutiny stage. We acknowledge that we are following an unusual procedure, but I assure the committee that we are pursuing it because we are absolutely sure of the necessity to do so.

John Mason: If I understand the proposals correctly, the system is that, under the remedial order, a draft certificate containing a conviction can be appealed to the sheriff provided that that is done within six months of Disclosure Scotland being notified of the intention to do so. If somebody chooses to make such an appeal, time will elapse between the request for disclosure and the certificate eventually being issued, which may cause the employer to be suspicious that there is something going on in the background. Is there some way of preventing or protecting against that? The fact that the employer gets nothing back suggests that there is something hidden.

Gerry Hart: The issue is the potential to interfere with a person's article 8 rights whenever a second certificate is sent to the employer. If there was something in the disclosure that should not have been there, by sending it to the person's employer you have in effect interfered with the person's article 8 rights. The policy intention behind this proposal is to ensure that there is no potential for that to happen.

Neither situation is ideal. A delay in the individual's employer receiving the certificate will, as you say, flag up a potential concern. However, while we have a system of issuing two disclosures, to the individual and to the employer—a system that our feedback tells us is greatly valued by employers across the country—a compromise has to be struck in relation to whether we issue one and when we withhold it. What is the greater evil? Is it to send out the disclosure and to interfere with a person's article 8 rights, or is to withhold the disclosure and not interfere with article 8 rights but leave the potential for uncertainty around what the employer might deduce from that? In policy terms, we have decided that the latter is the only appropriate response that we could possibly make because it would be simply unacceptable to interfere with article 8 rights or to potentially do so. That is the reason for the policy decision.

John Mason: I understand your dilemma, but I wonder how things will work out in practice. If nothing comes back to the employer and the employer does not offer the job to the person, could the person then have a claim against Disclosure Scotland or try to make a claim?

Angela Constance: With someone making a new disclosure application, they will get their certificate before the employer gets it and will then have 10 days to appeal to the sheriff. That is quite a tight timeframe. I appreciate that any delay might be undesirable, but there has to be some gap. Because the individual will receive the disclosure information first, they will have the opportunity to appeal to the sheriff within 10 days. That is within the target of completing 90 per cent of applications within 14 days, if they are correctly completed in the first place.

The Convener: Does that mean that if I make an application for a relevant job, you would want to turn round my potential disclosure to me in four days so that I have 10 days to appeal it before you meet the target of 14 days to my potential employer? That seems unlikely, which is why I am asking the question.

Gerry Hart: We would not tie it up like that. The individual will receive their disclosure and they will know that spent convictions have been disclosed, if that has happened. Thereafter, they will have a period of 10 working days to intimate an intention to appeal. They do not actually have to make the appeal in those 10 days; they just have to tell us that they are going to do that. At that point, we will not issue the employer certificate. However, such cases are so few in number that they could not really impact on the general attainment of our service level agreement or target, if you like, of dealing with 90 per cent of cases within 14 days. We still have the spirit of that target to meet and we will strive to do that. It is in the individual's gift to tell us if they want to initiate an appeal. If they do not, it will all issue in the normal fashion, but they will still have those 10 days to make their mind up.

The Convener: So everyone who receives such a disclosure will know that they have 10 working days—in effect, two weeks—to appeal and they will know that their potential employer will not receive a disclosure until the two-week period is up, regardless of where we are on the aspiration of 14 days.

Gerry Hart: Yes.

The Convener: Thank you—that is clear.

Angela Constance: I concur with Gerry Hart's characterisation of the process. I was perhaps a bit oversimplistic in the way that I articulated it.

The Convener: That is okay. I understand that.

I recognise that we are dealing with small numbers here and that they probably will not impact on the statistics but we parliamentarians always worry about the individual and let the statistics take care of themselves.

We will move on to John Scott.

John Scott: Before I come to my specific question, I want to ask a general one. Given that it is 15 months since the Supreme Court judgment, are there any people who will feel themselves to have been disadvantaged in the meantime because the law was changed in England and Wales prior to the judgment and, since then, elsewhere? Is it unreasonable or reasonable for people to feel that they might have been disadvantaged in the interim?

Angela Constance: Although there is no direct read-over between the UK Supreme Court judgment and Scots law, it is reasonable for the Government to take action.

We are not saying that the existing system is not compliant. Ultimately, it is for the courts to decide those matters. However, of course, we want to ensure that our system is as robust as possible in light of UK Supreme Court judgments and other case law. As far as we can, without things being tested in court, we want to ensure that our processes are ECHR compliant, that we get the right balance and that public protection is at the heart of everything that we do.

John Scott: That takes me nicely to my next question. In relation to non-protected schedule B1 convictions, the policy note says that the "starting point" is that such convictions will be included on higher-level disclosure certificates. Is it the intention that Disclosure Scotland will have discretion over inclusion of such convictions—for example, discretion to take into account the nature of the offence and its relevance to the employment or post applied for—or will discretion operate only at the level of the sheriff's consideration, where the individual who is subject to the conviction chooses to apply to the sheriff court for removal of entries relating to such convictions?

Angela Constance: I am not a lawyer, so allow me to explain how I understand the provision. Disclosure Scotland is not operating a discretionary scheme; the scheme is set out by rules that are, ultimately, approved by Parliament. Of course, people can take matters to a sheriff, who will consider the situation in terms of the existing law.

Gerry Hart can say a bit more about that.

Gerry Hart: The policy that determines whether something is or is not disclosed is still a policy decision that ministers have made, but it is set out and codified in a way that is applicable in the same way across different cases. The UK Supreme Court ruling in 2014 set out a number of tests that a reasonable person might apply when thinking about whether something should or should not be disclosed. The rules that are set out by the ministers try to accommodate those tests and apply them in a rational and coherent way.

However, we understand that there will always be cases in which the circumstances of the case, which is one of the tests that the court flagged up, are such that it would not be right to disclose them. That is why we have made provision for individuals to be able to make the case to the sheriff. We want it to be possible for account to be taken especially of unusual circumstances or particular background factors that mean that, in a particular instance, the general policy rules should not apply in the "may or may not disclose" rules list of offences. That is the thinking behind it.

The rules will be applied in a very black-and-white way. However, with regard to a disclosure of a spent conviction on the rules list, we must remember that, often, when offences are codified on police systems, they occur together in a single string of narrative. In those cases, we will disclose the matters around the same diet, when there has been a conviction. That is why there is a caveat in the words; if I picked you up correctly, that is what your question was about. It is not that the rules will be applied in a discretionary way by Disclosure Scotland, or that somebody will sit and make a judgment of Solomon about whether something should be disclosed. That will not happen. The only person in this process who will have that discretionary role will be the sheriff. The rules will be applied otherwise.

John Scott: So—for the avoidance of doubt—there will be no discretion available to Disclosure Scotland.

Gerry Hart: That is correct.

John Scott: Discretion will be available solely through the court.

Gerry Hart: Yes.

Stewart Stevenson: I will start off with an incredibly naive question.

Schedule B1 is headed "Offences which are to be disclosed subject to rules". My question is this: where are the rules?

Angela Constance: The rules concern what age the individual was at the time of the offence. I will ask Gerry Hart to talk about the technical aspects, but—in plainly spoken terms—we can clearly distil rules into whether the individual was

over or under 18 at the time of the offence and how long ago the conviction occurred: was it 15 years ago or seven and a half years ago? The timeframe depends on the age of the offender. In terms of the nature of the offence, that is also reflected in the fact that there are two schedules.

I will ask Gerry Hart to explain about where the rules are.

12:45

Gerry Hart: As the cabinet secretary set out, the rules are simple. They are, for this middle group—

Stewart Stevenson: If I may intervene, I understood the timeline aspect and the two different lists. That is a set of rules. However, in evidence we have heard reference to a certain matter. I will create my own example. Item 9 in schedule B1 is embezzlement. Clearly, that will be an important matter to disclose if the employment relating to the disclosure request is in the financial services industry. However, it might not matter in the same way if the employment were in the care sector. In the evidence that we received, I got the sense that, if the application related to financial services, with regard to the offences in schedule B1, as a matter of rule there would be a list of offences that would be disclosed in relation to employment in the financial services sector and a different list relating to those that would be disclosed in relation to employment in the care sector. I see witnesses' heads nodding.

In relation to that distinction between the different employments and which of the matters in B1 would therefore be disclosed as a matter of rule—as distinct from the court ruling and people applying—where are those rules?

Angela Constance: We have considered those issues. Ailsa Heine will pick up on your example.

Ailsa Heine: The rules are contained in the definition of what will become protected convictions. That is set out in the affirmative order and will be set out in the Police Act 1997, as it will be amended by the remedial order. The definition sets out what is a protected conviction, by reference to the offences that are listed in the two schedules.

Stewart Stevenson: I wonder whether the witnesses might help me by pointing at the relevant page in the material that is before us. I do not want to explore the matter in detail; I merely wish to know where the rules are. My reading of the instrument, as a lay person, did not lead me to understand the answer to that question.

Ailsa Heine: In the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015, the definition of protected convictions is in article 2(2), on page 2. That is the crux of where the rules are contained—

Stewart Stevenson: Forgive me—

Ailsa Heine: I realise that it is complicated.

Stewart Stevenson: That is why I am asking.

Ailsa Heine: Page 2 of the order sets out a definition of protected convictions.

Stewart Stevenson: I have that. The order will insert a section 2A, and there is some reference on the following page to children's hearings and so on. However, I got from previous evidence the sense that in the case of someone who is operating in the financial services, some offences would be chosen from those that are provided by the menu—I will call it that informally—that is schedule B1, and some would not be.

I might be being hopelessly naive, but I get the sense that my colleagues are with me on this.

Ailsa Heine: The rules are intended to apply across the whole spectrum of higher-level disclosures. It is not intended that a distinction will be made according to the job that is being applied for or the purpose of the disclosure. The rules apply across the board.

Stewart Stevenson: So—just to be clear and to make it easy for even me to understand—according to the process by which Disclosure Scotland will work, all the offences in schedule B1 will normally be disclosed.

Ailsa Heine: Yes.

Stewart Stevenson: Right. That is helpful. It is possible that, when I was listening to some of the previous evidence, I confused myself into imagining that there was some difference.

A distinction seems to arise when the person about whom the disclosure is being made—for the sake of argument, they work in the care industry—suggests that a disclosure about embezzlement might not be necessary. Is that the only time when matters that are set out in schedule B1 are removed from the disclosure certificate?

Gerry Hart: Yes, although it is worth sharing with the committee a bit of additional information. When it comes to the specific aspects of what you are asking about, the chief constable has powers to give that sort of information in enhanced disclosures.

Stewart Stevenson: But that is non-conviction information, which we heard about earlier and which I understand.

Gerry Hart: Yes.

Stewart Stevenson: That is very helpful and simplifies things.

The Convener: That was the basis of my question about administrative discretion. If what you are telling me is that the rules are that simple and that black and white, that addresses my question about who might be making these kinds of decisions, because it sounds as though they are not going to be made.

Stewart Stevenson: We will now move on to more detailed matters. To be blunt, I could not have asked the other suggested questions without understanding that matter, so please forgive me.

My first question is about the hard cases rule. Paragraph 4 in schedule B1 refers to breach of the peace, which is one of those very wide common-law offences that range up to quite severe things and down to relatively trivial matters. I wonder whether you will confirm something that I think I just heard. If someone under 18 is one month short of the seven and a half years that would exclude the conviction from having to be disclosed, can that individual ensure that the conviction is excluded only by appealing and going to the sheriff court? There is no other way of doing that, and it is not within the remit of Disclosure Scotland.

Angela Constance: Yes.

Gerry Hart: Yes.

Stewart Stevenson: I think that we have covered that, so I do not need to spend any more time on it.

My next question is a bit more substantial. Article 3 of the draft order makes a distinction between judicial proceedings in which spent convictions may be protected and other tribunals and hearings where there is no such provision. There appears in what is before us to be no provision for going to the sheriff court to argue that something in schedule B1 should not be disclosed when somebody is in front of a tribunal and is asked to make a disclosure. Is that the Government's policy intention, or has something in the drafting led to that difference in these different contexts? In other words, there are contexts in which, as far as the legal profession is concerned, things on schedule B1 do not have to be disclosed.

Angela Constance: As we are straying into Kevin Gibson's territory, I will ask him to reply to what is a good point.

Kevin Gibson (Scottish Government): The starting point is that convictions on the list in schedule B1 will always be admissible in the proceedings that are not listed. In other words, they cannot become protected.

Stewart Stevenson: I understand that—and that is why I have asked the question. Why has that distinction been made? Why, in certain contexts—the whole of schedule B1—is there no provision for something being deleted? Why is that different from disclosure to an employer?

Kevin Gibson: We are talking about two separate categories of proceedings, the first of which is proceedings in which what is relevant or disclosable is set out in a separate context. In that case, we are talking about firearms proceedings and proceedings under the Gambling Act 2005. The founding legislation that sets up those proceedings describes what conviction information is relevant in the context of those proceedings, and all the 1974 act does in that respect is to ensure that policy in those particular areas is not upset by convictions becoming spent and therefore not disclosable in such proceedings.

Stewart Stevenson: So the Government is making a judgment and taking the view that, because the existing legislation in relation to, say, firearms certificates, gambling licences or whatever already has a comparatively narrow and specific focus, this provision does not breach the private rights of individuals under article 8 of the ECHR.

Kevin Gibson: There are two things to say about that. One is that many of the proceedings that fall into that category are in reserved areas, and we could not affect the policy decision that has been taken by the UK Government about, for example, what is relevant to applications for gambling licences.

Stewart Stevenson: Forgive me; I am going to come in. You are not raising a red herring here by saying that you would legislate if we had the powers, are you?

Nigel Graham (Scottish Government): Disclosure is already restricted under other legislation. The Gambling Act 2005 says that there are certain types of spent convictions that need to be disclosed. As that is set out in that legislation, to have a different type of disclosure in the bill would not make sense, because there already is restricted disclosure. We would not be breaching the ECHR, because disclosure is restricted already through the Gambling Act 2005.

Stewart Stevenson: I was just picking up the vires issue that was raised. Notwithstanding the fact that it would be ultra vires, there is no suggestion that you would want to legislate in areas that we were not competent to legislate in. We do not need to go any further than that.

Kevin Gibson: The second element to pick up on is that the judicial authorities that determine what is and is not admissible in those proceedings will in large part be public authorities with their own ECHR obligations to respect. We have taken the view that, where a public authority has the decision as to whether a conviction or private

information is admissible, it is right to allow that authority to exercise its discretion in that area.

Stewart Stevenson: What we are saying is that this court judgment, which is the spring for why we are here, is something that a number of public bodies will need to take account of when they have people appearing in front of a range of bodies that they are responsible for. Will that extend to the people who are appearing in front of those bodies? Will they understand that they are not required to disclose things?

Kevin Gibson: There are two aspects to disclosure. There is the disclosure itself but also the reliance that is placed on the disclosure. That is where the responsibility of public bodies comes into play. They would not be in a position to rely on irrelevant private information to an individual's prejudice.

Stewart Stevenson: To close off that issue—I am conscious that I may be going off-piste to a substantial extent—will the Government ensure that the bodies that are going to have to take account of the case in England and Wales, to which we are now responding in the Scottish context, are made aware of the implications that there may be for them and that will be for them to consider, so that there is not a gap in what they are doing? We are doing something, but there are things beyond that in other parts of public policy and practice. I want to be sure that the Government is making sure that that is drawn to the attention of those public bodies.

Angela Constance: Yes. We have had discussions with various bodies on that point.

Stewart Stevenson: Sorry, I have quite extensive notes here—

John Scott: In the meantime, I would like to ask a basic question. Are there any cost implications for businesses and companies? I was unable to read all the paperwork in time, so I am not aware whether that has been discussed. It would be helpful to know whether there are cost implications. There is no financial memorandum attached, is there?

Angela Constance: There is an equality impact assessment and a business and regulatory impact assessment. There are no additional costs to businesses and individuals over and above what there currently are. Obviously, when a system is refined, there are organisational costs in and around that, but they are manageable. There is also the cost to individuals if they choose to appeal.

13:00

James Kelly: I am sorry, but I want to go back to schedule B1. I know that my colleagues are reassured, but I still have some queries about it. I will run through a practical example. Point 18 is on public indecency. Say that someone has a conviction for that. In the first instance, that has to be included on their certificate. What would be circumstances in which that would be taken off their disclosure certificate?

Angela Constance: The rules that we have established are black and white. This is not Disclosure Scotland exercising personal discretion. The rules touch on the age of the individual at the time of the public indecency and how many years have elapsed. Thereafter, if that was on the individual's record and they were not satisfied about that, it would be for them to appeal to the sheriff. I will check with colleagues that I have not missed anything.

Ailsa Heine: The disposal in the case would also be relevant. If the person had received an admonition or an absolute discharge for that offence, it would never appear once it was a spent conviction.

James Kelly: I understand that, but if there is a conviction, it appears on the draft certificate and is then shown to the person. The person then has the facility to appeal that.

Gerry Hart: As long as it fulfils the 15-year requirement and it appears on the disclosure as a spent conviction, the individual would have to go to the sheriff and explain what the circumstances were or the particular context behind the offence in order for the sheriff to be satisfied that it should not thereafter be disclosed.

James Kelly: But it is not the case that, in the first instance, it would be on the certificate. If the conviction had fallen outwith the timescales under some of these rules relating to the age of the person at the time and the length of time since conviction, it would not be included on the certificate; it would simply not be there.

Angela Constance: Yes. If it was a public indecency conviction when the individual was 19 and 15 years has elapsed, it is not disclosed. If less than 15 years has elapsed, it is disclosed and the individual can take that to the sheriff. I should add a point about employers on receipt of information. We know that some offences, whether breach of the peace or some sort of public indecency, are quite broad and can capture a range of behaviours. If the employer sees reference to a breach of the peace or public indecency offence, they can ask the individual for more information about that and the individual can speak about it. In some instances—this is a decision for the employer—the employer might say, "Well, that was 14 years ago and they've given an explanation and been of good behaviour." I suppose that there is discretion for

some employers in some cases, although not in all cases.

Gerry Hart: It is also worth mentioning that if that conviction was in the vetting information on the individual, it would come up to the protection services part of Disclosure Scotland, which would be able to make a decision as to whether it may be appropriate to consider that individual for barring in either the children's or adults list, or both. While that information is presented to Disclosure Scotland, it would make that decision routinely, and does so currently on those kinds of cases. There is therefore an extra safeguard in the system, which is the purpose of barring under PVG.

James Kelly: But am I right in saying that there are certain public indecency offences that would be disclosed automatically under the current system that may not be disclosed automatically under the new proposals?

Gerry Hart: Subject to the rules having been applied and the necessary time having elapsed, yes. Forgive me, because I cannot recall the precise details of all the lists, but if that offence is on the rules list—

James Kelly: It is on the rules list—

Gerry Hart: —it is one that would not be disclosed after the relevant period of time had elapsed.

James Kelly: Are you comfortable with that, cabinet secretary, or is it a matter of concern?

Angela Constance: I am a former forensic social worker. Of the offences that may be disclosed, a range of offences would always cause concern for individuals but, as regards particular roles, there is the added security of the PVG system, which places individuals with some sort of public indecency conviction, for argument's sake, on the list of barred individuals. None of this is entirely comfortable for us as individuals but, as the Government, we are front and centre in this respect—it is a matter of public protection.

We have to learn from case law and the UK Supreme Court judgment in order to ensure that our system is more proportionate. There are offences that will always be disclosed, and there are offences that will be disclosed for a duration of up to 15 years—or less if the individual was under 18 at the time of the conviction.

Stewart Stevenson: I return to the issue of other proceedings—I have been looking at the quite long lists of proceedings that the committee has before it. There appear to be quite a number of proceedings in which convictions remain protected and self-disclosure is not necessary. One example is:

"Proceedings held in respect of an application for the grant, renewal, or cancellation of a licence to be a taxi driver or private hire driver."

I want to be clear that the Government is taking the necessary actions to ensure that it is clear in proceedings of that character and in the other proceedings mentioned in what is quite a long list—those which are not ultra vires and which are within the powers of the Government—that there are protected convictions and self-disclosure is not necessary. I say that notwithstanding the fact that schedule B1 is headed "Offences which are to be disclosed subject to rules"—I know that the heading never has legal force; it is only informative. I want to ensure that the whole circle is being squared properly where the Government has the power to do that.

Angela Constance: That is something that justice officials have spent considerable time on.

Nigel Graham: There is a distinction between the different types of proceedings, such as those that do not relate to employment and do not necessarily fall within the remit of the UK Supreme Court ruling and where high-level disclosures do not happen because an exempted question is not asked. That is to disapply section 4(2) of the Rehabilitation of Offenders Act 1974; the proceedings come in at section 4(1).

We may ask whether it is appropriate for the Parole Board for Scotland to have limited access to someone's previous convictions, no matter how long ago they were. The decision that the Government agreed was that we need to have that information. The Scottish Criminal Cases Review Commission considers whether someone has maybe suffered a miscarriage of justice, and there may be reasons for it to investigate information about someone's previous convictions in order to make an assessment of whether a miscarriage of justice might have happened.

The same is the case if the independent assessor is trying to find out the facts when someone has suffered a miscarriage of justice. If someone says, "I've never done anything wrong in my life. This is my first conviction, and I need £5 million", the assessor has to be able to look at previous convictions. It might say, "Wait a minute, you have a previous history of things," and such a level of compensation might therefore not be right.

There are different processes for the different proceedings. In those instances involving an explosives licence or a firearms licence, for instance, it may be felt to be appropriate to require a full disclosure for public safety reasons. As we said earlier, if we consider gambling, other legislation underpins that and there is therefore no point requiring such a disclosure because things are already restricted and protected.

Schedule 1 to the 2013 order, "Proceedings", which relates to professions, links with the fact that schedule 4 of that order allows someone to be asked questions about their spent convictions in order to be part of those professions. Given the way in which that order is drafted, those concerned will not be treated any differently if they disclose a conviction that is not a protected conviction if it would not have been disclosed in a high-level disclosure through the appeal court. There are therefore underpinning protections.

The preceding section is particularly complicated because it is different: it is not about high-level disclosure because of excluded questions, and there are different reasons for proceedings and for court proceedings. That is what makes this part of the order complicated and is why certain rules apply, with some convictions in, some out and some protected.

Stewart Stevenson: Just to be clear, if something that did not require to be disclosed emerges during proceedings, it is perfectly proper—indeed, required—that the conclusions of the proceedings take no account of the information that has emerged.

Nigel Graham: There is no option for an appeal to the court because the person would not be issued with a higher level disclosure by Disclosure Scotland in the first place. The only rules that can apply will apply when it becomes protected. The tribunal or proceedings can only take things are not protected into consideration.

Stewart Stevenson: Okay.

John Scott: I have a general question. Notwithstanding the differences between Scots law and UK law, are the two lists largely similar? If one is in a protected category in Scotland, is it largely similar in England, or will people who want to apply for a job in England have a different set of rules? Notwithstanding the legal terms, are the lists largely similar?

Angela Constance: There are different names for different offences.

Nigel Graham: There are different rules in England and Wales under the Rehabilitation of Offenders Act 1974; they have different rehabilitation periods as well as a different set of rules. When a conviction becomes spent in England and Wales is different to in Scotland.

The England and Wales answer to the UK Supreme Court ruling is also different. I have not checked through every single offence list to see how England and Wales have dealt with the issue, but they have done a similar analysis and say that certain types of conviction should always be disclosed and certain types should always be protected. In England and Wales a conviction is protected after 11 years if the person has only one conviction. If they get another conviction, nothing is protected and everything is disclosed for ever. They halve the period for under-18s.

There are complications because we have drawn what we think is a proportionate line in the sand whereas England and Wales have taken a slightly different approach and said that, if someone is convicted more than once, they can forget about protection; it does not matter what or how serious the second conviction is.

Gerry Hart: A recent case in the Northern Ireland High Court concerned a lady who had a conviction for carrying a child in her car without using a seatbelt. Had there been only one child in the back of the car, the matter would have not been disclosed but, because there were two children in the car, there were two convictions and the matter was held on. The court found that that was not a proportionate interference with her human rights.

That filtration system, as it applies south of the border and in Northern Ireland, was developed before the UKSC ruling. The system that ministers are trying to put in place in Scotland was developed with full awareness of that ruling and subsequent case law, and we believe that it is a fair and decent attempt to strike the right balance.

John Scott: Thank you.

Stewart Stevenson: The matter of different lengths of periods to be considered as spent has emerged between Scotland and England and indeed elsewhere. Paragraph 56 in schedule A, which is entitled "Corresponding offences elsewhere in the UK or abroad", and refers to:

> "offence under the law of England and Wales or Northern Ireland, or any country or territory outside the United Kingdom, which corresponds to any offence listed in paragraphs 1 to 55 of this Schedule."

Would that require disclosure under the periods that are applicable in a non-Scottish jurisdiction? In other words, if it is 11 years in England—well, actually the period in England is shorter—

Nigel Graham: Yes, it is shorter in England. If a conviction is unspent, it will be disclosed; otherwise the rules will apply.

Stewart Stevenson: Therefore, the question whether a conviction is spent with regard to an offence committed outwith Scotland is determined by the local rules, not the Scottish rules. Is that right?

Kevin Gibson: The Scottish rules apply to offences committed in England and Wales or—

Stewart Stevenson: Or elsewhere, then.

Kevin Gibson: The offence is still a matter of Scots law if it is committed it in England and Wales.

Stewart Stevenson: So even if a conviction is spent after 11 years in England, it might still be required—

Nigel Graham: It becomes protected, not spent, after 11 years. In Scotland, for those over 18, the period with regard to protection is 15 years from date of conviction, while in England and Wales it is 11 years. If you commit an offence on the rules list in England and Wales and then move up to Scotland, the period in question will be 15 years from date of conviction.

Stewart Stevenson: Even though the offence was committed in England, where the period is 11 years.

Nigel Graham: Yes.

John Scott: So the domicile is all-important.

Angela Constance: It is all about residency.

Stewart Stevenson: That is fine. I am not seeking to challenge it—I just want to understand it. That is all.

13:15

The Convener: That discussion implies that Scottish citizens might be ignorant about the rules that you are bringing in and might be very confused when they talk to the significant number of people who simply assume that English law and Scots law are the same. Is the Government proposing to bring in some guidance and make it clearly available?

Angela Constance: We are very alert to the fact that the 1974 act as it stands is legislation from the 1970s and is very complex and confusing and that, for citizens, the current situation is not always easy to understand or navigate. As the committee has pointed out, we have added another layer of complexity with the affirmative and compliance orders, but we will certainly follow the parliamentary process and update the Disclosure Scotland website in order to explain the situation using layman's terms and plain English.

We will also give consideration to other publications where such information should be sited; for example, the Scottish Government website would be important in that respect. Individuals seek advice on such matters from a variety of sources; they might go to an MSP or a citizens advice bureau or they might speak to someone at the job centre, a criminal justice social worker or a lawyer. There is a particular range of stakeholders we could be targeting, and we could make people aware that plain English guidance will exist. However, we will need to wait until the end of the 120-day period following the laying of the compliance order.

The Convener: I just want to challenge that. After all—and assuming that it works—this will be the law from Thursday morning, and I respectfully suggest that having to wait three or four months to issue guidance will probably not be terribly helpful to the very large number of people who will want to know what happens in between.

Angela Constance: We have already heard from committee members that it has been established that future changes are possible, pending the 120-day scrutiny period. We will of course fully consider ways of making the situation clear as of Thursday, but we will continue the matter as we move forward. There is a recognition that the landscape in this area is and has always been complex, and we take in good spirit the point that we need to ensure that clear guidance is available.

Gerry Hart: I think that we have an amended website that is ready to go, and we have a significant number of artefacts such as frequently asked questions, briefings for staff and other such lines that are all ready for this change. However, as the cabinet secretary has said, all of that will evolve as the consultation goes forward. We will need to keep in communication, because, given the way that this change has come through, it is very important that a dialogue develops. That is very much the spirit in which we hope to approach this issue.

The Convener: That is good to hear. Of course, Parliament might be forced to change its mind and tack not because of a consultation but because of another court case turning up over which we have zero control.

I think that John Scott has a residual question.

John Scott: There have been different treatments of the Supreme Court ruling in different parts of the UK. There is perhaps more than one way of skinning a cat, although I do not expect that that is a legal expression. The different treatments appear to put into practice what requires to be done, but are they all equally good in terms of ECHR compliance?

Angela Constance: Ultimately, that is for the courts to decide. The starting point for all of us is that the legal system in Scotland is different from that in England and Wales. That is just a statement of fact; I am not giving an opinion about that. Given some of the on-going issues that colleagues elsewhere in the UK are tackling, I believe that the Scottish Government was judicious in waiting until after the Supreme Court judgment, following case law and taking a bit of time to see how things unfolded before coming to Parliament with its solution.

John Scott: Thank you. I was not trying to catch you out; I was just trying to reassure myself.

If, following the process of parliamentary scrutiny and stakeholder engagement, the remedial order is modified in a way that also affects the disclosure by individuals of their convictions, it is likely that a further affirmative order under the Rehabilitation of Offenders Act 1974 will be laid in Parliament to incorporate similar changes, as has been discussed. What would be the process in that instance? Would a further instrument require to be afforded an expedited process? Also, what would be the implications for disclosures made under the draft order that is being considered today?

Angela Constance: There is certainly a theoretical possibility that we would return to Parliament with another affirmative order, depending on the views and the issues that are raised in the post-legislative scrutiny of the compliance order. It is difficult for me to predict the issues that may or may not be raised in that process. I will hand over to the officials in a moment for them to give a more technical response.

I outlined two reasons why we had to have an expedited process for the affirmative order. One is the disruption. If we change the system, it is disruptive to Disclosure Scotland, which has to cease operation while we go through that process. In my mind, that necessitates an expedited process of some description. Also, if we are moving from one refinement to another, there needs to be public confidence in the decisions that are made. It is difficult to achieve public confidence and make the decisions when we are going from one system to a more refined system.

My instinct is that, should we need to lay another affirmative order—although I appreciate that it is unsatisfactory from a parliamentary point of view—we may well be looking at another expedited process. Do the officials have anything to add?

Ailsa Heine: We will take into account later the observations that are made and take a view on whether there should be any changes to the remedial order. It covers different things from the draft affirmative order, particularly around disclosure and the way that the appeal process operates for both the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007. There could be changes in the remedial order that do not need to be reflected in the affirmative order.

John Scott: In general terms, it seems to me that, given that the affirmative order has been expedited, if we need another one that will also be expedited, the parliamentary process will have become a little ungainly. I can put it no more elegantly than that. That is not something that the Parliament would necessarily welcome.

Angela Constance: We hope that there will be confidence in the proposal that we are making to Parliament. However, it would be foolish of me to rule out the possibility that stakeholders and parliamentarians will raise matters that need to be considered. That means that, at this stage, we cannot rule out another affirmative order, although I am told that a second affirmative order would not be expedited.

The Convener: Ah.

John Scott: That is precisely the point that we were discussing.

The Convener: On the basis that that is the justification for why you are here now, we would expect the same rules to apply. I think that we would be in the same position.

Angela Constance: I am sorry that we have gone round the houses on that one.

The Convener: That is okay.

What would be the implications for disclosures that are made in the interim, given that we will have to change this in 120 days' time? The law that you propose, if implemented, will stand for 120 days. I presume that those disclosures will be valid in their own terms.

Ailsa Heine: Any disclosures that are issued under the law as it applies from Thursday 10 September until a second remedial order is made—if such an order is made—would be valid under that law.

The Convener: It is perhaps worth making the point that it is neither our job nor that of the Parliament to decide whether the order that we are considering is the one that we would have drawn up or whether we all agree with every single line in every list. I suggest that the issue that we must consider is whether the order is capable of being ECHR compliant, recognising that there is more than one way to approach such compliance. That is the evidence that we have been trying to tease out this morning.

We have reached the end of our list of questions, but there are a few things that I would like to pick up on. First, I ask Gerry Hart to go back to the point that he made about more than one conviction appearing at the same time and whether that would mean that a conviction for a protected offence would necessarily have to be disclosed with others that are not protected.

Angela Constance: Each offence must be considered separately, but Gerry Hart can run through the process.

Gerry Hart: The decision has been taken that, where a spent conviction that is being disclosed appears as part of a concatenated body of text with other matters on the same diet, the process will be that they will all be disclosed. However, every conviction that is spent is processed as if it was the only one, so there is a proportionate inception process that does not group everything together in a pattern but takes things on their merits. The issue of disclosing matters around a spent conviction is offset by the fact that everything is processed separately. There is no direct correlation, but there is a link in that process.

The Convener: Is that on the basis that the protectable convictions are, nonetheless, part of the narrative of the unprotectable one?

Gerry Hart: That is the policy intention. We believe that disclosing the matters around the non-protected conviction will give a context around the matter that is the central concern, and that that is fair and proportionate.

The Convener: In that context, it would be a fair and proportionate use of information, although you would accept that such information is potentially private.

Gerry Hart: Indeed.

The Convener: On another issue, as I understand it, it has always been said that the age of the offender is their age at the time of the offence, but the time is the time since conviction. Forgive me for not looking that up. Can you clarify that?

Angela Constance: It is the age of the offender at conviction, not at the time of the offence.

Nigel Graham: That is how it works under the Rehabilitation of Offenders Act 1974, so the approach is consistent.

The Convener: That is fine. That is at least a justification, and that is on the record.

Gerry Hart: It is worth pointing out that the statement does not always contain the age of the offender at the time of the offence.

13:30

The Convener: I am with you there.

I want to ask about something else, just to put it on the record. My understanding of the 10-day period when information is disclosed to the applicant but not to the potential employer is that it is the Scottish Government's defence with regard to the disclosure of private information. It gives the applicant 10 days' notice that the information will be disclosed unless they say that they are going to appeal it. Is it as simple as that?

Gerry Hart: Yes.

The Convener: What justification, as a matter of law, does the Government have for taking that view? I am not saying that it is unreasonable, but can you explain it?

Nigel Graham: The current order provides that justification. Section 4 of the Rehabilitation of Offenders Act 1974 says that, once an offence is spent, people do not need to disclose it. However, the Parliament turned around and said that the 2013 order allows that extended period of disclosure for certain types of employment and profession, so it is a consistent approach. The question is at what point we draw the line. We decided on 15 years, but there may be instances where somebody has done something that the sheriff court can—

The Convener: That is about the 15 years defence. I am specifically concerned about the delay of 10 working days. Is there a statutory precedent for that? I am not saying that it is wrong—

Angela Constance: Are you asking why the period is 10 days as opposed to 12 days or eight days?

The Convener: Yes. I wonder whether there is a legal precedent for that. I am not arguing that it is unreasonable; it seems very reasonable and proportionate. I am just wondering whether there is anything else—

Ailsa Heine: There is no particular legal precedent on which the time period is based. It is simply about trying to strike a balance between giving the individual a chance to consider the information—and whether they want to use the opportunity to appeal—and not prejudicing them, particularly by leaving a longer period in which an employer is left without a disclosure. It is about trying to strike a balance with regard to what is reasonable and what is a reasonable period of time for people to make a decision as to what to do.

Gerry Hart: It is a policy decision.

The Convener: I think that we can finish on that point. I thank the witnesses for their patience and their lucid explanations. Forgive us if, to start off with, we got some things wrong, which I think will be manifest from the record. I think that we are now in the right place.

We will now move into private session.

13:32

Meeting continued in private until 13:55.

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