The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 29 September 2015

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
27th 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)
Kathryn MacGregor (Scottish Government)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 29 September 2015

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

The Convener (Nigel Don): Good morning and welcome to the 27th meeting in 2015 of the Delegated Powers and Law Reform Committee. As always, I ask members to switch off their mobile phones, please.

Agenda item 1 is to make a decision on taking business in private. Does the committee agree to take in private item 7, which is further consideration of the delegated powers in the Land Reform (Scotland) Bill; item 8, which is our further consideration of the delegated powers provisions in the Higher Education Governance (Scotland) Bill; item 9, which is consideration of a draft report on the Community Justice (Scotland) Bill to the Justice Committee; item 10, which is consideration of a draft report on the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill to the Health and Sport Committee; item 11, which is consideration of a report on the work that the committee has considered during the parliamentary year 2014-15; and item 12, which is consideration of the evidence received on the Succession (Scotland) Bill today and in previous weeks?

Members *indicated agreement.*

John Scott (Ayr) (Con): Although I certainly agree that we should take the items in private, I should also, in relation to item 7 on the Land Reform (Scotland) Bill, put on record my concern that it is perhaps one of the most incomplete bills that our Parliament has ever considered. Many of the policy areas—five, I think—are still under development. This committee exists to scrutinise, but we cannot do so when so much is not available for scrutiny. For example, in several areas, there is the potential to breach the European convention on human rights. I am extraordinarily concerned about the bill and its fundamental weaknesses.

The Convener: Thank you for those observations, which we will consider when we get to item 7.

Succession (Scotland) Bill: Stage 1

10:03

The Convener: With that, we turn to agenda item 2, which is our stage 1 consideration of the Succession (Scotland) Bill. Today, we will take oral evidence from the Scottish Government, in the persons of Paul Wheelhouse—good morning, minister—who is the Minister for Community Safety and Legal Affairs; Jill Clark, who is team leader in the civil reform unit; and Kathryn MacGregor, who is a solicitor in constitutional and civil law. I wish good morning to both ladies, who have been diligent observers of what has gone on in the past.

I think that the minister would like to make an opening statement.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): I would be grateful if I could make a very brief statement, convener.

I thank the committee for inviting me to give evidence this morning. I welcome the recognition that the bill will make the law on succession fairer and more consistent, and that such reform is perhaps overdue.

The committee is well aware of our approach to this work. Progressing the law in two separate and consecutive pieces of legislation has the benefits of not delaying a set of uncontentious reforms any further, and of ensuring that there can be the level of scrutiny that the bill deserves. We feel that the advantages of that approach have been recognised by other witnesses. That said, progressing two pieces of legislation in quick succession raises the question of consolidation; we will certainly consider that in the context of any future bill in this area.

I have been very impressed by the committee's careful questioning, which has helpfully teased out a number of issues, particularly the inclusion of a guardian in the provisions in section 1; some jurisdictional matters; clarity around the term "uncertainty" in relation to the survivorship provisions; and the question whether section 3, which relates to rectification of a will, should be extended to home-made wills. On the last question, I have to confess that I had been unaware of the range and extent of the do-it-yourself will market and the growth in online templates. There are also differences in the services that such websites offer, including in whether they have a solicitor who ultimately drafts the will. It is therefore only right, as the committee

has highlighted, that we take account of technological changes when we formulate policy.

Similarly, it has been very interesting to follow the debates on some of the terminology. I mentioned the term "uncertainty". Although I am clear that Lord Wheatley has helpfully put the term beyond doubt, I very much agree with the committee's sentiment that legislation should not just be for those who are legally qualified and that we need to sense-check things. In that regard at least, I think that there is clarity about "uncertainty"—if that does not confuse matters—and that the concept is one that the majority of people can understand. That is why, on that and on a number of other points that have been highlighted, we are continuing to reflect on whether the bill requires to be amended. We are open to further views on those issues.

Given that the bill is subject to the Scottish Law Commission bill procedure, I would, of course, be interested in the committee's views on any changes that took the provisions beyond those that were set out as recommendations in the Scottish Law Commission's 2009 "Report on Succession".

I and my officials will be pleased to take any questions.

The Convener: Thank you very much for that brief statement, which covers some of the areas that colleagues will, I am sure, want to question you on more closely.

I think that you covered whether the Government would want to consolidate legislation in this area. The committee would encourage the Government to do that. Generally speaking, we would encourage the Government to consolidate the law, anyway.

How do you feel about issuing of guidance? It is clear that changing the law of succession will affect the general public as well as practitioners. Every one of us should make a will. How can changes in the bill and other changes be put before the general public in such a way that they understand the need to act?

Paul Wheelhouse: That is a very important question. As I said in my opening statement, we need to make laws as understandable as we can, so that it is not necessary for people to be legally qualified in order to understand their rights and responsibilities. I share the view that it is important to make the provisions in the bill accessible to the public. Therefore, we are considering carefully how we can use our succession website and succession publications to disseminate the changes in law in an easy to understand way. In addition, should further changes be made to the scheme of succession in Scotland, we will consider other methods of dissemination that will be aimed at getting the information across more widely, and we will include in that work the changes that the bill will make.

I draw the committee's attention to the document that we produced, entitled "What to do after a death in Scotland", which is available to members of the public in the event that they suffer a bereavement. That advice could be updated and refreshed to make it current.

We are grateful for the Scottish Law Commission's kind offer to help us to produce guidance that might be necessary to ensure that not just legal practitioners but laypeople understand the law, once the bills are in force.

The Convener: It is tempting to suggest that a rather more important document might be one called "What to do before death".

Paul Wheelhouse: That is a fair point.

The Convener: The issue affects all of us—there are some inevitabilities in life.

On that wonderful note, we will go to John Mason, who will ask about section 1.

John Mason (Glasgow Shettleston) (SNP): Minister, I note that you referred to guardians being dealt with in section 1. Provisions in wills appointing guardians are included in the scope of section 1. The committee has heard various arguments suggesting that that should not be the case. Among those are the argument that step-parents might have to resort to expensive and time-consuming court action, and that it would introduce inconsistency in the law when compared with the approach to guardianship provisions in deeds other than wills. What was the rationale for including provisions on guardianship in the scope of section 1? Given the evidence that we have heard, are you still content that that is the correct approach?

Paul Wheelhouse: I am grateful to John Mason for bringing up the issue, because it is a very important one.

We continue to reflect on the views that have been expressed about whether the appointment of a former spouse or civil partner as the guardian of a child should be set out as an exception to the section 1 rule. That would be the case only when one of the parents had accepted the child or children as part of the family and did not already have parental rights and responsibilities.

On one hand, the Scottish Government shares the view of the Scottish Law Commission that it must be assumed on divorce that, as legal separation severs all ties between the testator and their ex-spouse or civil partner, it was not the testator's intention for them to be appointed as the guardian of the child unless they had made

express provision in a will under section 1(3). In our view, that provides a more equitable outcome that is more likely to be line with the testator's wishes. Having said that, we acknowledge the concern that has been raised in evidence to the committee, that because the appointment of a guardian can be made not only in a will but in separate documentation, there is a risk that guardians will be treated differently according to what documentation has appointed them. We are continuing to think very carefully about the equity of the approach and whether in such circumstances the remedy of an application to the court for guardianship would be proportionate.

I appreciate the significance of the issue in relation to step-parents, civil partners and others who may have had a role in a child's life. We need to continue to reflect on those matters and consider whether we need to make changes to the bill.

John Mason: I appreciate your comments. There is a feeling that families are becoming more complex these days. Step-parents are quite a regular feature now; I do not think it would be exceptional that something of the sort would turn up.

Paul Wheelhouse: Absolutely. I recognise that from my own family. It is a common feature of society today and we need to reflect the modern society in which we live. I take that point on board.

John Mason: What about the fact that there are other deeds that affect guardianship? Is this the right bill into which to bring all that?

Paul Wheelhouse: The bill is making some important but largely technical adjustments that will bring legislation into line with the current experience in society. As to whether it is the best vehicle for other things, committee members will be aware that we are looking at a more fundamental view of succession in a separate consultation, so we will have opportunities in the near future to look again at issues. I believe that the measures that are in the bill are proportionate and largely non-contentious. I hope that they will progress the law of succession in the interim and withstand any subsequent succession bill, as well.

John Mason: Okay. Thank you.

The Convener: We turn to John Scott for consideration of the timing of revocation.

John Scott: The committee has heard mixed views about when section 1 should take effect. Arguments on both sides have made reference to what is consistent with the broader framework of private international law, and to what will be challenging in practical terms for practitioners. What process did the Government go through in order to formulate the approach that is set out in section 1?

Paul Wheelhouse: Is that question framed specifically with respect to the domicile issue?

John Scott: Yes.

Paul Wheelhouse: The Scottish Law Commission is of the view that in order to provide an appropriate link with Scotland the rule should apply where the testator dies domiciled in Scotland regardless of where the divorce, dissolution or annulment took place, as long as it is recognised in Scotland. We agree with that.

The rationale for the approach is that the provision relates to the law of succession; it therefore makes better sense for domicile at death to be the determining factor. I note that the committee has taken evidence on that point and has received a mix of responses. We were encouraged that both Professors Crawford and Carruthers, who are specialists in private international law, agreed that the domicile at death is preferable. They helpfully pointed out the link to section 1(5) and the requirement for the divorce to have taken place within the United Kingdom, or otherwise to be recognised in Scotland.

We consider that the combined effect of a divorce that is recognised in Scotland and a person who is domiciled in Scotland at the point of death is a sensible rule that provides the necessary connection to Scotland and is consistent with the treatment of succession law generally. We believe that the proposed approach will provide consistency; that is the rationale for the approach that we have taken.

John Scott: So you are not persuaded in any way by TrustBar's arguments for an alternative approach?

Paul Wheelhouse: We will continue to listen to the views of the committee. If the committee has a strong view that counters the position that we have taken today and the view of Professors Carruthers and Crawford, we will listen to that. As things stand, we believe that the proposed approach is correct.

The Convener: Thank you for putting the Government's view on the record. We will shortly be reflecting on the totality of the evidence, and if we feel that we need to impress something else on you, we will say so.

Richard Baker has questions about the court's power to rectify a will.

10:15

Richard Baker (North East Scotland) (Lab): A number of witnesses have argued, both for reasons of principle and for practical reasons, that

the current scope of sections 3 and 4 should be expanded to include wills prepared by the testator themselves, including those prepared using online forms or software packages. I understand from your opening comments that you have become more aware of the great variety of those. Should I take it from your comments that you have accepted the case that has been made for the expansion of the scope of those provisions? What are your views?

Paul Wheelhouse: Mr Baker raises an important issue. I believe that we have reflected on the views that have been expressed by other witnesses to the committee. As he has said, I was quite surprised at the range of options that are available to people, particularly in the form of online templates. We have looked at a variety of websites, some of which involve a solicitor preparing a will, some of which involve responding to a questionnaire from which a will is drawn up by a will-writing company, and in others of which a template is simply completed and printed with no third-party intervention as such.

As many of those who have appeared before the committee have said, evidence of something lost in translation between the testator and the person preparing the bill is the key to these provisions. Sections 3(1)(b) and 3(1)(d) set that out—the testator instructs what they want included in the will, someone else prepares the will based on those instructions, and the court is satisfied that the will fails to give effect to those instructions. In a sense, it is dealing with cases in which there is a breakdown in communications. Some online wills would be included where the above criteria are met, if there were some dubiety as to how well the testator's wishes had been interpreted.

Where a testator draws up their own will themselves, whether on paper or online, that provision would not apply, and we are content that that is the right outcome and that the provision itself is clear on that point, because there is no possibility of misinterpretation if the person has filled in the will themselves. We will continue to reflect on whether software could be considered as constituting a third party. Having to think about such issues has brought us firmly into the 21st century, but we think that it is unlikely to be the case. The important factor is the involvement of someone other than the testator. We would be happy to add something to the explanatory notes to confirm the position if the committee feels that that needs to be clarified.

Richard Baker: That might well be helpful. I take your point that the key issue is about there being another person involved in the process.

Paul Wheelhouse: That is my understanding.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to explore the nature of the other person that you are seeking to catch. It seemed, on the basis of evidence that the committee has had, that the legal profession is of the view that it should be somebody who has failed to exercise their professional duties in an appropriate way. In other words, the other person who might be caught by that provision would be somebody who—I am not sure whether these were the words used, but I will use them—is legally qualified. Is that how the Government currently sees it?

Paul Wheelhouse: I am happy to be corrected by Jill Clark and Kathryn MacGregor if I am incorrect, but I understand that, in the framing of the legislation to date, we have not thought in those terms. The presence of someone else to verify that the person's intent was different from what was ultimately expressed in the will is the key issue. Whether they are legally trained or not, it is about having someone there to say, "Actually, I don't believe that's what the person intended," making it possible to argue for a revocation of the provisions if they were inaccurately delivered. However, I take Mr Stevenson's point on board. With your consent, convener, I would like to bring in Jill Clark to comment on that point.

Jill Clark (Scottish Government): The minister is absolutely right. We do not have a view that it need be a legally qualified person. It could be a layperson. It is about things being lost in translation and whether there is evidence to show that something did not translate as the testator wished.

The Convener: Before we come back to Stewart Stevenson's question, I would like to pursue that. If I have heard you aright, you are suggesting that the important thing is that there is a person who might stand up in court and give evidence, rather than a person who actually wrote something down, provided advice and was a scribe.

Jill Clark: The evidence may not be the person. It may be that there is a draft piece of paper that shows one thing and a final will that shows something different, but it could also be a person.

Stewart Stevenson: I am now going to make things dramatically more complicated. As we will discuss, in other areas we talk about heritable property that is not in Scotland. However, we can turn that the other way round and say that there will be heritable property in Scotland for which the will that is seeking to effect its disposition was instructed and is being considered primarily by a jurisdiction outwith Scotland. How does it work when a Scots court will interpret, under Scots law, a non-Scottish will in relation to heritable property? Does the same issue touch on it? I had in mind a

particular example. Just as the writers to the signet have a tradition, in places such as India, where literacy levels are comparatively low, most villages will have a writer with a public stall on the high street, who is employed by the illiterate. I wonder how, when there is a challenge to the translation of the testator's intention based on the difference between that intention and what ends up on the bit of paper, that will be dealt with in relation to heritable property in Scotland when the will has been constructed in another jurisdiction. Or am I making the matter so complicated that the question is unreasonable?

Jill Clark: Of course it is not an unreasonable question. It would work as it does at the moment when someone who lives in a foreign jurisdiction challenges a will. Kathryn MacGregor will correct me if I am wrong, but I am sure that the law will operate in the same way as it does now and will continue to do so. Whatever jurisdiction's standards apply will continue to apply.

Stewart Stevenson: Let us be clear and close off this line of inquiry. What is in the bill, and what the Government might do to the bill, will not remove other rectification approaches that are not covered by the bill but are covered by existing law, particularly case law.

Jill Clark: No. Absolutely not.

Paul Wheelhouse: That is correct.

John Scott: Forgive me if I am asking an ill-advised question—it would not be the first time—but, given what you said before Stewart Stevenson's last question, is there going to be a change in emphasis in the weight that will be given to the intent of a testator? You talked about considering previous writings or something. Is that what happens as the law currently is, or is there going to be a change in emphasis there?

Paul Wheelhouse: I believe that that would currently apply under the existing law. We are dealing with the provisions relating to the new technology that is available whereby a will could be generated in the absence of a third party—it may be entirely technologically driven through the software—and no one would have had any intervention to be able to understand what the intent of the testator was in framing their will. That is different from a situation in which there is some other human involvement, when someone is able to testify whether the testator meant something different from what was ultimately put into the will. There may have been a fault in the software, a provision might have been dropped when the testator submitted the will and they may not have spotted that. That is a hypothetical example, but the other person would be able to say that they knew that the testator intended to have that provision in the will and they could perhaps prove it if they had seen the draft notes that the testator was using to fill in the template.

I ask Jill Clark to confirm whether the position regarding other writings is similar to the current position.

Jill Clark: Yes, it is. Some of the examples that the Scottish Law Commission uses in its report refer to something in a draft document not being picked up when it was typed up. There is no change in position there.

John Scott: Thank you very much.

Richard Baker: You have given us your consideration, minister, but the evidence that the committee has received on the issue is mixed. Some of those who gave evidence, including Professor Paisley of the University of Aberdeen, spoke of the risks and dangers of expanding the provisions in sections 3 and 4, particularly given the increased number of challenges from disappointed beneficiaries that there may be on the basis of that. I presume that you have given the matter some consideration. How did you weigh up the arguments?

Paul Wheelhouse: Yes, and a similar situation applies to home-made wills. I believe that the Scottish Law Commission was persuaded by the argument that it would be difficult to obtain sufficient evidence to satisfy a court of the need to rectify a home-made will. I guess that similar issues apply in relation to online wills. The Law Commission recommended that the provision should relate only to wills that are prepared by someone other than the testator. We certainly agree that the power to rectify a will should be confined to cases in which the will has been prepared by someone other than the testator and where a comparison can be made, through the presence of someone or documentation, between the testator's instructions and the will in order to prove that there is a discrepancy between what was intended and what was ultimately delivered. Without that, we fear—I suspect that this is where Mr Baker is also fearful—that unentitled persons might seek to raise actions disputing the terms of a will purely on the basis that they do not benefit under that will. It would be difficult to deal with that in that situation.

Richard Baker: My penultimate question is on how you will achieve the policy objectives that you have laid out. You have provided clarity on the scope of sections 3 and 4, and you said that you will amend the explanatory notes. Does that require change in the bill as well? There is some uncertainty about whether, to achieve that policy intention, sections 3 and 4 have to be amended, or whether that is already captured and it is just a question of providing more details in the explanatory notes.

Paul Wheelhouse: I risk being corrected by my colleagues, but I do not believe that we need to amend the bill to provide a change to the explanatory notes. However, I will just check with my colleagues that that is correct.

Jill Clark: Yes, it is.

Richard Baker: Section 4(1) provides that an application for rectification must be made within six months of the grant of confirmation or, in any other case, the date of the testator's death, with the court having discretion to extend the time limit. A number of witnesses have argued that the time limit should run from the date of death and not from the date of confirmation, and various alternative time limits have been proposed to the committee. Given the weight of evidence that we have received on the topic, are you minded to reconsider the bill's approach on the matter?

Paul Wheelhouse: That is a fair point. The basic policy is that applications for rectification should be made within a reasonable time. The six-month period was drawn from recommendation 51 of the Law Commission report. We note, however, that TrustBar raised concerns in its written evidence that, if the confirmation does not take place for a number of years, that might result in an application for rectification taking place after a period of six months. Others have agreed with those concerns, as Mr Baker said. However, the opposite view has also been set out by Eilidh Scobbie, on the basis that a will becomes a public document only on confirmation, unless a solicitor voluntarily registers the will on death. We were encouraged by the view from Professor Paisley that, were an executor or other individual to wilfully cause a delay in confirmation, those would likely be circumstances in which the court would extend the time limit on cause shown. On the basis that the court has the power to waive the time limit on cause shown, we think that the bill gives effect to the SLC recommendation that rectification should occur within a "reasonable time".

It is worth remembering that the bill contains two potential starting points, which Mr Baker alluded to. Where confirmation is required, the starting point is the date of confirmation and, where confirmation is not required, it is the date of death. For small estates, the time limit will be six months from death, subject of course to the court's power to waive that.

I hope that that clarifies the Government's position on the issue. I recognise that there is not a consensus on it.

The Convener: That helpfully clarifies the Government's position. We will go away and reflect on that.

John Mason: I will ask about the protection for third parties acquiring property, which is dealt with in sections 3, 4 and 19. TrustBar argues that there is a deficiency, because only partial protection is offered to third parties who acquire property and who might be prejudiced by a subsequent rectification. Its suggestion is that it would be better to apply sections 8 and 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 to wills on the ground that that would offer better protection and there is already a lot of case law around that legislation. Would it not be better to extend those provisions into the area rather than doing something completely new? Do you have any thoughts about that?

10:30

Paul Wheelhouse: I do indeed. I am grateful to Mr Mason for raising that point.

A beneficiary under the will as executed is obliged under the law of unjustified enrichment to restore any bequest or the value of the bequest to the executor if he or she is not a beneficiary under the will as rectified. The aim of the measure is to ensure that the rightful beneficiary receives the property that they were entitled to, and the need to protect that person's rights outweighs any property rights of the beneficiary who was not entitled to receive the bequest.

As Mr Mason indicated, TrustBar submitted that section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 gives protection to third parties by providing that a court may rectify a will only where

"the interests of a person to whom this section applies would not be adversely affected to a material extent by the rectification",

but that no similar protection exists under sections 3 and 4 of the bill. However, we take the view that the bill provides adequate protection to third parties who rely on a will that was subsequently rectified. Section 3 expressly protects a third party who derives title from a beneficiary under a will that is subsequently rectified. In addition to that, rectification is at the discretion of the court, which will have regard to the rights of all those affected, to whom section 3(4) expressly provides third-party protection.

I refer to section 19 of the bill. In the example that TrustBar provided in oral evidence last week, its concern was about a person who acquired a loan for the value of the property that they were going to inherit and the will was subsequently rectified. As the convener noted last week, if that was a loan in contemplation of inheritance, there would be no protection against the asset, and the section does not apply. If it was after party B had acquired the title, party B would be protected by section 19(2)(b).

We therefore believe that we have covered the third-party protection angle. I hope that I have put on record something that addresses Mr Mason's concerns.

John Mason: Yes—fair enough.

The Convener: I would like to pursue that. Forgive me. If I have understood the matter correctly, if I inherited and received a significant amount of money from a will that was going to be rectified and the money was going to be taken away, and I set up in business in such a way as to tie up that money, which I would be required to give back, that would leave me and my creditors in trouble. I would not have acquired that for value, but would have acquired it under the estate. All sorts of houses of cards would fall down because I would have to give the money back but I would no longer have it, as I would have dispersed it into a business. Is that the intention?

Paul Wheelhouse: In line with what Mr Scott said about ill-advised questions, I would like to reflect with colleagues on that particular example, if I may, to ensure that I do not give a misinstruction or ill-advised response to the committee. I will double-check.

If I may, I will bring in Kathryn MacGregor so that there is not a miscommunication.

The Convener: Yes, please do.

Kathryn MacGregor (Scottish Government): Will you confirm that you are talking about somebody who incurs debt in advance of inheritance on the assumption that they will inherit but who subsequently does not inherit as a result of rectification?

The Convener: No. I am with you entirely on that argument. I think that we articulated that last week. I am talking about a situation in which I have inherited and been given £100,000 but the court is going to rectify the will and I will have to give back the £100,000 that I did not otherwise have; I have dispersed that into a business—not into a particular asset that I can sell but into the working capital of the business. As I said, that would leave a house of cards that would have to fall down, and there would be no way in which I could raise the money. Is that the intention?

Kathryn MacGregor: That is not the intention. I certainly understood that section 19 would give protection to that individual and subsequently their creditors, but I would like to reflect on that point. Maybe we can write to the committee about that.

The Convener: My concern is that I would not have given value for what I have received but would have just received it as a gift. Those around me would have given some value, but in the commercial world that could be pretty tenuous, rather than being something like a mortgage, which we could clearly identify. That is not an unreasonable example.

Paul Wheelhouse: It is a fair point and we will check to see whether there might be any unintended consequences in such a scenario.

The Convener: Thank you.

John Scott: Government officials clarified in oral evidence that section 5 is intended to apply only in respect of wills that are revoked after commencement, and the Government intends that section 8 will apply to documents that are executed on or after commencement. TrustBar has said that it is happy with that, subject to the Government's intentions appearing in the bill. Is the Government minded to amend the bill to reflect that point and include its intentions in the bill?

Paul Wheelhouse: That is a fair question. We will deal with the application of provisions as part of the commencement order. The SLC proposed that ministers should appoint a single day for the commencement of the more extensive bill that was attached to its report, on the basis that it formed a package that could not sensibly be broken down into smaller parts for commencement at different times.

As is set out in the delegated powers memorandum, the Scottish Government considers it likely that it will also take a view that the provisions should be commenced as a whole. However, it considers that it is preferable to ensure that there is flexibility in the commencement powers in case it transpires that there is a need for staggered commencement. That will also allow for the possibility that amendments will be made to the bill during its passage through the Parliament that might impact on the approach to commencement.

Specifically on section 8, which implements recommendation 60 in the SLC report, the application of the bill provisions will be dealt with in the commencement order. I hope that that reassures Mr Scott. It is not the policy intention for section 8 to have retrospective effect. The intention is for the section to apply only to wills that are executed after the commencement date. Otherwise, testators' wills might not have the effect that they intended at the time of drafting. If testators were required to amend their wills, it would be costly, which is why we have taken that approach to the application of the provisions in the commencement order and in setting out the timing.

John Scott: Section 6(2) allows the testator to state in his or her will that section 6 should not apply. TrustBar has made a specific point about that, saying that section 6(2) needs to be revised to give greater clarity about the effect of a legacy

of the residue in certain circumstances. What is your view on TrustBar's suggestion?

Paul Wheelhouse: We looked at how section 6 will operate if there is a competing residual legacy. Where the specified legatee is a child, niece or nephew of the testator, the common law rule conditio si institutus sine liberis decesserit—forgive me for using the Latin—operates so as to prefer the descendants of that child, niece or nephew over an alternative legatee who is specified in the will or a legatee under a legacy of residue or intestacy. Under section 6, which places that rule on a statutory footing—with some departures—an alternative legatee will be favoured over the descendants of the child, niece or nephew. However, those descendants will be preferred over a residual legatee.

As Mr Scott has done, we note TrustBar's evidence on that point. It said:

"the residue clause should be neutral and should not weigh against the testator's deceased son or daughter, so that what was destined for them can go to the grandchildren."—[*Official Report, Delegated Powers and Law Reform Committee*, 22 September 2015; c 38.]

We do not believe that there is any evidence that more cases will be dealt with in the courts or that there will be greater uncertainty. However, we are taking on board the comments that TrustBar made last week and we will give the matter further consideration as we approach stage 2 to see whether we need to make any amendments to address that.

The Convener: In pursuit of that, minister, will you comment on TrustBar's comment that section 6(1)(a) should read "a will identifies as a beneficiary" rather than "names as a beneficiary"? We had a brief discussion on the use of the word "names".

Paul Wheelhouse: That is one of the issues that we are reflecting on in advance of stage 2. The point that was raised in evidence is a fair one. We will come back to the committee in writing with our view on that.

The Convener: We will now have questions from John Mason on survivorship, please.

John Mason: Sections 9 to 11 deal with survivorship, and I have two questions on that. The first is a general question. Professors Carruthers and Crawford suggested that there are quite a lot of policy issues in the bill, and they asked whether they should really be included, as it is not meant to be a particularly controversial bill. Do you feel that the professors have a point?

Paul Wheelhouse: I recognise the complexity of the issues that Mr Mason refers to. We are of the view that the matter is capably being considered under the SLC bill criteria and, therefore, within the context of the bill. The recommendations met the criteria that we applied when deciding what should form the basis of the consultation, in that they are not inextricably linked to the fundamental reforms in parts 2 and 3 of the SLC report. They will therefore work with the law as it stands and apply equally to any new scheme of succession that may be introduced at some point in the future.

Survivorship is only one of a number of policy issues in the bill, however, and we are not of the view, which is shared in the response to our consultation, that it is controversial. We will welcome the committee's view on the issue if it feels strongly about it, but we believe that it is not inextricably linked to the more substantive potential reforms that are subject to the separate consultation. We therefore believe that it is possible to deliver the policy through the bill and in the spirit of the SLC bill process.

John Mason: A specific point that TrustBar raised, on which Professor Paisley supported it, is that the bill should perhaps address the situation where a family perishes together and the estate ends up falling to the Crown rather than to other relatives. The suggestion was made that nobody in their right mind would want the money to go to the Crown and that, however remote a relative was, most people would prefer the money to go to them. Do you have any thoughts on that?

John Scott: Representing the Crown.

Paul Wheelhouse: Yes—I have to be careful at this point.

We are persuaded that the matter would benefit from further consideration. The key lies in how a rule might be framed. Currently, in cases where an estate is intestate, it will fall to be held by the Crown if there are no children, parents, siblings, spouse or civil partner, uncles or aunts, grandparents, brothers and sisters of grandparents or other ancestors—that is quite a lengthy list. It is worth noting that the rule will apply in only a very small number of cases. Therefore, we believe that the number of cases that fall into intestacy will be tiny.

We need to understand what happens to estates that fall to the Crown. First, they are investigated by the national ultimus haeres unit—is that the correct pronunciation?—and they then pass to the Queen's and Lord Treasurer's Remembrancer. The QLTR—I will resort to using the acronym—administers the estate, paying any debts and so on, and then it will be added to the unclaimed estates list. At that point, the estates are advertised on the website as

"having fallen to the Crown".

However, we understand that the great majority of those estates will subsequently be paid to blood relatives, so relatively few of them end up in a situation where the assets are ultimately retained by the Crown.

I note Mr Scott's point that I represent the Crown in this respect, but it would clearly be desirable if assets could go to the family members that the person who died without a will would have hoped that their assets would go to.

A change of this nature, if it could be robustly and clearly framed, would develop or extend the Scottish Law Commission's recommendation, which might create a tension around remaining within the criteria for a Scottish Law Commission or Delegated Powers and Law Reform Committee bill. We have thought carefully about what we could sensibly and reasonably put through the committee without causing concern about a lack of consultation on fundamental changes.

The Convener: So, that might not be the final word on the issue, if it troubles us as a Parliament in the future.

Paul Wheelhouse: If the committee feels strongly on behalf of the Parliament that further action is needed on the matter, I will look to address that. However, we believe that the bill is sound given the spirit of the process in which we are engaged with the committee, and we feel that the provision to which it gives effect is reasonable. That said, we are persuaded that the matter will benefit from further consideration, and if the committee has any particularly strong views, we will welcome them.

10:45

The Convener: We turn to the issue of uncertainty, which is in the capable hands of Mr Stevenson.

Stewart Stevenson: In your opening remarks, minister, you referred to Lord Wheatley putting the meaning of "uncertainty" in this context beyond doubt. TrustBar, in particular, has suggested that certainty would be enhanced if the determination of uncertainty by the balance of probabilities was incorporated in the bill. Are you and the Government minded to think further about that?

Paul Wheelhouse: I recognise that the issue is important, hence the amount of time that has been devoted to discussing it.

With regard to the bill's expressly providing that the time of deaths is "uncertain" when it cannot be established on the balance of probabilities that one person survived the other, we do not consider that any change is necessary, as no one—it would appear—is suggesting that the provisions as drafted do not work legally. They align with the approach that is taken in the Succession (Scotland) Act 1964 and the Scottish Law Commission's draft bill, and we believe that the term "uncertain" is clearly explained in the explanatory notes, specifically in paragraph 36. The reader of the bill will get the answer to the issue without having to resort to the case in question.

It is not always possible or desirable for legislation to state everything expressly; in fact, if it does so, it can risk undermining the interaction between legislation and the background law in which it operates. TrustBar pointed out that it is unnecessary to refer to the balance of probabilities, which Mr Stevenson mentioned, and using those words here might give rise to questions about the absence of a corresponding approach elsewhere in the bill in relation to questions about the evidential standard that is required to prove a legal proposition.

Professor Carruthers said in her evidence that it is not always desirable

"to put into legislative form a rule that already operates effectively at common law."—[*Official Report*, *Delegated Powers and Law Reform Committee*, 22 September 2015; c 2.]

Alignment with the approach that is taken in the 1964 act ought to guarantee the same legal result, and changing the wording might introduce new room for legal argument and uncertainty over, say, who has established what and what the term "cannot" means.

As I said, we believe that our approach is consistent with the 1964 act, and we hope that paragraph 36 of the explanatory notes clearly sets out the intention.

Stewart Stevenson: In essence, then, the standard of proof that prevails in civil courts is on the balance of probabilities, and that being the norm, it catches the cases that are before us under the bill.

Paul Wheelhouse: I believe that Mr Stevenson is correct, but I stand to be corrected by my colleagues.

Stewart Stevenson: They look as if they are nodding.

With regard to sections 9 and 10, TrustBar and the Law Society of Scotland have said that one should not trump the other and that in certain circumstances both might prevail. In particular, section 10(4) rules out section 10(1)(b) when people die simultaneously or the order of death is uncertain. It seems to me that the effect of sections 9 and 10, when taken together, is to tip wills into intestacy where it is asserted that the will can be used to determine who will inherit beyond the primary people who might inherit.

Are you minded to think about the interoperation of sections 9 and 10 in light of the remarks that have been made in evidence to the committee?

Paul Wheelhouse: As ever, I will continue to reflect on the matter, and I am certainly keen to see the committee's detailed comments on it. For the record, however, I note that we have listened carefully to those who have offered views on section 10(4), including the view that it adds nothing to the bill and that, as Mr Stevenson has indicated, it might be perceived as resulting in more cases of intestacy.

It might be worth setting out for the record that the intended purpose of section 10(4) is to achieve the desired policy in a situation where the testator dies in a common calamity with one or more people. The policy intention in that case is that each deceased person should be treated as having failed to survive the other. That would have the effect that the property would not be divided equally between their estates, as would be the case in the absence of subsection (4).

We will, however, give further consideration to the point and whether an amendment is needed. If the committee is able to give a view on the direction in which we should go, based on the evidence that has been presented, I will consider that. However, I hope that I have set out today our intent in section 10(4)—that each deceased person is to be treated as having failed to survive the other.

Stewart Stevenson: It is not for me to anticipate what the committee might say, but there seems to be a tension between sections 10(1)(b) and 10(4) that, as a layperson, I am unable to reconcile.

Paul Wheelhouse: We want the law to be understandable. If there is uncertainty, we will reflect on that in considering the evidence that is presented by the committee.

The Convener: That is a fair point. The law needs to be understandable. If a degree in logic is needed for people to work out how on earth it is going to apply when they look at their family's affairs, something will have gone wrong somewhere.

Paul Wheelhouse: Agreed.

Stewart Stevenson: I recall doing a course in logic and metaphysics and I suspect that the issue tips into metaphysics rather than logic.

I will move rapidly on. The Scottish Law Commission originally wanted to put forfeiture on a statutory footing, rather than simply tweak aspects of it. Is the minister still considering putting it on a statutory footing, rather than giving the courts the 100 per cent discretion that is currently denied them?

Paul Wheelhouse: That is a very fair question. In its 1990 report, the Scottish Law Commission recommended that the common law of forfeiture should be placed on a statutory footing and that, at the same time, the Parricide Act 1594 should be repealed.

However, in its 2009 report, the Scottish Law Commission shifted its position and decided not to recommend placing the common law of forfeiture on a statutory footing. It perceived that forfeiture was rare in practice, and that having provision for forfeiture in the common law had not created any difficulties, up to that date at least.

We share the Scottish Law Commission's view. I appreciate that not everyone might be in agreement, but I note that in general witnesses are content with that approach.

Stewart Stevenson: Professor Paisley suggested that the Forfeiture Act 1982 was

"terrible"

and

"one of the worst pieces of legislation ever passed by the Westminster Parliament".—[*Official Report*, *Delegated Powers and Law Reform Committee*, 22 September 2015; c 3.]

He was seeking to make a point, perhaps. He suggested that the traditional common-law concept of personal unworthiness, which is in Scots law, is a better way for the courts to judge sensibly who might be excluded from inheriting after particular circumstances.

As a footnote, I say that the Parricide Act 1594 covers by no means all such circumstances, and I suspect that deleting it from the canon of law would not be unreasonable.

Paul Wheelhouse: That is a very reasoned point. We are aware of the oral evidence on the matter.

The personal unworthiness rule that Mr Stevenson referred to is considered in part 2 of the Scottish Law Commission's 1986 consultative memorandum 71, especially in paragraphs 2.2 to 2.14. The common law is also mentioned in part VII of the commission's 1990 report, at the end of paragraph 7.5, in which examples are given of situations where it might be useful.

The approach of the commission's 2009 report leaves the common law to deal with situations that are not covered by the Forfeiture Act 1982. I take Mr Stevenson's comments about the 1982 Act. I will not add to them today.

The Scottish Law Commission's reports made no recommendations on personal unworthiness. We are therefore giving some consideration to the application of section 10 to the personal

unworthiness rule. It is something to which we could return with the committee in due course.

The Convener: That suggests that you might return to quite a few things. That is what we are about.

John Scott: I welcome what you say, minister. Professor Paisley raised a forceful point about personal unworthiness and I am sure that the committee will want to be assured that you have, in every way, considered every aspect of what he said. I am reassured by what you say.

The Convener: Thank you for that comment. If that concludes forfeiture, we go back to John Scott on the protection of executors and section 18.

John Scott: In section 18, which is on the protection of trustees and executors, there is for the first time an explicit duty on executors and trustees to make reasonable inquiries about possible beneficiaries. It is clear to the committee that advertising is not part of practitioners' current practice. Will you offer guidance to practitioners who might be concerned about the potential implications of the apparent new duty in section 18?

Paul Wheelhouse: We have considered the evidence provided on that point. Section 18 contains no requirement to advertise for beneficiaries, as Mr Scott indicates, and it remains to be seen how the duty to make reasonable inquiries will operate in practice.

In its 1990 report, the Scottish Law Commission noted that the requirement on trustees and executors

"to make such enquiries as are reasonably necessary in the circumstances would represent at most only a slight change in the law."

On that basis, "reasonable inquiries" would appear to be a commonly understood term. The Scottish Law Commission considered whether an "express duty to advertise" was appropriate, but it was content that a general duty to make all reasonable inquiries was sufficient. It went on to advise that an express duty to advertise would give

"undue prominence to this method of pursuing enquiries."

Section 18 adds new section 27A(2)(b)(i) to the Trusts (Scotland) Act 1921, and we are content that its wording—

"such enquiries as any reasonable and prudent trustee would have made in the circumstances of the case"—

is sufficient for the purposes of the section and does not require to be defined. What is deemed to be "reasonable" will be determined by the courts. We understand that in evidence Eilidh Scobbie raised the point that we get into "a different ball game"—I believe that that was the term that she used—when people have to go abroad or come from abroad, so we believe that the current wording provides sufficient flexibility to make reasonable inquiries in different circumstances. We are content with the provisions as they stand, but, as always, we will listen to the committee's views.

I hope that that has addressed Mr Scott's question.

John Scott: It has certainly addressed it, but the issue turns on the idea of what is "reasonable" and what reasonable inquiries are likely to be. I would be disappointed if it were for only the courts to decide. Of course, the word "reasonable" has many uses in Scots law.

I do not really know what I have to say, but I am slightly worried that the provision is still not sufficiently exact.

The Convener: Minister, you said that the SLC thought that the change would be "slight"—that is roughly what you said. If we intend to change the law, should we not be specific about that change? Those who know what the law is will be in a good place, but those who have to guess will have to take advice. If we do not know what the slight change is, we will all be in a hole.

Paul Wheelhouse: I will reflect on that point and respond. Mr Scott is clearly concerned about the scope for misinterpretation, so we can perhaps reflect on that and see whether it can be dealt with in the explanatory notes or whether the provision can be tightened up. If I may, I will come back to the committee on that point.

The Convener: The committee represents the normal citizen of Scotland who might well unexpectedly find himself or herself as an executor or a trustee without knowing the first thing about it and for whom all this would be a bit of a shock. Those people, who might include us, need good advice—without necessarily going to lawyers—about what they reasonably need to do. We are not considering what the law says to lawyers here; we are talking about the ordinary man and woman who is confronted with this problem.

Paul Wheelhouse: You and John Scott have taken a reasonable position. Those who find themselves in such a situation might be distressed about the loss of a loved one and the last thing on earth that they will need is confusion about what should or should not be done.

If there are ways in which we can make it clearer to the executor what steps they might want to take to ensure that the appropriate advertisement is made, we will consider them and come back to the committee.

11:00

Stewart Stevenson: I put it to the minister that what constitutes reasonable inquiries will change over time, as certain kinds of inquiries become more practical. Indeed, 20 years ago, much less information was available to the ordinary citizen. Three or four years ago, in a Christmas debate, my family identified that we had a missing cousin. I was able within 30 minutes to identify where they stayed, who they had married, the names of their children and the telephone number at which they could be contacted, and I could provide a photograph of their house to the member of the family who had raised the subject. Twenty years ago, however, it would have been beyond contemplation to even initiate such an inquiry. That shows that we should be very careful about allowing the courts the discretion to decide at the time what might be reasonable, because we cannot anticipate what will be reasonable. Without wishing to put my hand too far up your back, I say that it might be useful if, in one of the debates on the bill, the Government expressed something along those lines, if that is the Government's view of what might constitute reasonable inquiries.

Paul Wheelhouse: That is a fair comment. We must recognise that legislation that deals with something as fundamental as the law of succession and which will be, for a period—if not for ever—the established legal position will have to take account of new possibilities.

I am surprised that Mr Stevenson did not mention that he had canvassed his missing cousin in that 30-minute period, because I know how efficient he is in that respect. His helpful example shows how much easier it is in the modern era to identify individuals than it would have been prior to the establishment of the internet and the proliferation of online data sources.

It is a serious issue that we must reflect on. We must ensure that the law will withstand future change.

The Convener: Forgive me for seeking to have the last word on the issue, but I make the point that, although we would not want to take away the courts' discretion to interpret the law—that is what they do—the fact is that, at the end of the day, the men and women whom we represent do not want to go anywhere near a court.

Paul Wheelhouse: There may be a balance to be struck whereby we keep the flexibility that Mr Stevenson has identified that we need in the system as well as provide as much support as we can to those who find themselves acting as an executor, so that they understand their responsibilities and can access some guidance about how to go about their duties.

The Convener: I think that Stewart Stevenson has a question on private international law.

Stewart Stevenson: I think that John Scott might have the next question.

John Scott: What question are we on?

The Convener: We have dealt with question 17. We are over the page now.

Stewart Stevenson: In that case, I will deal with the issue of international law.

Professors Carruthers and Crawford have suggested that the issue of domicile is not fully resolved in the bill, in particular in relation to the distinction between movable and heritable property. It would be useful if the Government were to confirm that it is not the intention to insert Scottish jurisdiction over heritable property that is beyond our jurisdiction, where a local set of rules will determine the inheritance. That might be a good starting point. Might you wish to make the bill clearer in that respect?

Paul Wheelhouse: I will do my best to answer the question but, because the point is a technical one, I might bring in my colleagues to supplement my response. I know that points have been made about a potential jurisdictional gap. We are not of the view that there is one, but we note the comments, particularly from Professor Carruthers, in respect of this matter.

The bill provisions apply only when the testator dies domiciled in Scotland. The SLC's recommendation 50 is implemented in as far as it relates to the provisions in the bill. The policy intent is that it should be possible to apply for rectification of a will only if the testator dies domiciled in Scotland. That is reflected in the draft SLC bill section 27(1). Recommendation 50 has been applied to the extent that it relates to the provisions on rectifying a will in sections 3 and 4, to which recommendation 48 restricts application to domicile.

On the specific point about movable and heritable property I will bring in my colleague, Kathryn MacGregor.

Kathryn MacGregor: Private international law is a fairly complex matter, as a number of the people who have given evidence to the committee have said. The Scottish Government has dealt with it in relation to this bill by considering it on a section-by-section basis.

The Law Society of Scotland raised a comment on whether section 1 should be extended to heritable property. That was not our intention. We have had discussions about that with the Law Society and will continue to do so.

As the minister mentioned, in respect of sections 3 and 4 the rectification is limited.

Professor Carruthers made a point about the jurisdictional gap and asked why we have not extended the application to movable property. We have not done that because recommendation 48 of the SLC report, which specifically referred to those sections, only applied that application to domicile in respect of heritable property.

Stewart Stevenson: Let me be clear and consider a case of someone domiciled in Scotland, which means that the matter is determined under Scots law, but where the will has been written in another jurisdiction and relates to heritable property in the jurisdiction in which the will was written. Are we saying that, in that example, the Scots process can rectify the disposition of the heritable property in the foreign jurisdiction, subject of course to any overriding local laws that might prevail?

Paul Wheelhouse: I will bring Jill Clark in on this one.

The Convener: Please do.

Jill Clark: I will defer to Kathryn, but I think that that would be the case.

Kathryn MacGregor: That is my understanding—it would not apply to the foreign movable or heritable property that Stewart Stevenson referred to.

Stewart Stevenson: So that is the general principle of international law as it exists.

Kathryn MacGregor: Yes.

Stewart Stevenson: That is fine.

The Convener: That deals with that issue. For section 20 on gifts made in contemplation of death, we move back to John Scott.

John Scott: Professor Paisley, supported by Professor Carruthers and TrustBar, took issue with the drafting of section 20. Professor Paisley memorably described it as "logically incoherent" last week. Does the minister wish to comment on the drafting of the provision? Do you share the professor's views?

Paul Wheelhouse: The wording used is intended to make it clear that the abolition of the donation mortis causa as a distinct legal entity does not prevent an individual from making a gift subject to the same conditions in similar circumstances: that is, in contemplation of death. The only change in law is that the conditions are no longer automatic.

The evidence provided to the committee appears to overlook the distinction between, first, the abolition of the special form of gift called the donation mortis causa and, secondly, a gift made by someone in contemplation of his or her death with express conditions other than in that special form. Section 51(2) of the SLC bill was included so as to resolve any doubt that might arise on the abolition of the customary mode of gift known as a donation mortis causa about the ability of people to make gifts subject to conditions in the sort of circumstances in which the customary mode of gift might previously have been deployed—I will take a breath after that.

Having said that, the words in question were not part of the SLC bill, and we will therefore reflect further on the concerns raised in evidence and whether the section requires to be amended at stage 2. We will perhaps come back to the committee on that—along with other points that were raised earlier—in relation to whether we believe an amendment is required to address the concerns that Mr Scott has directed me to look at.

John Scott: I would be grateful for that.

The Convener: Is the provision drafted in the way it is because we do not put inverted commas into statute? If we were to write it in normal English, donatio mortis causa—or whatever—would be in inverted commas to indicate that it was that set of words.

Paul Wheelhouse: Yes, I believe that that is correct.

Kathryn MacGregor: It is really a matter for the draftsmen, but I think that that would be the case.

The Convener: Would it be italicised?

Kathryn MacGregor: Yes.

Paul Wheelhouse: It is italicised in my notes, convener.

The Convener: If that is the problem, so be it.

I will move on to ancillary powers and pick up on a point that has been exercising the committee in general. Like pretty much every other statute, the bill has ancillary provisions—in this case in section 25. Section 25 is drafted in terms that are not the same as in other statutes. It is entirely unclear to us why the ancillary provisions are in different forms in every case, although I presume that it is because someone thought that they should have different meanings.

Do you have any comment on the ancillary powers in section 25, and do you take the point that we should have a standard set of words unless there is a real need for different ones?

Paul Wheelhouse: I will take the latter point away for discussion with colleagues to see whether there could be a standard form of words to make things easier for committees. I appreciate your point, convener.

In terms of the rationale for having ancillary powers in the bill, we note from your report that the committee

"accepts, in principle, that an ancillary powers provision is appropriate to this Bill."

We highlight the fact that any such powers would be exercised using the affirmative procedure, allowing Parliament the opportunity to scrutinise in detail the provisions and ensure that they are robust and deliver the policy intent. I hope that that comforts the committee. I am sure that Parliament will not miss its chance to point out any flaws in any provisions that come forward.

We believe that to be a proportionate approach, which avoids the necessity to use primary legislation to deliver the bill's intentions.

The Convener: That concludes our questions. I thank you for your attendance. The bill has presented a challenging and interesting experience. We will have to reflect on all the evidence.

11:12

Meeting suspended.

11:16

On resuming—

Instruments subject to Affirmative Procedure

Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 [Draft]

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

Members *indicated agreement.*

Criminal Justice and Licensing (Scotland) Act 2010 (Supplementary Provision) Order 2015 [Draft]

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

Members *indicated agreement.*

Private Rented Housing Panel (Landlord Applications) (Scotland) Regulations 2015 [Draft]

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

Members *indicated agreement.*

Instruments subject to Negative Procedure

Tuberculosis in Specified Animals (Scotland) Order 2015 (SSI 2015/327)

11:17

The Convener: The instrument contains a minor drafting error: article 2(1) contains an otiose definition of "authorised veterinary inspector" whereas in various places the order refers only to a "veterinary inspector". Does the committee agree to draw the order to the attention of the Parliament on the general reporting ground in respect of a minor drafting error?

Members *indicated agreement.*

The Convener: Does the committee agree to note and accept that the Scottish Government has undertaken to remove the otiose definition by amendment in due course?

Members *indicated agreement.*

Legal Aid (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/337)

The Convener: The instrument fails to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

The instrument was laid before the Parliament on 17 September and came into force on 22 September. The requirement to leave a minimum of 28 days between laying and coming into force has therefore not been complied with. The Scottish Government has explained that the amendments to legal aid provision introduced by the instrument were required to be in force as at 22 September, when various provisions of the Courts Reform (Scotland) Act 2014 came into force. The amendments seek to ensure that legal aid provision will operate effectively in respect of, among other things, the new sheriff appeal court established by that act.

The committee will also wish to note that the Scottish Government had proposed to make amendments to existing legal aid provision via an affirmative instrument, which was laid before the Parliament in draft on 9 June and considered by the committee at its meeting on 23 June. That draft instrument was withdrawn on 17 September following concerns raised by the Justice Committee at its meetings on 8 and 15 September. The instrument before the Delegated Powers and Law Reform Committee today was laid before the Parliament on 17 September and makes substantially the same amendments as those proposed in the earlier draft affirmative instrument but with specific changes that seek to address the concerns raised by the Justice Committee.

Does the committee agree to draw the instrument to the attention of the Parliament on reporting ground (j) as there has been a failure to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

The Convener: Does the committee agree to accept the Scottish Government's explanation for the failure to observe the requirements?

Members *indicated agreement.*

National Health Service (Payments and Remission of Charges) (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/333)

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

Members *indicated agreement.*

Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Amendment Rules 2015 (SSI 2015/334)

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 any parliamentary procedure

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No 13) and Courts Reform (Scotland) Act 2014 (Commencement No 4) Order 2015 (SSI 2015/336)

11:20

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

Members *indicated agreement.*

Human Trafficking and Exploitation (Scotland) Bill: After Stage 2

11:20

The Convener: The purpose of this item is to consider the delegated powers provisions in the Human Trafficking and Exploitation (Scotland) Bill as amended at stage 2. The stage 3 debate on the bill will take place on Thursday 1 October. The committee should therefore agree its conclusions today, so that they can be captured in a report prior to the debate.

Members will have noted that the Scottish Government has provided a supplementary delegated powers memorandum and will have seen the briefing paper for the committee. It is proposed that members may wish to find all the new or amended delegated powers acceptable.

Does the committee agree to report that it is content with the provisions in the bill that have been amended at stage 2 to insert or substantially alter provisions conferring powers to make subordinate legislation and other delegated powers?

Members *indicated agreement.*

The Convener: Thank you very much.

11:21

Meeting continued in private until 12:39.

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