The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 27 October 2015

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
29th 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:

Kevin Gibson (Scottish Government)
Nigel Graham (Scottish Government)
Ailsa Heine (Scottish Government)
Diane Machin (Disclosure Scotland)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 27 October 2015

[The Convener opened the meeting at 10:03]

Decision on Taking Business in Private

The Convener (Nigel Don): Good morning. I welcome members to the Delegated Powers and Law Reform Committee's 29th meeting in 2015. As always, I ask members to switch off mobile phones, and I note that we have received apologies from Richard Baker.

Agenda item 1 is a decision on taking items 9 to 12 in private. Item 9 will allow the committee to further consider the delegated powers in the Alcohol (Licensing, Public Health and Criminal Justice) (Scotland) Bill, item 10 will enable the committee to consider a draft of its first quarterly report for the parliamentary year 2015-16, item 11 will enable the committee to reflect on the evidence that it has heard on the remedial order subject to affirmative procedure, and item 12 is for the committee to consider its draft stage 1 report on the Succession (Scotland) Bill. Does the committee agree to take those items in private?

Members *indicated agreement.*

Remedial Order subject to Affirmative Procedure

Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (SSI 2015/330)

10:04

The Convener: Agenda item 2 is consideration of a remedial order subject to affirmative procedure. We will take oral evidence on the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (SSI 2015/330), which is currently out for consultation by the Scottish Government. The order interacts with the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015, which the committee considered at its meeting on 8 September.

I welcome from Disclosure Scotland Diane Machin, United Kingdom Supreme Court project policy lead; and from the Scottish Government Nigel Graham, policy adviser in the directorate for justice; Kevin Gibson, solicitor in criminal justice, police and fire; and Ailsa Heine, senior principal legal officer in food, children, education, health and social care. Good morning, colleagues.

It occurs to me that someone might want to make an opening comment, although that might not be the case. I see that it is not—that is fine. I just wanted to make sure that no one wanted to say anything in the first instance.

In that case, we turn to questions from the committee. We will start with John Scott.

John Scott (Ayr) (Con): Good morning, everyone. I will go straight to sections 13 and 14 of the Convention Rights (Compliance) (Scotland) Act 2001, which deal with the making of urgent remedial orders. The statement of reasons that, as required by section 14(2)(b), has been laid with the remedial order does not appear to explain the compelling reasons for making such an order as distinct from any other action such as primary legislation, nor does it explain why the Scottish ministers considered it necessary to follow this urgent procedure, particularly given the length of time that has elapsed between the UKSC judgment and the Scottish Government's bringing forward the order. Can you give us explanations for both matters?

Ailsa Heine (Scottish Government): The Scottish Government felt that it was necessary to use the urgent procedure simply to provide certainty from the point at which the new legislation was brought into force. Although some time had passed since the UK Supreme Court

judgment, the fact was that it took some time to consider the policy solution and the implications of what the UK Supreme Court had said in relation to the cases in England and Wales.

John Scott: Right. Can you explain the compelling reasons for making a remedial order instead of creating primary legislation?

Ailsa Heine: It was all about providing certainty in the legislation from the point at which it came into force. Had we introduced a bill, it would have been more difficult to provide certainty about the law as the bill was going through Parliament. There would have been a need for an expedited bill process instead of a normal bill process, and we therefore felt that the remedial order was more appropriate.

John Scott: Okay.

The Convener: Do you want to follow that up, Mr Stevenson?

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): It might be helpful if the witnesses could put on record their understanding of why the order was introduced on the particular day that it was. In other words, why did it not happen a month earlier? Why could it not wait for another month? What drove the Government to introduce the order on that particular date in the calendar? Was it simply that the Government was ready to do it at that point and that it did things as quickly as it could?

Ailsa Heine: It could not have been done in the two or three months before, because that was recess. Unfortunately, it was impossible to do it prior to recess, simply because of the practical and legal considerations in preparing the operational solution and drafting the legislation.

The date chosen was as soon as possible after recess had ended. We were conscious that it could not be much later, because of the dissolution of Parliament in March next year and the fact that we needed 120 days for the order to go through the parliamentary process. There were a lot of practical considerations around the date. Recess prevented it from being done any earlier over the summer and a later date could have led to difficulties towards the end of the process, because we would have run into timing difficulties. There were a lot of practical issues around the date that we chose, as we had to make sure that it fitted in with the parliamentary process.

John Scott: Forgive me for jumping back in. The reason that primary legislation was not created was essentially expediency, because there was not enough time.

Ailsa Heine: No, I do not think that that is the case.

John Scott: I am concerned about the suitability of the approach. Forgive me if I have misunderstood you, but from what you have said it seems to be more of a matter of convenience that we have arrived at this process.

Ailsa Heine: On our choice of the remedial order as the legislative means, it was considered that the procedure set out in the Convention Rights Compliance (Scotland) Act 2001, which gives ministers the power to remedy both primary and secondary legislation, was the best option because the legislative solution could be brought into force immediately and provide certainty about both what people were required to self-disclose and what the state was required to disclose on disclosure. That was the primary driver for the remedial order. The powers existed in the 2001 act and it was felt that this was an appropriate use of them, to provide certainty. Once that option was chosen, there were practical considerations about when the remedial order could be made.

Stewart Stevenson: Is it correct to say that the potential defect in Scots law that arose from the UK Supreme Court ruling has been remedied, in essence, through two separate legal processes: the quick fix—I am not suggesting by the use of the phrase "quick fix" that it is any sense deficient—and the fix that we are now consulting on? It would have been difficult to do it through primary legislation, because you were still working on the second bit. Is that fair comment? You would have had to do two bits of primary legislation if you had taken that road. For everybody concerned, it is therefore more straightforward to do it this way.

Ailsa Heine: Can I clarify that, when you refer to a "quick fix", you mean the previous affirmative order?

Stewart Stevenson: Yes, the previous order that we passed.

Ailsa Heine: There could not have been primary legislation to make the provisions that were in the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015, because the powers do not exist to make that as primary legislation. That is not within devolved competence.

Special powers are given to ministers to make the necessary provisions under the rehabilitation of offenders legislation, but that can only be done through secondary legislation powers. That part of the fix—the changes to the rehabilitation of offenders provisions relating to self-disclosure—could only ever have been done in secondary legislation, because it would not have been within devolved competence to do that in a bill. If there had been a bill to deal with what is in the remedial order, there would still have been a need for secondary legislation to deal with the rehabilitation

of offenders procedure. Kevin Gibson can explain a bit more about the rehabilitation of offenders powers.

Kevin Gibson (Scottish Government): Essentially, we are required under the Rehabilitation of Offenders Act 1974 to make provision that affects reserved matters. Ordinarily, we would not be able to do that and we certainly cannot do it in primary legislation, but an order under the Scotland Act 1998 transfers to the Scottish ministers the necessary secondary legislation powers under the 1974 act, which in effect allows us to make provision about reserved matters, but only in exercise of those specific powers.

Stewart Stevenson: Just to be clear, was it a section 30 order that granted us the power? I dare say that it went across my desk, but I have forgotten it.

Kevin Gibson: It was a section 63 order.

10:15

Stewart Stevenson: So section 63 of the 1998 act—I must go and look at it—gave us the power to make the specific provisions, but only by secondary legislation.

Kevin Gibson: Correct.

Stewart Stevenson: We are short-circuiting the argument, but that is probably sufficient for our purposes.

The Convener: It is still not entirely obvious to me why it was better to lay the order that we have rather than introduce expedited legislation that could have been considered in a day—which we have done—and, at least in principle, would have allowed for a full parliamentary debate about some of the measures that are in front of us that we cannot change, such as the content of schedules. That could have been done at the same speed, so why was the order that we have in front of us the preferred route?

Ailsa Heine: Had we done that, we would have been asking Parliament to do two expedited procedures: one for the Rehabilitation of Offenders Act (Exclusions and Exceptions) (Scotland) Amendment Order 2015 and one for a bill. We tried to avoid having too many expedited procedures. Also, we felt that the 60-day period of consultation that is available under the Convention Rights (Compliance) (Scotland) Act 2001 once a remedial order has been made would allow us to take into account issues that the Parliament and other stakeholders express and to consider whether any modifications need to be made to the remedial order. Therefore, the remedial order is not absolutely set in stone; it could be amended and the amended order would come into force later on.

The Convener: I accept what you said but, as ever, the committee is concerned about the process. I contend that you could have replaced the remedial order with expedited legislation that would have enabled Parliament to put its moniker on everything that is in the order rather than having to consult about it.

Someone who is looking for a disclosure now is working with the remedial order. I accept that it is being consulted on and could be changed, but that begs the question why someone who is looking for a disclosure now is in a different regime from the one that we will have once we have modified it.

There are two different ways of tackling the matter. The parliamentarian in me would have preferred the expedited legislation because that would have meant that the Parliament agreed what is in the remedial order rather than, in effect, being asked to agree a consultation afterwards.

Ailsa Heine: I am not sure whether I can add much to what has been said. The remedial order was considered to be the best approach.

John Mason (Glasgow Shettleston) (SNP): Convener, am I right in understanding that we are not allowed to introduce primary legislation on the matter because it is reserved?

The Convener: We are talking about two different things. One is the order that was laid under the Scotland Act 1998 to change the reserved powers, which we are entitled to do. That is not what I am talking about. I am talking about the remedial order that is in front of us, which is within our remit and the provisions in which could have been introduced by primary legislation rather than by order. Our power to deal with reserved matters, which is what Stewart Stevenson was talking about, can be dealt with only one way. That is not in dispute—unless I have missed a point.

We are now talking across ourselves.

Ailsa Heine: I accept that it would have been possible to have the provisions that are in the remedial order in primary legislation because they are all within devolved competence.

The Convener: Right. Your argument is simply that the Government felt that primary legislation was not the better way to do it. I have asked the question and that is the answer.

Ailsa Heine: Part of the answer is that it was necessary for the changes to the Rehabilitation of Offenders Act 1974, the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 all to come into force at the same time and that process is slightly more manageable when all

the amendments are contained in secondary legislation.

Stewart Stevenson: Now that I have section 63 of the 1998 act in front of me—I do not recall ever having read it—I see that, unlike section 30, it transfers power only to the Scottish ministers, not to Parliament. Therefore, a section 63 order can allow ministers only to lay secondary legislation. It does not grant ministers the power to introduce primary legislation. I just wanted to be clear that my reading of section 63 corresponds to what you are trying to say.

The Convener: Thank you for clarifying that.

John Scott: We note that the remedial order, while already in force, is currently out to consultation. Will you explain the consultation process and which bodies are involved?

Diane Machin (Disclosure Scotland): We issued a notice of consultation on the day that the order was made, which was 10 September. Following the legislative provisions, we have a 60-day consultation period. We sent notification to all of our key stakeholders. We have posted the legislation on the Scottish Government's consultation website and on citizen space, and we have advertised it on Disclosure Scotland's website.

John Scott: What is the nature of the responses received to date? Have any issues been raised about the compatibility of the approach taken in the order with the European convention on human rights?

Diane Machin: So far we have received only four responses to the consultation. One was from the Sheriffs Association, which stated that it would not be submitting a response. We had a response from an individual saying that we should have a disclosure period of 10 years instead of 15 years. That was a one-sentence response with no explanation. The other two responses were from individuals who were both very positive about the amendments that we have made.

John Scott: Would that be in line with expectations?

Diane Machin: We are hoping for more responses. Given the complexity of the provisions in the legislation, we would not expect those responses to arrive until close to the deadline, but we will have to wait and see what happens.

John Scott: For those who might be watching this, when is the deadline?

Diane Machin: The consultation closes on 24 November.

John Scott: Please send in your responses—

Diane Machin: As soon as possible.

John Mason: I want to ask a few questions about the offences in schedules 8A and 8B. Will you explain why it was felt best to tackle the problem by putting in schedule 8A the list of offences that always have to be disclosed, and putting in schedule 8B the offences where there is a little more room for movement?

Following on from that, why were the particular offences put in each list?

Diane Machin: The rationale for the offence lists has been subject to quite a lot of scrutiny in Disclosure Scotland and beyond. We worked up a rationale, which has a number of criteria in it, and we considered the roles that require high-level disclosures. We identified offences that result in serious harm to a person, that represent a significant breach of trust and/or responsibility, that demonstrate exploitative or coercive behaviour, that demonstrate dishonesty against an individual and abuse of a position of trust, or that display a degree of recklessness.

In looking at offences that already exist in legislation and offences that have already been disclosed by Disclosure Scotland over the past five years or so, we determined that there is a certain group of offences that are so serious that they should always be disclosed. Those are offences that fall into one or other of those criteria.

We then determined that there was another set of offences that contained an element of those behaviours but which were not as serious as the first set. The passage of time may well diminish the relevance of those offences to the person making the employment decision.

John Mason: I do not want to go through all 17 offences in schedule 8A and all 23 in schedule 8B—we could probably debate them all in detail—but clearly some of them are close to the line as to whether they are serious. Fraud jumps out at me; it could be a tiny fraud, which I accept might not always need to be disclosed, but it could also be an extremely serious fraud. Was it difficult to split the two groups of offences into lists?

Diane Machin: It has been a lengthy process that has gone through a number of stages and a number of exercises both of internal and external rationalisation. We absolutely accept that there are some offences that could easily be in one list or the other and that some offences, such as fraud, can cover a broad range of behaviour from less serious to extremely serious. However, we took account of the fact that the sentence that is imposed by the court is the first consideration in determining whether or not something should be disclosed. If the offence in any instance was extremely serious, it is highly likely that that will be reflected in the sentence that was imposed by the court. If it is a lengthy sentence, it may never be

spent and will therefore always be disclosed. If the court imposed a less harsh sentence, we need to take that as reflecting the fact that the offence in itself was probably at the less serious end of the scale.

John Mason: My understanding is that the regime is slightly different in England, Wales and Northern Ireland and that when those jurisdictions took things forward they relied on evidence from the Independent Advisory Panel on the Disclosure of Criminal Records. Has the Scottish Government had some equivalent source of evidence on which to base its rules?

Diane Machin: There is no independent advisory panel for Scotland. In developing our rules and our offence lists, we paid close attention to what was done in England and Wales and in Northern Ireland. We paid attention to their lists of offences that will be filtered or not filtered, and we also looked at the other rules that they had put in place.

The regimes in place in England and Wales and in Northern Ireland are quite different to what is in place in Scotland. They are in some senses a lot more restrictive. For example, if someone has more than one conviction on their record in England and Wales, everything will be disclosed, regardless of what those convictions are. Also, if they have any sentence of imprisonment, everything will be disclosed. We felt that that approach was not appropriate in Scotland, so our regime offers more flexibility in considering the nature of the sentence and the number of convictions.

The Convener: Could I pursue that issue? Clearly we are not here to compare ourselves with England, and people in England will have to answer to the courts on that one. When you compared offences in Scotland and England, did you find that, although the words are often different, the general nature of the offence appeared to be the same, or are our legal systems sufficiently different to make the offences non-comparable anyway?

Diane Machin: It varies depending on which offence you are looking at. There are some that are different and there are a lot that are similar.

We took account of everything that we have disclosed since 2011, both from criminal history system records and from police national computer records, and we also looked at what the Disclosure and Barring Service has on its filtering list, which includes a range of Scottish offences. The two lists are broadly comparable, but there are certain offences that exist in Scotland that do not exist in England and Wales.

The Convener: For the record, can you confirm that there is no known offence in Scotland that is not on one of the lists? Did we deliberately miss anything out, or is everything covered?

Diane Machin: As far as I am aware, we have covered everything, even things that exist in legislation but have not been prosecuted yet.

The Convener: Thank you.

John Mason: You said that one of the few responses that you had to the consultation was on the question of whether it should be a period of 10 years or 15 years over which something might have to be disclosed. Can you explain where the timescale of 15 years came from and why it was felt to be appropriate?

Diane Machin: A number of factors were taken into account in reaching the decision on having a 15-year timescale.

We looked at the CHS weeding rules that Police Scotland applies. It applies a 70-30 rule whereby an offender's conviction has to have been on record for 30 years and they have to be aged 70 before it will automatically be weeded from CHS.

10:30

We also looked at the maximum rehabilitation periods under the Rehabilitation of Offenders Act 1974, under which the longest period of time that it takes for any offence to be rehabilitated is 10 years. For practical reasons, therefore, we could not have a disclosure period of less than 10 years, because that would render the provision for disclosure of spent convictions meaningless for any sentence that had a rehabilitation period of 10 years.

As such, we had to choose something between 10 years and 30 years. We felt that, whereas the length of sentence is a matter of judgment, 15 years is half of the 30 years for which something stays on the record and it covers the time during which people are likely to be seeking employment or voluntary roles, so we opted for that.

John Mason: Thank you.

My understanding is that the Supreme Court had a number of demands or requests on things that should be factors, which included the nature of the offence, the disposal in the case and the time that has elapsed. It seems that all those things have been taken into account, but I have a question on the fourth one, which was the relevance of the disclosure information to the employment that is being sought. When the committee discussed the matter before, we had some questions about that. Disclosure Scotland appears to have no discretion to withhold a disclosure by looking at the nature of the employment that is being sought. Can you explain

why you believe that we are still following the relevancy principle?

Diane Machin: Yes. Our considerations of relevancy apply primarily at the point of the development of the offence lists. Careful consideration was given to the attributes that are required for roles that require higher level disclosure, and the offence lists were developed on the basis of those attributes.

The system that we have put in place does not make any assessment of the relevance of the offence at the time when the disclosure application is submitted, because the assessment of relevance was carried out in the development of the offence lists. We believe that the offences that are on the lists are relevant to any of the roles for which a higher level disclosure is made.

John Mason: So relevance applies only to the offence and not to the employment. You make no distinction between different types of employment. The assumption is that, if a higher level disclosure is required, it is a blanket—

Nigel Graham (Scottish Government): The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, which has been agreed by Parliament, sets out the types of employment, occupations and professions that require higher level disclosure, so there is already scrutiny by the Parliament to decide what type of employment requires higher level disclosure.

John Mason: But there is the possibility that people can go to the sheriff and get something removed. That almost implies that some of the offences would not be relevant.

Nigel Graham: The offence could be 14 years ago and the person might have done wonderful things since they were convicted. There are a variety of reasons that the sheriff might consider based on the evidence that the person provides them with. It might be that the thing that the person did 14 years ago, or 12 years ago, is not relevant to the particular job, in the eyes of the sheriff.

However, Parliament has agreed that specific jobs, professions and occupations require a higher level of scrutiny than others that are not in the order. There is a relevance factor to those jobs, and that is why they require higher level disclosure. In the appeal process, the sheriff can consider the evidence that the person provides to them and make the appropriate decision on whether the thing should be disclosed if it is not protected.

John Mason: I do not know about the rest of the committee, but I am struggling with the word "relevance". It seems that it is used in a broad brush way, whereas to me it should bring in the individual person and the job and how the two relate to each other.

I find it hard to believe that we should not have a system for considering relevance before the matter goes to the sheriff and that we just say that everything is relevant and it is up to the sheriff to take a more careful look at the matter. I wonder why Disclosure Scotland would not look at the issue of relevance. For example, although fraud would be absolutely relevant with regard to certain jobs, I suspect that it would be less important for other jobs that contained no financial angle, even though some of them might need higher-level disclosure. Is it just a cost-saving measure that Disclosure Scotland cannot look at individual cases and that we simply leave the matter to the sheriff?

Diane Machin: It is fair to say that there is a practical issue to take into account. The types of jobs that are prescribed as requiring a higher level of disclosure contain a myriad of roles. If we created a list of offences for every particular role, it would be extremely difficult to apply that in a practical way. It would introduce huge scope for error in ensuring that the right list was being applied to the right role, and it would make it extremely difficult for members of the public applying for disclosures to understand which particular list applied to the role that they were applying for.

I re-emphasise our belief that the relevance is contained in the offence list. We are not disclosing everything; indeed, after debate and discussion, we have determined that certain types of offences are not relevant to roles requiring higher-level disclosure. Generally speaking, we will not disclose them. We believe that the offences on the lists are relevant to those jobs that require higher-level disclosure.

John Scott: What about the relevance of offences that are on the cusp? Is it the Government's position that in cases on the cusp of the rules where spent conviction information is disclosed to an employer, whether following an unsuccessful application to the sheriff or otherwise, the issue of the relevance of the conviction to the particular post is for the employer, not the state, to decide?

Nigel Graham: I am sorry—are you talking about when a higher-level disclosure is issued and when the conviction itself is not a protected one?

John Scott: I am talking about the relevance of a conviction to a particular post in cases that are on the cusp, even those in which there might have been an unsuccessful appeal to a sheriff.

Nigel Graham: If it is on the cusp, it will not be protected.

Diane Machin: By "on the cusp", do you mean on the cusp of being non-disclosable?

John Scott: I think so.

Nigel Graham: So you mean on the cusp of being protected.

John Scott: Yes.

Nigel Graham: So we are talking about 14 or 14 and a half years.

Diane Machin: Or 14 years and nine months.

The law does not allow Disclosure Scotland any discretion with regard to what is included on a disclosure certificate. Depending on what the sentence is, if the conviction is less than 15 years old and is on the rules list, it will be included on the certificate.

How that is then handled becomes a matter for the applicant. If the conviction was, say, 14 years and 11 months old, the applicant could apply for a new certificate a month later, and the conviction would not appear on it. That would be a simple way of dealing with the matter, but if they did not wish to do that, they would have the option of applying to a sheriff.

At the end of the day, it is up to the employer to look at the conviction on the record and decide whether it should be taken into account in the employment decision.

John Scott: So, in those circumstances, the matter is ultimately for the employer.

Diane Machin: Unless the sheriff determines that we must remove the conviction from the certificate.

John Scott: Right. Thank you.

The Convener: Returning to the principle of your answer, Ms Machin, I note that you said that there were practical reasons why Disclosure Scotland could not take these things into account in every case, given that you are dealing with literally thousands every week. However, is there not a legal reason why you cannot do so? Quite simply, you are not entitled to—you are not a tribunal. Even if we were to ask that you should do so, you could tell us, "Well, we're not empowered to do that, and you would need to legislate if you wanted us to be empowered in that way." Is that fair comment?

Diane Machin: As things stand, we are not empowered to do that. Disclosure Scotland vetting staff have no discretion over the decisions that are made.

The Convener: So you need a set of rules that are inviolate and, as Mr Graham has pointed out, the discretion has to be the parliamentary discretion to tell you the circumstances under which those rules are applied.

Diane Machin: Yes, or for you—or judicial review—to tell us that the lists or something else is wrong.

The Convener: Yes, indeed.

Stewart Stevenson: Because of where my colleague John Scott has taken us, I feel that it might be useful to test something with you, Ms Machin. For certain types of employment, the enhanced disclosure must be provided and it is then for the employer to decide, on the basis of what has been disclosed, whether to proceed with the employment. However, is it not fair to say that in many instances—my own experience tells me that this relates to critical national infrastructure such as oil terminals, banks and power stations—there are other considerations that the employer has to apply? In other words, they could get a horrendous enhanced disclosure but not have the free power to conclude that they should employ the person concerned, because there are other constraints outwith this system that would apply in those circumstances. Is that a generally correct thing for me to say?

Diane Machin: I do not know the answer to that one.

Nigel Graham: Surely that must be down to the employer.

Stewart Stevenson: Just to be clear, you will be aware that there are, if I recall correctly, five levels of critical national infrastructure, which are governed by legislation. When I ran a bank's computer centre, it used to be visited once a year and inspected as part of the critical national infrastructure at either level 3 or 4—I cannot remember which. I did not have a free hand in who I employed.

I am just making a very general point; I am not asking for a specific response. However, there are other legal constraints that will fall on employers in making employment decisions, whether there has been disclosure or not. I just want to make sure that we are quite clear that that is the case.

The Convener: To be fair to the witnesses, they are responsible for their part of the system and not for other parts. However, it is interesting to have Stewart Stevenson's point on the record. I think that John Scott wants to come back in.

John Scott: I think that the distillation of what has been said is that there is in essence no discretion if a disclosure is on the cusp of the time limit. Notwithstanding that an employer might wish to take somebody on, they will not be able to do so if a disclosure is within the time limit and the conditions of employment imply that they are not able to.

Nigel Graham: Disclosure in itself does not prevent someone from having a job. Disclosure gives the employer access to information in order to make an appropriate determination about the suitability of an individual. It is not the case that if an individual disclosed something through the Rehabilitation of Offenders Act 1974, an employer would say, "Now you've disclosed a spent conviction—a high-level disclosure—I must now dismiss you," or, "I will not employ you." If there are other rules of employment that say, "If you have committed X offences and that is in a disclosure, we can't employ you because you're not a fit and proper person to be part of this organisation," that is separate from decisions through the 1974 act or the remedial order.

John Scott: But, de facto, there is no discretion if that is the case.

Ailsa Heine: There is no discretion for Disclosure Scotland, but the employer has full discretion as to what aspects of the information in the disclosure they want to take into account. There may be other legal constraints on the types of person that the employer can employ but, in general terms, the employer is free to disregard all the information in the disclosure if the person says, "I am now a changed person," or whatever. Disclosure Scotland also issues a code of practice under the Police Act 1997 that gives some guidance to employers about how to handle information that they have received in a disclosure. It is quite clear that a disclosure that records convictions does not necessarily mean that the person should not be employed; it is a matter for the employer to take into account and make their own decision on.

John Scott: That is helpful. Thank you.

10:45

John Mason: Just to tie up my questions on this matter, I might be repeating myself but I think that most organisations—indeed, most employers—have some kind of internal procedure that people with a grievance or disciplinary issue can go through before they go to employment tribunals or the courts. That would also be the case with the Department for Work and Pensions if someone had a problem with their benefits. In this case, however, a decision is made without any possibility of review or appeal, and the matter goes straight to the courts. Is that not a strange system?

Ailsa Heine: It is not entirely different from the system that Disclosure Scotland has for decisions on barring people from doing regulated work with children or adults. When it makes its decision, the appeal will go straight to the sheriff. In a sense, therefore, this kind of model already has a parallel in Disclosure Scotland's operations.

One of the issues with Disclosure Scotland having some kind of internal review after the initial disclosure is issued is that it could struggle to get sufficient information about the role, because it would have to rely totally on the applicant to tell it about that. As Diane Machin has pointed out, there is a myriad of roles within the posts for which higher-level disclosures are required. In addition, it could be quite difficult for Disclosure Scotland to get any information about the offence that was committed, particularly if the offence was quite old, and again it would have to rely entirely on the applicant. That lack of information would lead to unfair decisions being made, because Disclosure Scotland would simply not have the information to make a decision. On the other hand, a sheriff would be able to obtain that information from sources other than the applicant.

John Mason: That answer was very helpful and clear. It raises other questions in my mind that I do not think that we will be able to sort out here, but with regard to the Supreme Court's point about the relevance of the disclosure information to the employment sought, I think that you are saying that that is not a judgment that Disclosure Scotland can make. I absolutely respect that.

Ailsa Heine: In a lot of cases, such a decision would be very difficult for Disclosure Scotland, because it simply would not be in a position to get sufficient information to make a proper decision. You would end up with a discretionary and flawed system.

John Mason: I accept that. Thank you.

Stewart Stevenson: I want to move on to the processes behind the policy decisions that you have made with regard to application to the sheriff to delete from a disclosure matters set out in schedule 8B. I understand that in Northern Ireland and in England and Wales people whose offences are going to be disclosed do not in legislative terms have a similar ability to challenge such a decision in the equivalent of the sheriff court. Why has that measure been written into what we are doing when it has not been written into what is happening in England and Wales?

Diane Machin: The regime in England and Wales has provision for disclosures to be considered by an independent assessor instead of through the court. We considered such a provision and decided that it would require Disclosure Scotland to create some kind of tribunal or to give the function of making such discretionary decisions to an existing tribunal. The alternative was to make provision for appeal to the sheriff court, and that was the option that we chose.

Stewart Stevenson: So all the regimes in the UK have a process for independently challenging what is being disclosed, albeit that our way is different from the way that the others have chosen.

Diane Machin: That is right.

Stewart Stevenson: Right—that is helpful.

We have been told that the Scottish ministers will invariably oppose sheriff court actions by individuals whose offences are going to be disclosed. Am I correct that that is the policy?

Diane Machin: I am not sure that they would invariably oppose that; I think that we have had said that we would have to look at each individual case and decide.

Stewart Stevenson: If, over a period of time, the courts concluded that, in circumstance A, a particular kind of offence should not be disclosed, the Government would perhaps not repeatedly go back in what it judged to be similar circumstances.

Diane Machin: I assume that that would be the case.

Stewart Stevenson: Will legal aid be available to individuals who seek to challenge a decision by Disclosure Scotland to disclose something on the second list?

Diane Machin: We understand that civil legal aid would be available.

Stewart Stevenson: That is helpful.

The Convener: Forgive me for interrupting, Stewart. I do not want to challenge Ms Machin's answers, but she is saying "would" and "will". Is this not already happening? Has there not been a case yet?

Diane Machin: Thus far, we have had notifications of intentions to make an application to a sheriff but, to date, we have not received papers. Last week, we spoke to the Scottish Courts and Tribunals Service and it advised us that, to its knowledge, it has not received any applications to date.

The Convener: So without worrying what the numbers are, the system has been running for several weeks—

Diane Machin: Yes—since 10 September.

The Convener: And you have been dealing with thousands of cases.

Diane Machin: No. So far, we have had seven notifications.

The Convener: Sorry—I was asking about the number of disclosures.

Diane Machin: We have around 1,000 disclosures a day, so there will have been thousands.

The Convener: So tens of thousands of disclosures have been made under the process. Because it is a very quick process, we might have expected some challenges to come through. Therefore, we can already conclude that most of the disclosures have not been challenged.

Diane Machin: Yes—that would be fair.

The Convener: That is helpful.

Stewart Stevenson: At the end of the legal process, some offences are disclosed and are on the disclosure notice and others are not disclosed. When a person who is subject to a draft disclosure makes a challenge to the court, how do we protect from being disclosed the offence that is on the original list and that the person wants to be excluded? Does the court action itself not disclose the offence?

Diane Machin: Once an applicant notifies us that they intend to apply to a sheriff, we will not send the disclosure certificate to the employer or countersignatory.

Stewart Stevenson: I understand that. My question is about the court process.

Ailsa Heine: The sheriff can order the proceedings to be held in private if they think that that is appropriate.

Stewart Stevenson: What is your expectation as to sheriffs' behaviour?

Ailsa Heine: That is difficult to assess. As I mentioned, at the moment there are appeal processes against listing decisions. Those are normally private proceedings when someone is listed and then barred from doing regulated work with children. Those currently go through the court process and so potentially could become public, but there have not been any issues about them becoming public.

Stewart Stevenson: In particular, since the basis of objecting to the disclosure of a particular offence might relate to the post for which the person is applying, how is it possible for the court to obtain information about the nature of the post without involving the potential employer and thus disclosing the offence to them?

Does that silence mean that the question is in the category of good questions that you did not want to be asked?

Diane Machin: The court can make inquiries of the employer without disclosing what the offence is.

Stewart Stevenson: Forgive me, but I am going to be quite obtuse about this. Given that the action that is taken by the individual may—only may—focus on the specific job specification and the activities and responsibilities that are related to the post, I suggest that it would hardly be adequate for the court to rely on what the individual says about the responsibilities of that post in coming to a conclusion as to whether it is appropriate for the offence to be struck from the disclosure list. Is that not a fair comment? How can it possibly be the case that the court can come to a judgment on the matter without having the specific details from the employer, who may well be a private sector employer?

Ailsa Heine: The court will not need to disclose to the employer what offence is being considered or whether more than one offence is being considered, but it could ask the employer what the nature of the role is. It will then become apparent to the employer that there is an appeal on-going against a disclosure certificate, but the employer will not have the details of the offence that the person is asking to have removed from their certificate.

Stewart Stevenson: Let me move to a specific example. Let us suppose that there is a case in which nothing in schedule 8A needs to be disclosed, and in which there is a single offence in schedule 8B, which is being challenged in the court. The employer clearly does not end up knowing what the offence is whose inclusion in the list is being challenged, but is aware of the nature of the challenge. Let us suppose that the challenge is successful and that an enhanced disclosure certificate that has nothing on it is therefore provided to the employer. Is not it fair to say that, at that point, the employer would know—notwithstanding his having been provided with a disclosure certificate with nothing on it—that an offence has been deleted from the draft disclosure certificate?

Diane Machin: An employer could deduce that, but an employer could also deduce that based on the legislation; for example; if they had submitted an application and more than 14 days elapsed without their receiving the certificate, at which point they might start asking where their copy of the certificate is, and could deduce that because they have not received the certificate there might be something on it that they cannot—

Nigel Graham: An employer cannot be prejudiced by that.

Stewart Stevenson: That is the point that I was coming to. What constraints are there on the employer if the employer responds to something that, in legal terms, is not disclosed at the end of that process? If the employer is acting on a belief that there is a matter that is not disclosed in the enhanced disclosure certificate but which might have been disclosed in other circumstances, is there recourse against the employer's actions—in particular, if they decide not to employ the person, in those circumstances?

Nigel Graham: Section 4(3) of the Rehabilitation of Offenders Act 1974 provides that when an offence is not disclosed an employer cannot be prejudiced against a person, but there are also no powers and no civil or criminal penalties in the legislation that would give an individual recourse against an employer who does that. How would one know that an employer had decided not to employ a person because of non-disclosure? The legislation says that an employer cannot be prejudiced against a person if nothing is disclosed, even if they think that there may be something, and have googled the person and seen something about a spent conviction.

We know from information that we receive from stakeholders and individuals that people feel that employers are prejudiced in that way, but they cannot prove that such prejudice exists. Our discussion paper and engagement events in 2013 prompted a lot of individuals to tell us that they feel that employers exercise such prejudice and that there is no action that they can take against it. That is one of the things that we proposed in the consultation on the Rehabilitation of Offenders Act 1974, which closed on 12 August. Future work will look at what can be done about employers who exercise such prejudice, although the legislation says they cannot be prejudiced against a person for non-disclosure of a spent conviction or for something that is not included in a higher-level disclosure. We are asking whether the legislation needs to be changed in that way. At the moment there is in the legislation no penalty against an employer who does that.

Stewart Stevenson: To draw my interaction with the witnesses to a conclusion, I say that it is an existing issue in that it can happen anyway.

Nigel Graham: It has been an existing issue since 1974.

Stewart Stevenson: That is correct: there is an existing issue to do with there being a risk in how employers respond to information from outwith the disclosure process, of which they may become aware by other means or even as part of their interaction with a person. In our narrow consideration of the order, we are not making that situation either better or worse, in any material sense. The problem pre-existed and continues to exist.

11:00

Nigel Graham: In respect of prejudice, or of the disclosure of spent convictions, or something that

has not been disclosed in a high-level disclosure, I agree that we are not making things worse.

Stewart Stevenson: We remain, therefore, in the position that we were in before the order. That is the point that I wanted to draw us to, having had the discussion about—

Nigel Graham: Yes. Primary legislation would be required to change the Rehabilitation of Offenders Act 1974.

Stewart Stevenson: That need pre-dated the order.

Nigel Graham: Yes. That is why we asked the question in 2013, and why I have been asked the question for the past 11 years.

Stewart Stevenson: That is helpful.

John Mason: I want to follow on from what Stewart Stevenson has asked about. I asked earlier whether Disclosure Scotland can find out the relevance of a disclosure to a particular job, and the answer was that it probably cannot. Stewart Stevenson asked the same question about the courts, and the answer again appeared to be that they probably cannot do so. Both would probably have to go to the employer to investigate the job further—or maybe there would be a job description online, for example. That again raises in my mind the question why it is better that the sheriff do a bit of digging than Disclosure Scotland.

The Convener: I guess that the question whether it would be better for Disclosure Scotland to be able to do that is a policy issue. We have already discussed Disclosure Scotland's not currently having the power to do that. I think that I am with that, but there is the policy question of what might be the better way forward.

Ailsa Heine: Disclosure Scotland does not have those powers at the moment; it would have to be given additional powers. In considering how any appeal-type process would operate, consideration was given to whether Disclosure Scotland would need additional powers. We should not give Disclosure Scotland powers to try to get information either from individuals or employers, because sheriffs already have those powers and can exercise them more fully than it could. Disclosure Scotland knows from experience of dealing with listing decisions that it can, in some circumstances, be very difficult to get information. That was a material consideration in passing the appeal process to the sheriff, in this case.

John Mason: Thank you.

John Scott: I want to take the witnesses back to something that was said a moment ago concerning court action, ultimate disclosure, non-disclosure and an employer not being prejudiced against someone who may have a spent conviction. Are there any implications under article 8 of the European convention on human rights if an employer inadvertently discovers that someone has a spent conviction? Are you saying that that would be without prejudice and that there would therefore be no ECHR issue?

Ailsa Heine: If an employer inadvertently finds out about a person's convictions, the state will not be breaching the person's article 8 rights because it is not the state that is disclosing them.

John Scott: Do you have no concerns whatsoever about the process leading an employer "to conclude that"? I think that those were the words that were used earlier.

Nigel Graham: People can ask for their convictions to be removed from Google, as well. When a person is convicted in court, that is public information at the time, but the legislation makes it clear that an employer cannot dismiss an employee when somebody else says, "By the way, do you know that Mr X has a spent conviction?" It would be the employer deciding to make such a decision about how they treat their employees—not the Scottish Government or the state. Employers must justify such decisions.

The difficulty with the Rehabilitation of Offenders Act 1974 is that, although it says that an employer cannot be prejudiced, there is no penalty against them if they are. There are, for employers that discriminate against individuals for employment reasons, penalties through employment law, rather than through the Rehabilitation of Offenders Act 1974.

Stewart Stevenson: I will pick up on that point. I understand that, under the European Union legislation that has introduced what we might term the Google law, the decisions are made by an independent panel that is appointed by Google. That panel has decided in a number of cases of conviction-related requests for deletion that it is in the public interest not to delete. The very real difficulty appears to be that the process is extra-legal rather than intra-legal, so I suspect that we should not rely too much on the presence or absence of things.

Nigel Graham: People would try to do that, but in terms of the legislation it makes no difference. The fact is that the law says that, even if the conviction can be seen on Google, if it is spent the employer should not be prejudiced by it. That is the key thing that the legislation says.

Stewart Stevenson: Yes.

The Convener: Is it expected that folk will get legal aid in the rare cases that finish up in front of the sheriff?

Diane Machin: Yes.

The Convener: That is appropriate.

Diane Machin: Yes. We consulted the Scottish Legal Aid Board, which estimated that between 75 per cent and 100 per cent of applicants would likely be eligible for legal aid.

The Convener: Thank you.

We move on to what extent the Government and Disclosure Scotland are providing guidance to those who apply—and, indeed, to employers, given that we have had a lot of discussion about what employers should or should not be doing. How will all this be communicated to the people who need to know?

Diane Machin: We have, on the Disclosure Scotland website, provided fairly extensive guidance. There is basic background guidance on how the system works and there is a "Frequently asked questions" section, which we update regularly. Within Disclosure Scotland's customer liaison team, we are keeping a log of all inquiries and the particular issues that people are raising. We then provide lines for the customer liaison team to use when they respond to people. Those are the main pieces of guidance on our website. There is also information on the Scottish Government's website.

Nigel Graham: We have, on the Scottish Government website, a web page on the Rehabilitation of Offenders Act 1974 that provides a link to Disclosure Scotland's website. We thought that it was important to do that, because it is a moving piece of guidance on what Disclosure Scotland is doing. Rather than having Scottish Government guidance and Disclosure Scotland guidance, the Scottish Government web page links directly to Disclosure Scotland's guidance, so that when the Disclosure Scotland guidance is updated, the link is also updated for the Scottish Government.

The Convener: One of the problems for people when they search is their knowing the right word to use. How much thought has been given to what words people can search for and still get to the right place?

Nigel Graham: The information is under the title, "Scottish Government higher level disclosures", so if someone types in "higher level disclosure", the search comes up with information on the Rehabilitation of Offenders Act 1974 and on recruitment, convictions and spent convictions.

The Convener: Okay—but some people might not use the phrase "higher level disclosure", because those words might not spring to their mind.

Diane Machin: Information on changes to the disclosure regime is on the front page of the Disclosure Scotland website. There are various links in various places.

Nigel Graham: That is where the Scottish Government web page links directly to.

The Convener: I just want to encourage you to think that there might be people out there who do not have the word "disclosure" in their vocabulary.

Nigel Graham: Indeed—but the Scottish Government's computer system inputs metadata for the website. I have tried to think of every single possible word that somebody may think of in order to get information about employment decisions. I cannot remember all the different words that I put in. We have to create metadata that cover what a person might think they should type in order to find information. That is what we have done.

The Convener: Thank you. That was the bones of what I was asking about and I am grateful for the response.

Diane Machin: It is perhaps also worth noting that when applicants receive a certificate that has a spent conviction on it that is on the list of offences that are to be disclosed—subject to rules—they are also sent an insert that explains that they can, if they wish, apply to a sheriff. The insert explains the process and provides a link to guidance on the website and to the customer liaison team.

The Convener: That is helpful. That brings us to questions on the technical stuff from John Scott.

John Scott: I want to find out the meaning of the words "for the same purpose". In article 3 of the order, paragraphs (2)(a) and (3)(a) insert into the 1997 act provision to the effect that a criminal record certificate or an enhanced criminal record certificate must not give details of a spent conviction that was excluded from a previous certificate by virtue of an application to the sheriff where

"it appears to the Scottish Ministers that the application ... is made for the same purpose for which the application for the other certificate was made."

Does "for the same purpose" mean for exactly the same post or for similar types of work? How is the provision to be applied in practice? Does the wording clearly give effect to the policy intention?

Ailsa Heine: When somebody applies for an enhanced or standard disclosure, they have to state the post that they are applying for, so the decision will be based primarily on the nature of the post that the person has entered on the application form. It will not necessarily be the exact role; the job that the person describes in the application will have to be looked at.

John Scott: So the wording could mean similar types of work rather than exactly the same post.

Ailsa Heine: Yes. If the person was applying for a job with another employer, I think that that would fall within the same purpose. We are not talking about just the same job with the same employer.

John Scott: How will that be interpreted in practice? Is it "for a similar purpose" and not "for the same purpose"?

Ailsa Heine: The person would not have to be working for the same employer, but they would have to be doing broadly the same job with another employer. Particularly for enhanced disclosures, the purposes are clearly set out in the legislation.

For example, somebody who was seeking an enhanced disclosure for the purpose of adopting a child would have to state that purpose. They might have applied to adopt one child and been unsuccessful for whatever reason. If they made another application to adopt, that would be the same purpose, even if they were applying to a different local authority.

John Scott: So you are content, although you have not had much time to reflect on it, that the wording clearly reflects the policy intention.

Ailsa Heine: Yes. We gave the wording quite a lot of consideration and we feel that it is clear. It ties in with a lot of the wording in the 1997 act on the purposes of disclosure.

John Scott: My other question is on the rules that enable an applicant for a disclosure certificate who believes that the information in the certificate is inaccurate to apply to the Scottish ministers for it to be corrected. I note that, when the information could be the subject of an application to the sheriff, the option of applying to the Scottish ministers for correction is not available. Will you explain in what circumstances an applicant may apply to the Scottish ministers for a correction and in what circumstances the only option will be to apply to the sheriff? How will an applicant know which route to pursue?

Ailsa Heine: If there is an issue with, say, the name of the person or the penalty that has been imposed, that will still be dealt with by Disclosure Scotland as the correction of an inaccuracy on the certificate.

The only time that a person can apply to the sheriff is if they want to apply for a conviction to be removed. They have to notify Disclosure Scotland that they will make that application and, if they tell Disclosure Scotland that they are appealing because their name is wrong in the certificate, because Disclosure Scotland has got the penalty wrong or because they were not convicted of the offence mentioned, Disclosure Scotland can intervene and say that it needs to deal with the case, rather than the case going through an appeal process. The appeal process is absolutely restricted to the situation in which a person wants to remove a conviction.

11:15

The Convener: If I understand you correctly, you are saying that an appeal to the Scottish ministers, which is in effect to Disclosure Scotland, would be on the basis that what was on the form was wrong, whereas an appeal to the sheriff would be on the basis that although what was on the form was right, the person did not want it disclosed.

Diane Machin: The person would be saying that the information was correctly disclosed but that they would rather that it was not disclosed.

Ailsa Heine: There is a host of reasons why information might be inaccurate. Such a process has existed all the time that Disclosure Scotland has been issuing disclosures.

The Convener: The order contains power for the Scottish ministers to alter the lists of offences, which I understand will be subject to the affirmative procedure. Why do you feel that that is the appropriate way to proceed?

Ailsa Heine: We feel that it will be necessary at times to update the lists of offences—for example, if new offences are created. Such offences could be added to the lists as part of consequential amendments to legislation. However, if they were not, it would be important to have a power to change the lists in the schedules by order, and we thought that it would be appropriate for that power to be affirmative.

The Convener: You see that as a way of bringing in new offences when they appear rather than as a way of moving offences between the lists.

Ailsa Heine: The power could be used to move offences. However, its primary purpose would be to add new offences to the lists when those offences were created. Alternatively, if sheriffs decided that certain offences were not relevant, we might want to remove offences. In general, though, the power would be used to add new offences.

The Convener: In general, you would expect a new offence to be created by statute—it is difficult to see how else it could happen these days—and that statute would probably put the offence on the list. The power is probably redundant, but it is there just in case it is needed.

Ailsa Heine: Yes. It will ensure that there is always a power in case, for some reason, an offence is not added.

The Convener: That brings us to the end of our discussion. I am grateful to you for what has been a long and at times detailed session, which has been extremely helpful. Thank you.

11:18

Meeting suspended.

11:22

On resuming—

Draft Instruments not subject to Parliamentary Procedure

Public Services Reform (Social Work Complaints Procedure) (Scotland) Order 2016 [Draft]

The Convener: The instrument is subject to the super-affirmative procedure. At this stage, the draft order has been laid only for consultation purposes. It is laid before the Parliament for 60 days. After that period and after ministers have had regard to any representations, the order will be laid in draft for approval by the Parliament.

The draft order does not expressly revoke the Social Work (Representations Procedure) (Scotland) Order 1990 (SI 1990/2519) to remove it from the statute book. The Scottish Government has undertaken to include the revocation in the draft order following the current consultation stage.

Does the committee agree to draw the draft order to the Parliament's attention on the general reporting ground because, in accordance with proper drafting practice, it should have included the revocation of SI 1990/2519 to remove that order from the statute book, subject to the saving provision in article 7?

Members *indicated agreement.*

Public Services Reform (Insolvency) (Scotland) Order 2016 [Draft]

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

Members *indicated agreement.*

The Convener: Our legal briefing notes that, unusually, articles 8, 10 and 13 of the order are placed in square brackets to indicate that they are provisional. It appears that those provisions would become redundant or cease to have effect on the coming into force of certain provisions in schedule 9 to the Small Business, Enterprise and Employment Act 2015. It would instead have been possible to add footnotes to explain that those articles are provisional on the relevant provisions of the 2015 act coming into force.

Given that this is a draft order that has been formally laid before Parliament in accordance with section 26(2) of the Public Services Reform (Scotland) Act 2010, does the committee agree with the legal adviser's suggestion that the use of bracketed provisions should be avoided in a draft instrument that is laid before Parliament?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

Scottish Tribunals (Listed Tribunals) Regulations 2015 [Draft]

11:24

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

Members *indicated agreement.*

Scottish Tribunals (Administrative Support for Listed Tribunals) 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.*

Courts Reform (Scotland) Act 2014 (Consequential and Supplemental Provisions) 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.*

Instruments subject to Negative Procedure

Private and Public Water Supplies (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/346)

11:25

The Convener: The meaning of the provisions that are contained in the regulations could be clearer in two respects. First, in new regulation 5B of the Private Water Supplies (Scotland) Regulations 2006 (SSI 2006/209), it could be made clearer that the phrase

"a concentration or value which would make the water unwholesome"

refers to water that fails to satisfy the requirements for "wholesome" water in relation to a private water supply for human consumption, as specified in regulation 7 of the 2006 regulations.

Secondly, regulation 11(b)(i) substitutes some words in column (3) of the entry for "total indicative dose", which is item number 33 in the table in schedule 3 to the 2006 regulations. The substituted words are

"from 'for' to the end",

but "for" occurs twice in the provision, so it is not clear where the substitution should occur. It could be made clearer that the words should be substituted from "for" where it first occurs to the end of the provision.

The Scottish Government has indicated that it proposes to clarify regulation 11(b)(i) by amendment

"at the next suitable opportunity".

That is understood to mean as and when another reason to amend the 2006 regulations becomes apparent at a later date.

Do members have any comments?

Stewart Stevenson: The regulations use the word "unwholesome", but the original European regulation uses the phrase "wholesome and clean". It would almost invariably be helpful if, in drafting its instruments to implement European regulations, the Government used exactly the same phrase, unless there is a specific legal reason related to Scots law for using a different phrase. If the Government uses a different phrase, it should provide an explanation for doing so. We are talking about a single instance, but there is a general point to be made about how drafting should be undertaken, so that we avoid having discussions about whether "unwholesome" is the

antithesis of “wholesome and clean”, which is not immediately obvious in plain English.

The Convener: Thank you for those comments.

Does the committee agree to draw the regulations to the Parliament’s attention on reporting ground (h), as the meaning of the provisions could be clearer?

Members *indicated agreement.*

The Convener: Does the committee also agree to call on the Scottish Government to clarify both provisions that I mentioned through an amendment as soon as practicable?

Members *indicated agreement.*

Glasgow Clyde College (Removal and Appointment of Board Members) (Scotland) Order 2015 (SSI 2015/348)

The Convener: The order fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. As the order was laid before the Parliament on 8 October 2015 and came into force later that day, it does not respect the requirement that at least 28 days should elapse between the laying of an instrument that is subject to the negative procedure and the coming into force of that instrument. The Cabinet Secretary for Education and Lifelong Learning outlined the reasons for the Scottish Government’s decision to proceed in this manner in her letter to the Presiding Officer dated 8 October 2015.

Does the committee agree to draw the order to the Parliament’s attention under reporting ground (j), as it does not comply with the requirements of section 28(2) of the 2010 act?

Members *indicated agreement.*

The Convener: As regards the Scottish Government’s decision to proceed in this manner, does the committee agree to find the failure to comply with section 28 to be acceptable in the circumstances?

Members *indicated agreement.*

Climate Change (Duties of Public Bodies: Reporting Requirements) (Scotland) Order 2015 (SSI 2015/347)

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

Housing (Scotland) Act 2014 (Commencement No 4 and Amendment) Order 2015 (SSI 2015/349)

11:29

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

Members *indicated agreement.*

Footway Parking and Double Parking (Scotland) Bill: Stage 1

11:29

The Convener: Under agenda item 7, members are invited to consider the one delegated power that is contained in the Footway Parking and Double Parking (Scotland) Bill. If members are content with the recommendations in our paper, that will form the basis of a report to the lead committee. The draft report will not be discussed by the committee before it is published.

Is the committee content with the delegated power in section 6 of the bill?

Members *indicated agreement.*

Scottish Fiscal Commission Bill: Stage 1

11:29

The Convener: Item 8 is consideration of the delegated powers provisions in the Scottish Fiscal Commission Bill. If members are content with the recommendations in our paper, that will form the basis of a report to the lead committee. The draft report will not be discussed by the committee before it is published.

The bill contains five delegated powers. Is the committee content with the delegated powers in sections 5, 11, 7, 26 and 27 of the bill?

Members *indicated agreement.*

11:30

Meeting continued in private until 12:03.

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