The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 3 November 2015

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
30th 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:

Laura Dunlop QC

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 3 November 2015

[The Convener opened the meeting at 10:47]

Decision on Taking Business in Private

The Convener (Nigel Don): Good morning. I welcome members to the Delegated Powers and Law Reform Committee's 30th meeting in 2015. As always, I ask members to switch off mobile phones.

Agenda item 1 is a decision on taking items 10 and 11 in private. Item 10 will allow the committee to consider further a draft report to the Health and Sport Committee on the delegated powers in the Alcohol (Licensing, Public Health and Criminal Justice) (Scotland) Bill, and item 11 will enable the committee to reflect on the evidence that it will hear on the remedial order subject to affirmative procedure that we will deal with. 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)

10:48

The Convener: Agenda item 2 is oral evidence on the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015, which is subject to affirmative procedure. The order is currently out for consultation by the Scottish Government and is under consideration by the committee.

Good morning and welcome to Laura Dunlop QC, who represents the Faculty of Advocates.

I ask members for their questions for Laura Dunlop, starting with John Scott.

John Scott (Ayr) (Con): Good morning. Can I take you straight to article 8 of the European convention on human rights? What do you see as being the principal article 8 issues arising in connection with the remedial order, with particular reference to the United Kingdom Supreme Court judgment in the case of R (on the application of T and another) (Respondents) v Secretary of State for the Home Department and another (Appellants)?

Laura Dunlop QC: I see the main question as being whether the problem that was identified by the Supreme Court has been remedied. My answer to that question is that blanket disclosure of people's convictions will no longer take place solely in the context of there having been a request for information.

However, there is a supplementary question, which is whether the scheme as amended is still capable of operating so as to represent an unjustified interference with a person's article 8 rights to respect for his or her private life. I suspect that one cannot rule out the possibility of a case in which a court might consider that there had been interference that could not be justified. It is difficult, in a prospective exercise of this nature, to use words such as "always" or "never".

John Scott: Quite. Would you like to expand on where that possibility of interfering with the person's rights might occur?

Laura Dunlop: There is a measure of consensus about the article 8 analysis in respect of this situation. First, it seems to be accepted that the particular aspect of article 8 that we are talking about is respect for private life. It is often said that article 8 is about seeking to prevent arbitrary

interference with the interests that are protected by article 8.

In the hypothesis that we are considering, there would be interference, so one would be talking about whether it could be justified in terms of article 8. The questions are then whether the interference is in accordance with the law and whether it is necessary in a democratic society.

The matter of proportionality always arises. One matrix—if I can call it that—for analysing proportionality looks at four things. The first is the goal that is sought and the second is whether the measure that is being taken is rationally connected to that goal. Again, there is a measure of consensus about the goal, which everybody understands to be protection of vulnerable people, and about the connection to that goal, which I think is self-evident. The third and fourth aspects of the quartet of tools of analysis are perhaps slightly more difficult. The third is whether the goal could be achieved by another less draconian route, and the fourth is whether a fair balance has been struck between the competing interests—those being the need for disclosure in order to protect vulnerable groups and the goal of enabling people who have criminal convictions not to have an albatross around their neck for ever.

John Scott: Quite. So when is interference not interference with their human rights?

Laura Dunlop: When can interference be justified? It is difficult to avoid a sense of it being an impressionistic test. The clerk has drawn my attention to two cases, which I have looked at—the Northern Irish decision and the English decision about whether particular interferences can be justified. In the English High Court case, the problem was the continued disclosure of the offence of causing actual bodily harm. The scheme passed the test in that case, in that the High Court was not persuaded that it was an unjustified interference to disclose a conviction for causing actual bodily harm. In the Northern Irish case, the offences concerned were to do with having young people travelling without a properly fastened seat belt. The measure did not withstand challenge in that instance.

I use those examples to support my suggestion that there is a degree of impression involved and that a judge who is considering the circumstances of an individual who has had a conviction disclosed will probably have a first reaction about whether disclosure feels fair or not. I am sorry if that is not a very satisfactory answer, but I think that impressions always come into it to some extent.

John Scott: It is properly so: judges should always have some discretion.

Laura Dunlop: Yes. It is difficult to articulate criteria that one could use to test the fourth question on whether a fair balance has been struck. The decision must to some extent be about the judge's sense of whether a decision feels fair.

The Convener: Forgive me, John. Ms Dunlop has cited two recent UK cases. Given that we are talking about a European convention, is there wisdom to be gleaned from cases around Europe? I appreciate that they would be from different jurisdictions and would use different words, but is there anything for us to learn from how things work elsewhere?

Laura Dunlop: I am sure that there is. I cannot say that I have done an exhaustive study of comparative material, but it is always interesting and attractive to come across something from another jurisdiction that is very similar in terms of its facts.

If one was looking the problem of revelation of an elderly conviction that is thwarting a person's attempts to secure employment or a position in the voluntary sector, and an analogous case were to crop up in the Netherlands or elsewhere, one would want to look at it. One would want to see what attitude had been taken in such a case, especially if that case from another jurisdiction went to Strasbourg.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want to go back to where you started from and ask a straightforward question. Is it the Faculty of Advocates' view that the order will create an environment in which the prospect of a successful challenge under article 8 is sufficiently remote, and is that as good as we reasonably can do at the moment? At the end of the day, you clearly could not agree that it is impossible to challenge, so I am applying the "sufficiently remote" test and asking whether the Faculty of Advocates would feel that that expresses things properly.

The Convener: You will forgive me if I interfere from the chair just to say that I am conscious that Miss Dunlop is not here representing the Faculty of Advocates and probably would not want to do so. Although she may want to answer the question, it needs to be clear on the record that we are not asking her to speak for the Faculty of Advocates.

Stewart Stevenson: Forgive me. Ms Dunlop is described on the agenda as being from the Faculty of Advocates, so I asked my question on those terms. You may answer in whatever capacity you wish.

Laura Dunlop: I am comfortable with the question; I think that I can handle it. It is probably obvious from what I have said so far, but I should say that I can figure hard cases. I do not think that

it will be any surprise to members that it is not terribly difficult to dream up hard cases. Without giving anything away, I have recently been approached on an informal basis by someone who is, in fact, a hard case. One does not have to be terribly creative to think of examples of people who are very close to where lines are drawn. Lines are drawn on the basis of time—in relation to the rules list, if I can call it that. They are also drawn in respect of compartmentalisation—what offences have been put on each list and what offences are not on the lists at all. That is all line-drawing. The closer a case gets to the boundaries, the harder it can become.

The Faculty of Advocates had not, before the invitation to come to committee today, been minded to submit a written response, but we will now. That is a by-product of the invitation and of a considerable amount of thinking about the measure in recent days. I certainly feel that it is something on which we should submit a written response. I have already approached somebody to help with it, and I have someone else in mind whom I think will be very well placed to feed into the matter. I cannot say, however, that such written comment will be a definitive answer to all the questions.

Stewart Stevenson: Is the test that I have put—of successful challenge being sufficiently remote—a decent test for us to apply?

11:00

Laura Dunlop: That would be a comprehensible and reasonable test, but you could be wrong. Anyone who expresses a view on that may be wrong, but one does one's best. When I read the order and the evidence that the committee heard last week, I was struck by the fact that a great deal of thought has gone into this. It is sometimes sensible to make just one change and see what happens. This may not be the end of the story—further adjustment might be required in the light of experience, and there might be further challenges in England that result in development of the jurisprudence. Therefore, it might be that this reform happens and further tweaking or adjustment is required.

I am slightly repeating myself, but it is obvious that a lot of thought has gone into the order and that that thought has been informed by experience of the sorts of issues that come up. The sense of arbitrariness and possible random effects that one got from considering the previous scheme has been greatly alleviated. There is no doubt that a substantial reduction in the likelihood of challenge is being effected.

John Scott: It is to be welcomed that you regard what we are doing as honest endeavour and progress, so thank you for that. Of course, we would welcome further information from the Faculty of Advocates.

Do you wish to add anything further on the tests against which a court will assess ECHR compatibility in respect of interference with the article 8 rights?

Laura Dunlop: An issue that struck me when I was preparing for the meeting—I do not have conclusions on this, but it is an issue—relates to the 10-year period for rehabilitation, which is the maximum period of rehabilitation under the Scottish provisions of the Rehabilitation of Offenders Act 1974. As I understand last week's evidence, that was the starting point for selection of a period of 15 years. One of the answers that was given to the committee last week was that the 15-year period for the rules list—the list in schedule 8B—was informed by the fact that, under the act, 10 years is the maximum period before a conviction becomes spent, unless it is one that never becomes spent.

The Scottish provisions of the 1974 act have not been amended, but the English ones have, so the English periods have shrunk. I can, if we think in particular about the third of the four parts of the proportionality analysis, imagine that it can be argued that it is possible to achieve an acceptable result by a different method. It is conceivable that that argument could be strengthened by a comparison with a similar case in England, because the maximum period that has been chosen for England is 11 years, rather than 15. There is a difference between the regime as it will operate in Scotland and the regime as it will operate in England; that might be territory in which one could begin to fashion a proportionality argument. One of my questions is because I do not know the thinking behind that difference in respect of the periods in section 5 of the Rehabilitation of Offenders Act 1974; the periods have all been stepped down in the English part of the act, but have not been stepped down for Scotland.

John Scott: You have put that very subtly by asking a question about why there is a difference. Is it your recommendation that there should not be a difference?

Laura Dunlop: I cannot go that far, because I have not heard the other side of the argument. The decision that has been taken not to change the periods in Scotland will be for a reason. The situation did, however, strike me as being potentially anomalous.

The Convener: Thank you. That is clearly a question that we can pursue.

John Scott: That is an obvious question to pursue with others. That is all I have to ask at the moment.

The Convener: This is going to be a flowing discussion. We move to questions from John Mason.

John Mason (Glasgow Shettleston) (SNP): As we understood it from the UK Supreme Court, there were four issues not being considered that should be considered: the nature of the offence, the disposal in the case, the time that had elapsed since the offence, and the relevance of the disclosure information to the employment sought. It is the relevance of the disclosure that has concerned me and, I think, the committee as a whole.

The answer that we got from the Government is that relevance is being made a bit more specific by putting together a class of positions. The Government is saying that certain spent convictions will always be relevant for a whole class—that is, all those who need the higher-level disclosure. I had thought that relevance might apply more to the specific post and that every single case would therefore have to be looked at, although I understand that it would be a challenge for Disclosure Scotland to look at every case. Could you give us your view?

Laura Dunlop: I think that I understood the rationale for doing it in the way in which it has been done. There is a first generalised screening for relevance, against the list of offences in schedule 8A, which will always be disclosed because of their particular characteristics.

There are themes underlying the composition of the list of offences in schedule 8B that may become non-disclosed. One of the answers to the committee last week referred to the characteristics that the offences possess, such as causing harm to individuals or indicating breach of trust or recklessness. There has been an attempt to abstract those offences that possess characteristics that are in a general sense relevant to posts involving how other people are treated and how one behaves in a position of trust.

I cannot think of a way in which the specific relevance for an individual in a post could be addressed, other than through a measure such as has been included, which is to provide an individual right of challenge to the sheriff. The sheriff can scrutinise the particular position that the person is looking to take up and the nature of the offence so that the decision on the individual-specific relevance can be taken. Once I had seen that there are about 1,000 disclosures a day, I could not practically imagine any way in which one could build individual scrutiny into the system.

John Mason: We will explore that further with the sheriff and others. I understand, and you are confirming, that there would be practical issues for Disclosure Scotland.

In other areas of employment law, such as grievance or discipline procedures, internal systems are used before the case gets as far as an employment tribunal or the courts. Here, it seems that there is an initial step and then it is straight into the courts. That struck me as a bit clumsy. Do you see that as a problem?

Laura Dunlop: If there were an alternative suggestion, I would be interested to hear it.

This is blue-sky thinking, but the only analogy would be some kind of internal review. I am not sufficiently au fait with the workings of the body to know whether building in a review procedure at that point, rather than necessarily having to go to the length of taking the matter to a sheriff, is a realistic suggestion.

John Mason: My thinking is exactly the same. I do not know the details, but we have been assured that there are practical issues. To go back to the wider picture, if somebody going for a post in financial services had a conviction for something in a different area, the relevance of that offence could be challenged.

Laura Dunlop: Yes. The big divide that people make in criminal law is between offences against the person and crimes of dishonesty. Superficially, one can see that there is perhaps a mismatch if the job is in an area that requires financial probity but the conviction is for an offence against the person. However, I am not sure how far that sort of apparent mismatch really goes. That might be exactly the sort of territory that is right for scrutiny by a sheriff. If there is truly as much of a mismatch as first appears, that will be apparent to the sheriff when he or she scrutinises the particular circumstances.

Richard Baker (North East Scotland) (Lab): In response to Stewart Stevenson, you covered quite a lot of the ground of my first question. However, I was also going to ask about the adoption of a system of general rules, which might lead to harsh results in cases at the margins—the hard cases that you spoke about earlier. Is it compatible with article 8 of ECHR to adopt a system of general rules? I suspect that you will not want to give us a definitive answer to that, but your views will be welcome. However, more broadly, does adopting such a system of general rules strike a fair balance between the public interest and effective private interests—for example, in those hard cases that are on the cusp of the various rules?

Laura Dunlop: I read with interest the description of the sorts of situations in which these kinds of bright-line rules have withstood challenge

and of the circumstances in which they have not. Again, it would be very difficult to articulate general criteria for when a bright-line rule is acceptable and when it is not. The examples given by the Supreme Court are not necessarily clear about why a particular rule belongs in one category and not in the other.

One can say confidently that bright-line rules are sometimes accepted. Under the order, there is still a bright-line rule to a degree, although it is a much lesser degree than under the previous regime. To the extent that there is a bright-line rule, it relates to those offences that will always be disclosed. I cannot predict any more than that there might be a challenge by an individual who has a conviction for an offence that will always be disclosed. My crystal ball would suggest that the likely factual circumstances are that it would be something that somebody did when they were a young person—mistakes are made in adolescence.

Lord Wilson has referred in the Supreme Court to "childish error". If somebody did something in their teens, and in their 30s or 40s is looking even just for a position in the voluntary sector—to take up sports coaching or something like that—the offence will still be there. What about the bright-line rule in that case? I am not sure but—this is why I referred to the possible need to adjust the system in future—if a scenario of that nature were to go through the courts, it might be that some kind of review provision would have to be introduced in relation to the always-disclosed offences as well. However, I can certainly understand why that is not being done at the moment.

Richard Baker: You said that the Faculty of Advocates was forming more views on the issue at the moment, and I am sure that the committee will welcome those further views when they coalesce. The Scottish Government noted in its evidence the possibility that an employer might choose to disregard conviction information that had been disclosed, on the ground that in the employer's view it was not relevant to the post applied for. Do you think that that factor might be relevant to the compatibility of the state disclosure regime?

Laura Dunlop: I suspect that the answer to that is no. In many situations in which someone commits an act that is unlawful, there is the opportunity for somebody else further down the line to rescue that situation. However, the fact that that possibility exists does not alter the character of the initial breach.

11:15

John Mason: I want to build on what I said before and on what Richard Baker said. You said in one of your answers to Richard Baker that, if certain situations arose, the Government might need to have a review in the future. That is the area that I am interested in.

In the scenario that you suggested, somebody who had done something when they were younger applied for a sports coaching role. The conviction was disclosed, which the person then challenged because the conviction was not relevant to the post. Even if that person won the challenge, the next day somebody with exactly the same situation would again have the disclosure made; the rules would not change based on what the sheriff decided. Theoretically, there could be a string of such cases. My feeling is that it would better to pre-empt that by having a bit more flexibility within Disclosure Scotland. Is it satisfactory that we set the rules in place and have to review them if such a situation arises?

Laura Dunlop: It is a pragmatic response.

In the scenario that you are putting to me, the two circumstances are most unlikely to be exactly the same. For a start, you are talking about two individuals, and the circumstances of the second individual will not mirror exactly those of the first. One has to assume that the conviction is similar, the circumstances of the two individuals are similar and the two positions that they are going for are similar. If an application in a similar set of circumstances has succeeded in front of the sheriff, one might expect that the second application will also succeed. There will have been no precedent, because it is not a pure question of law, but it is likely that there will be an appeal or reference to the previous decision if there has been some degree of publicity about it. That opens another, difficult, can of worms. It is not immediately obvious how well publicised these decisions will be and how people will obtain information about how sheriffs have approached the power.

John Mason: That is helpful. We are obviously looking for things that could be improved, but you are right; a lot of it needs to be pragmatic and we will have to see how it goes.

Stewart Stevenson: I want to ask about some aspects of the sheriff process when an individual wants to challenge a disclosure before the sheriff court. We heard last week that the sheriff can take the hearing in private to prevent the disclosure of a matter that may ultimately not be disclosed. As far as it goes, that is perfectly satisfactory. However, for a determination to be made, it may be necessary for evidence from the employer to be led, and therefore the employer will be made aware of matters that it may be concluded will not be part of the disclosure certificate. Although the current legislation says that the employer should not act on that knowledge if it is not provided via disclosure, it appears that it does not include any

sanction or way of enforcing that. Do you have a view on that? You might care to break your response down into two parts. The employer might become aware of the nature of what is not being disclosed or, at a lesser level, they might merely be aware that something is not being disclosed.

Laura Dunlop: That is undoubtedly a difficulty. None of us can unknow something that we know, so if in the course of proceedings before the sheriff an employer has been involved and has discovered something, it will be there in the employer's mind. If the person is then unsuccessful, it is difficult to prove conclusively that the reason for their lack of success was the fact that the employer did not truly disregard the piece of information that he or she had come across.

I wondered when I was preparing for today's meeting whether an applicant in that situation would take the view that the risk was too great and just would not involve the employer at all. I suppose that that creates a different problem for the applicant, which is that it might be difficult to satisfy the sheriff that the information about the conviction is not relevant without any input from the person who can best describe what the duties of the post will involve. At least in theory, one can imagine the application to the sheriff, and the hearing on that application, taking place without the involvement of the employer, because the risk that Stewart Stevenson describes is a real one. In both scenarios that he described—where the employer discovers something quite specific to which he finds he cannot close his mind and where there is a smell-a-rat problem—I wonder whether there could be difficulties even if the application is conducted without involving the employer, because it would take a bit longer.

I am not sure about that because, having just been through disclosure myself, I know that it takes about six weeks. One can imagine a circumstance in which, because a person has elected to go to the sheriff, the process takes longer and the employer smells a rat because of that simple fact. Six weeks is quite a long time and things get delayed in the post and so on, and I suppose that one could finesse it, but the sheriff court will be required to progress that type of application with great expedition.

Stewart Stevenson: What I am hearing is that the problem that I described is a real problem in the real world.

Laura Dunlop: Yes.

Stewart Stevenson: The problem appears to have existed for a substantial period of time before the circumstances that are causing this particular piece of secondary legislation to be considered by the committee and by Parliament. Is there anything new in the order that is before Parliament that touches on that and changes the difficulties around the subject? If the answer is that there is nothing in particular that is new or that creates additional difficulties, I suspect that, for the purposes of passing the order, we can disregard the problem, although perhaps it should be considered elsewhere on another occasion.

Laura Dunlop: I have not identified anything new. The other thing that I would say about having the right to go to the sheriff is that, notwithstanding the drawbacks that you have identified, on which I agree with you, it is still better to have that right than not to have it.

Stewart Stevenson: Finally, I have a question that you may not wish to answer. Do you think that it is a subject that the Government or Parliament should return to at some future point?

Laura Dunlop: I would not go as far as that. I think that they should wait and see. It is something that one will need to keep an eye on. We should watch developments, particularly in the other jurisdictions in the UK, and in the light of any developments there, or if there are cases in Scotland, it may be necessary to fine tune the scheme.

John Scott: In that regard, we are long on analysis, on defining the problem and on agreeing that there is nothing new here. Do you have any proposals that might improve what is in front of us, or might the Faculty of Advocates reflect and come up with a suggestion that would better the proposal?

Laura Dunlop: To reiterate, it is evident, both from the order and from the evidence that was given last week, that a lot of time, thought and care has been put into the provisions already by people who are experienced in dealing with the issues. That probably reduces the likelihood that the Faculty of Advocates can think of something that they have not. However, never say never. I and the two people whom I have in mind to approach for their input will take it away and think about it. I have a lot of confidence in them, and we will see whether we can think of anything at all to offer as a suggestion for how the provisions could be improved.

John Scott: Many thanks.

I return to another question—forgive me if you have already answered it. There is apparently no provision for either an internal review by Disclosure Scotland or an independent review of the disclosure of non-protected conviction information. When an applicant considers that spent conviction information is irrelevant, their only option is to apply to the sheriff. Do you have any views on whether the lack of an independent

review, other than through the court system, has any bearing on proportionality?

Laura Dunlop: The difficulty is more likely to come with the offences that are always disclosed. As we have touched on already, it means that the "childish error", as Lord Wilson describes it—the adolescent misbehaviour that results in a conviction—will still be disclosed a long time afterwards. Twenty or 30 years later, when someone is applying for employment or even a voluntary position, that blot is still there, and there is no recourse as the scheme is currently constructed. There is no way to go to an independent person or the sheriff and ask that, because of the long period of time that has passed and the fact that the person may have done many good things in the interval, the conviction should not be disclosed for that particular purpose.

The difficulty with creating a review mechanism for the offences that are always disclosed is that, basically, one would not be creating a review so much as changing the whole scheme. If we create a review mechanism for people in that category, at a stroke we are saying that there is not a list of offences that will always be disclosed.

John Scott: On the other hand, it would have a bearing on proportionality.

Laura Dunlop: I think that it might, yes.

John Scott: Does that leave the order open to challenge under article 8?

Laura Dunlop: As I said earlier, one can, without being terribly creative, figure a hard case. If a challenge occurs, the courts will decide it, and whatever view the courts take would inform any adjustment of the scheme that took place thereafter. It might be better to wait and see how that approach pans out rather than going too far, too fast at the moment.

John Scott: Thank you.

The Convener: I would like to get back to the underlying jurisprudence of the issue. We have talked all the way through about a rules-based set of criteria. You have not given any indication that you would expect a British court to object to a rules-based criterion. We know that that approach can result in hard cases, but we are steeped in that principle. Is it fair to say that? Is there any indication that that might change?

Laura Dunlop: Having a rules-based criterion as a matter of principle seems to be a coherent and logical way to proceed. The arguments will be about the individual provisions within that system and whether an offence truly belongs on the rules list or should not be there at all. There might be arguments about the detail, but they will not be about having a rules-based system as a matter of principle—that should be acceptable.

11:30

The Convener: Yes. Will you reflect on whether greater notice should be taken of the sentence in either of the lists? I appreciate that sentences are mentioned in the order in that, if there was a discharge, the conviction may be discounted, which is perfectly reasonable, but is there scope for at least considering whether the sentence might be a criterion that would fit in with a sensible set of rules?

Laura Dunlop: I would prefer to reflect on that question and not to answer it on the hoof. I cannot rule out that greater regard could be paid to the sentence, but I would prefer to go away and reflect on that. Perhaps we can cover that when we submit something in writing.

The Convener: That would be helpful because, if we take the view that, essentially, there has to be a rules-based set of criteria, those rules have to look at data, and the data has to be populated with something. In effect, there have to be numbers or ticks. Clearly, the sentence can be enumerated, whereas most of the other things that we might want to talk about and that the sheriff might want to consider at some other point do not involve such a tick-box exercise. Is there anything else that we could possibly get as an enumerable criterion that Disclosure Scotland could use without having to use discretion?

Laura Dunlop: I suppose that I have to record a note of caution on the potential for using the sentence as some kind of marker. Many different things come into the reason why a sentence is chosen and, further down the line after the passage of time, it can be very difficult to get an accurate perspective on why a sentence was what it was. Even that could be difficult, but we can certainly think about it.

There is nothing else obvious that one can select as a marker and then use as a basis for discrimination.

The Convener: Thank you.

I have a couple of other thoughts. Given that surely very few cases will be in front of sheriffs, even if one were able to get the information on those decisions, is there any reasonable expectation that we will build up a body of law over a reasonable period of time, or might Parliament just revisit the matter once every generation? I am trying to challenge your thought that maybe we will tweak as we go along. I am sure that we might do so if a particular case comes along, but I do not really expect that a body of law will be built up in any sensible time period that will enable us to revise it, or am I wrong about that?

Laura Dunlop: If that eventuates, one will then not be sure whether there is a lack of cases

because the system is working well or whether something else is preventing people from bringing challenges. Absent a body of case law, it is probably unlikely that, with the many competing demands on members' time, the Parliament would revisit the matter or that the Government would do so, although I suppose that not very many cases would be needed. It depends on what sorts of circumstances and challenges arise, but even three or four cases that seem to illustrate a trend or a line might be enough to justify re-examining the provisions.

The Convener: Yes, indeed.

I want to pick up on one other issue. I hope that I understood you correctly on this, but please correct me if I have not. You said earlier that you feel that to have the sheriff route is better. If I understood you correctly, you meant that to have the sheriff route is better than not having it at all.

Laura Dunlop: Yes, that is what I meant.

The Convener: I am sure that that is right and absolutely fair. Will you reflect on whether the sheriff route might be an essential part of ECHR compatibility? If there is no mechanism whereby an individual can finish up in the courts, might that contravene their right to a fair hearing? I am talking about the ECHR in total.

Laura Dunlop: The procedural requirements of article 8 are not as well developed as the procedural requirements of some of the other articles. Instinctively, I think that it would probably be a concern if there were no review mechanism at all.

The Convener: That would push us back to judicial review as the fallback, and nobody likes to go there.

Laura Dunlop: That is right.

The Convener: It seems almost like an admission of defeat.

John Scott: Ms Dunlop, you spoke a moment ago about establishing a body of case law, which is a process that has perhaps already begun in England and Wales and elsewhere. Do you see that as helpful for what we are trying to achieve in Scotland?

Laura Dunlop: Yes. In this area, looking at case law from the other jurisdictions in the UK would be a highly relevant exercise.

The Convener: If you make a submission, you might like to consider where those other jurisdictions have got to and what any recent cases might help us to understand. That is clearly not something to do on the hoof now, but it would be helpful to have an update.

We have been round the subject, but is there anything that, on reflection, our witness would like to add by way of summary or conclusion?

Laura Dunlop: If you will permit me, I will look back through my quite extensive notes on the subject.

No, there is nothing that I would like to mention.

The Convener: Thank you. In that case, I—

John Scott: Of course, should it occur to you in the small hours of this or another night that there was something that you wanted to say, please feel free to let us know. I am sure that the convener was just about to say that.

The Convener: John Scott has put it very well—thank you.

That brings us to the end of the item. I will suspend the meeting briefly.

11:37

Meeting suspended.

11:39

On resuming—

Instruments subject to Negative Procedure

General Dental Council (Indemnity Arrangements) (Dentists and Dental Care Professionals) Rules Order of Council 2015 (SI 2015/1758)

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

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Act of Sederunt (Child Support Rules Amendment) (Miscellaneous) 2015 (SSI 2015/351)

11:39

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

Members *indicated agreement.*

Burial and Cremation (Scotland) Bill: Stage 1

11:39

The Convener: The purpose of agenda item 5 is for the committee to consider its approach to the delegated powers in the Burial and Cremation (Scotland) Bill. The bill contains a significant number of delegated powers, and it is suggested that the committee might wish to explore those powers in oral evidence. Does the committee agree to invite Scottish Government officials to provide such oral evidence to the committee on 17 November?

Members *indicated agreement.*

Private Housing (Tenancies) (Scotland) Bill: Stage 1

11:40

The Convener: Under agenda item 6, members are invited to consider the delegated powers provisions in the Private Housing (Tenancies) (Scotland) Bill at stage 1. The committee is also invited to agree the questions that it wishes to raise in written correspondence with the Scottish Government on the delegated powers in the bill. The committee will consider the responses from the Scottish Government at a future meeting, prior to considering a draft report.

Section 9(1) of the bill will enable the Scottish ministers to make regulations that impose a duty on landlords to provide tenants with information that is to be specified in the regulations. The substantive provisions regarding that duty are left to secondary legislation, unlike the statutory items in schedule 2. Does the committee agree to ask the Scottish Government whether consideration has been given to including on the face of the bill the proposed specified information under section 9(1), which a landlord will be under a duty to provide to a tenant, and whether the Government would consider it appropriate to include such information on the face of the bill in a similar manner to the approach taken with statutory items in schedule 2?

Members *indicated agreement.*

The Convener: Section 10 will allow ministers to make regulations specifying how the duty to provide information that arises under sections 8 and 9 is to be performed. In the same manner as with section 9, how the duty will operate is to be set out mainly in secondary legislation rather than on the face of the bill. Does the committee agree to ask the Scottish Government whether consideration has been given to including on the face of the bill rather than in regulations under section 10 the proposed provisions about how a duty arising under section 8 or 9 is to be performed?

Members *indicated agreement.*

Transplantation (Authorisation of Removal of Organs etc) (Scotland) Bill: Stage 1

11:41

The Convener: Agenda item 7 is to consider the delegated powers in the Transplantation (Authorisation of Removal of Organs etc) (Scotland) Bill, which is a member's bill. The committee is invited to agree the questions on the delegated powers in the bill that it wishes to raise in written correspondence with the member in charge. The committee will consider the responses at a future meeting prior to considering a draft report.

The bill proposes to insert a new section 2A into the Human Tissue (Scotland) Act 2006 that would enable ministers to provide by regulations for the designation of persons or categories of person as authorised investigating persons for the purposes of the 2006 act. The delegated powers memorandum states that the persons anticipated to be designated as authorised investigating persons will be in clinical and administrative roles in the national health service. However, the power is drawn to permit any persons or categories of persons to be designated as authorised investigating persons.

Does the committee agree to ask the member in charge to explain what other persons or categories of persons might be designated as authorised investigating persons apart from NHS staff and to explain what NHS clinical or administrative roles or grades might be appropriate for designation?

Members *indicated agreement.*

The Convener: The delegated powers memorandum justifies the negative procedure for scrutiny of the regulations on the basis that they are likely to be largely technical and expressed in terms of NHS grading and staffing arrangements. However, the power is capable of being exercised to designate persons or categories of persons beyond persons in an NHS role. The exercise of the power would also be highly significant to the proper operation of the opt-out system that is proposed in the bill. Does the committee agree to ask the member in charge to explain further why the negative procedure is considered to be more suitable than the affirmative procedure for scrutiny of the regulations?

Members *indicated agreement.*

The Convener: Section 16(1) of the bill would enable the making of regulations to make provision for adults from countries with opt-out systems of organ donation. The delegated powers memorandum explains that the objective

underlying the power is that, at the judgment of the Scottish ministers, there might in future be circumstances where a person dying in Scotland who met the requirements for an opt-out system of transplantation under their home system should be included within the opt-out provisions in new section 6B of the 2006 act, which would be inserted by section 6 of the bill. Section 16(1) of the bill would enable, by regulations subject to the affirmative procedure, any further modification of the 2006 act to cater for those circumstances.

Does the committee agree to ask the member to consider whether that power could be more suitably exercised by a super-affirmative form of procedure, which would enable the Parliament to consider an initial draft of the regulations, and, in that context, what the advantages and disadvantages of applying for such a procedure would be for the Parliament and others, in comparison with an affirmative procedure?

Members *indicated agreement.*

Community Justice (Scotland) Bill: Stage 1

11:45

The Convener: Agenda item 8 is for the committee to consider the Scottish Government's response to its stage 1 report on the Community Justice (Scotland) Bill. If members have no comments, are we happy to note the Government's response and, if necessary, reconsider the bill after stage 2?

Members *indicated agreement.*

Health (Tobacco, Nicotine etc and Care) (Scotland) Bill: Stage 1

11:45

The Convener: Agenda item 9 is for the committee to consider the Scottish Government's response to its stage 1 report on the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill. If members have no comments, are we content to note the response and, if necessary, reconsider the bill after stage 2?

Members *indicated agreement.*

Richard Baker: The issue of ancillary provision in section 33 and the fact that that provision was made in a different way from other legislation were things that we had wondered about raising with the Scottish Government, to ask further questions about why it is taking that approach. The fact that it is out of line with the approach in other legislation is something that the committee might want to raise, perhaps not by amendment at stage 2, although there is an opportunity for that, but at least by writing to ministers to highlight the fact that we have further concerns.

The Convener: As convener, I feel that we have raised that enough for the Government to have got the message. We have put it in at least three reports. It also figures in our quarterly report and is therefore something that we know will come up when the Minister for Parliamentary Business comes to speak to us in the next few weeks.

Richard Baker: Are you suggesting that, given that we have not acted on that yet—

The Convener: I suggest that, in this context, we do not need to raise the matter again, as it is pretty high up the agenda, as far as the Government is concerned, in many other situations, so it is well aware of the issue.

John Scott: I should speak in support of Richard Baker. Notwithstanding the fact that we have raised the issue on several occasions, we have not really had a satisfactory response to those concerns yet, as far as I am aware.

The Convener: That is a perfectly fair comment. I do not think that we have had a response.

John Mason: I think that we had some kind of response saying that the Government was willing to look at the issue. I do not know whether there was a timescale for that, but I think that there was an indication that the Government was going to review that, even though it may not have been a top priority. It is a question of tactics. Do you ask for a new bicycle every single day, or do you just ask a few times and then leave it for a while?

The Convener: The view from the clerk is that the Government is thinking about it and we know that it is thinking about it. On that basis, bearing in mind that we are thinking about a specific response at the moment, I wonder whether we could take that as what the Government is doing for the time being. The obvious threat is that we will come back to it with the next stage 1 report, which would perhaps be a slightly better route than responding to this response. However, if the committee wants me to respond to this response, I will do so. I do not really want to push the matter to a vote. We just need a collective view.

Richard Baker: Given that we are highlighting our concern about that again, and given that the issue is under consideration and that we can raise the matter with Joe FitzPatrick when he comes to the committee, that would be fine. I just think that it is important that, if we have not had what some of us regard as a satisfactory response, we do not just drop the issue.

The Convener: Should I informally remind the minister that we have had this discussion on the record?

Richard Baker: Yes, that is a sensible approach.

The Convener: It might be enough just to tell him.

That gets us to the end of item 9. The final two items will be in private.

11:49

Meeting continued in private until 12:00.

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