The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 17 November 2015

Session 4

Tuesday 17 November 2015

CONTENTS

DELEGATED POWERS AND LAW REFORM COMMITTEE
32nd 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:

Simon Cuthbert-Kerr (Scottish Government)
Richard Dennis (Accountant in Bankruptcy)
Graham Fisher (Scottish Government)
Graham McGlashan (Scottish Government)
Alex Reid (Accountant in Bankruptcy)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 17 November 2015

[The Convener opened the meeting at 10:07]

Decision on Taking Business in Private

The Convener (Nigel Don): Welcome to the 32nd meeting in 2015 of the Delegated Powers and Law Reform Committee. I ask members to switch off their mobile phones, which I am going to do myself—[*Interruption*.]—when it has decided to behave. [*Interruption*.] It is all right—I am there. Thank you.

It is proposed that the committee takes in private agenda item 10, which is consideration of a draft report on the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (SSI 2015/330), and agenda item 11, which is consideration of the evidence that the committee will hear on the Burial and Cremation (Scotland) Bill. Are members content to take those items in private?

Members *indicated agreement.*

Bankruptcy (Scotland) Bill: Stage 1

10:08

The Convener: Agenda item 2 is an evidence-taking session on the Bankruptcy (Scotland) Bill. I welcome from the Scottish Government and the Accountant in Bankruptcy: Richard Dennis, chief executive officer and the accountant in bankruptcy; Alex Reid, head of policy development at the Accountant in Bankruptcy; and Graham Fisher, head of branch 1, constitutional and civil law division, Scottish Government legal directorate. Good morning, gentlemen. It is good to see you again.

I will begin the questioning. The Bankruptcy (Scotland) Bill consolidates legislation dating back over the past 30 years, but given that most of that legislation is actually fairly recent, is there a need for consolidation?

Richard Dennis (Accountant in Bankruptcy): I do not think that the age of legislation is necessarily an issue when it comes to the value of consolidation, which is all about the number of reforms and changes that have been made since the initial legislation came into force and the ease with which it can be used. Given that we have just completed what might be the most radical reforms to personal insolvency this century, now is a particularly good time for consolidation. The bill, which is about ease of use and modernisation, will be available in future years and, as I said, after a period of major reform is a good time rather than a bad time to consolidate.

The Convener: Can you provide any examples of the practical difficulties that are associated with the current legislation?

Richard Dennis: I might be uniquely qualified to give you some examples of the practical difficulties. Members might recall that I was appointed as the accountant in bankruptcy in April, and when I came to use the current legislation, I found it very difficult to follow. In fact, I already use the consolidation bill instead of the existing legislation when I need answers to queries.

Consolidation is about making legislation simple, modern and up to date, dealing with inaccuracies and ensuring that the legislation is easy to use not only for specialists but for people more generally. It is extremely difficult to use the existing legislation.

Paragraphs 6 and 7 of the background paper contain some detailed material on the overall approach to consolidation and set out why it is valuable. That applies with particular import here, given the number of times that we have changed

the Bankruptcy (Scotland) Act 1985. If you tried to follow through the legislative requirements and how they might affect you, you would find yourself struggling and you would need to have lots of different documents on the table, unless you were able to pay for the kind of electronic consolidated version that some professionals have access to.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): It is self-evident that, as Mr Dennis said, we have just undertaken a major reform of the law in this area. At what point in the cycle do we discover the need to tweak legislation? Does that need not become most evident immediately after a major reform because, as soon as people engage with the changes, they realise that changes have been made? If so—if that statement proves, from broad experience, to be correct—might one not conclude that there might be a case for waiting to see whether, following major reform, any further changes are required before we move to consolidation?

Richard Dennis: I will ask my colleagues to respond to that, but my perception is that we did an awful lot of very radical things in the Bankruptcy and Debt Advice (Scotland) Act 2014. We will want to see the impact of compulsory financial education on certain classes of debtors, and I believe that about a fortnight ago there was a members' business debate on the use of the moratorium that was introduced in the act. The minimal asset process is new and is fundamentally different, and the common financial tool is also a significant change. We will want to see how those changes have bedded in and whether they have delivered what the Parliament hoped they would deliver.

Moreover, the wider stakeholder community is keen for us to stop changing things for a while. As the committee will know, there have been four or five major bankruptcy acts in the past decade, and after such a period of major reform, the stakeholder community out there needs time to adjust to all the things that have been done. It is therefore highly likely that, even if a tweak to the bankruptcy legislation was to become desirable, there would be good reasons—not least the question of parliamentary time—for thinking, "We'll leave it a few years before we do this."

I do not know whether my colleagues wish to add anything to that.

Graham Fisher (Scottish Government): We had the Scottish Law Commission report in 2013 and then the series of changes in the 2014 act. An issue about the preparation of a consolidation is that, if the work is not done, it can end up being lost. The drafter has to do a lot of detailed technical work to put the consolidation bill together, but with such bills there is always a danger that that work will be lost because of further changes and updates to the law from a range of different areas—in this case, not just Scottish Government proposals to change bankruptcy law, but ad hoc consequential amendments that are made by legislation in other areas. There is always a danger in waiting for the next set of policy reforms.

Stewart Stevenson: Essentially, then, the argument, which I am prepared to accept, is that after a major reform there is normally a period of quiet while we wait to see whether it is appropriate to make further changes in the light of that reform, and that that is probably the best period in which to undertake consolidation, if we are going to consolidate. Is that essentially the point that you are making?

Graham Fisher: Yes. When we consolidated the criminal procedure legislation, for example, policy changes were made before the consolidation provisions.

Alex Reid (Accountant in Bankruptcy): There is one other point. Consolidation was an option at the time of the Bankruptcy and Debt Advice (Scotland) Act 2014 because it implemented almost all the SLC recommendations. However, the decision was made to allow those changes to be implemented and to settle in before consolidation. That is the reason why consolidation is being done now.

10:15

The Convener: Thank you. That was helpful, and it brings us to the next set of questions, which are on timing.

John Mason (Glasgow Shettleston) (SNP): As I understand it, there were 38 recommendations in the Scottish Law Commission's 2013 report and the majority of them have been introduced. One change that seems to be happening in the bill concerns protected trust deeds. Why is it considered appropriate to include the law of protected trust deeds in the bill, and restate secondary legislation as primary legislation?

Graham Fisher: Principally, the bill consolidates the material in the Bankruptcy (Scotland) Act 1985 and its amendments in other legislation. As you say, it also adds in the protected trust deeds regulations. That was recommendation 38 in the SLC's report. In particular, the SLC noted the Law Society of Scotland's view that the protected trust deeds regulations are core to the daily practice of insolvency law and it took the view that, because this is a complex body of law and it is too important to be relegated to subordinate legislation, it would be useful to include it in the main bankruptcy statute. The Government

supports that approach, and it is the approach that the bill takes.

Protected trust deeds are considered to be a major alternative route into insolvency protection, and they are sufficiently important to warrant inclusion in the primary legislation. It might also be worth saying that provision for protected trust deeds has always been made under the bankruptcy statute. In the past, schedule 5 of the 1985 act contained more detailed provision on protected trust deeds. Under the bill, that is kept in the main bankruptcy statute. It fits well within the framework of the material that is consolidated in the bill.

At the same time, there is a need to keep some flexibility in the area because of changes to the granting of voluntary trust deeds for the benefit of creditors, which the measures regulate. The power for the Scottish ministers to change the area by regulations, if necessary, is also maintained and consolidated in the bill.

John Mason: I presume that the regulations were put in secondary legislation deliberately and for a reason. What has changed? Have they just become more important?

Graham Fisher: The overall framework is seen as being important. Some elements will be maintained in regulations, such as the power to set forms in relation to those regulations, but more of the overall framework will be returned to primary legislation.

There was a conscious decision in the Bankruptcy and Diligence etc (Scotland) Act 2007 to take wider powers to adjust the regulation of protected trust deeds. That was because of the need to be able to react to changing practices on the ground in the different forms of trust deeds that debtors can grant, advised by insolvency practitioners, for the benefit of their creditors.

John Mason: How do you decide what goes in primary legislation and what goes in secondary legislation?

Graham Fisher: That is a very good question. The answer might depend on the overall importance of the framework and the particular area. The Delegated Powers and Law Reform Committee is well placed to make judgments on that because of the forms and other aspects of legislation that you see daily.

The need to update values in legislation is particularly relevant to the bankruptcy legislation. Such measures are sometimes seen as administrative or minor even though they can be important in practice. The need for flexibility in certain areas might be a reason why matters are dealt with in subordinate legislation, and the overall effect and wider framework of the legislation is key. In this case, some of that is being added back into the primary legislation. Because protected trust deeds have a similar effect to sequestration, they are seen as worthy of being in primary legislation.

Richard Dennis: I think that it comes down to how far you see full administration bankruptcy, the minimal asset process and protected trust deeds as similar approaches. Those are the three choices for getting debt relief for someone who cannot repay their debts. Why would two of them be in the primary legislation and one of them not be in it? The purpose of putting the protected trust deeds provisions in primary legislation is to ensure that there is a level of consistency.

As the committee may or may not remember, one of the changes that the Protected Trust Deeds (Scotland) Regulations 2013 made was to change the time period over which contributions are paid for protected trust deeds. In the Bankruptcy and Debt Advice (Scotland) Act 2014, we brought full administration into the same time period. We have tried to make the two options more similar. Similarly, the common financial tool can be used for both. Increasingly, they are looking like similar options, and it is important that they are treated in the same way in legislation.

John Mason: The SLC's recommendation 1 was implemented only partially, and I believe that the reason for not implementing recommendations 32 and 37 relates to the use of the proposed section 104 order. Will you explain why those recommendations have been dealt with separately?

Graham Fisher: The SLC's first recommendation was to remove the words "or interest" in the context of a right or interest that the debtor has that may vest in the trustee in sequestration. That was considered when the Bankruptcy and Debt Advice (Scotland) Bill was considered, and it was discussed in detail with the SLC. Essentially, there was a concern that, if the recommendation was implemented in all the different areas of consideration, it might inadvertently lead to a doubt at the margins about what transfers to the trustee when the debtor is sequestrated and during the period of the sequestration.

The doubt in question was a fairly technical one. For example, in relation to a hope of succession or a bequest that the debtor might expect to receive, there was a doubt at the margins about whether, in a peculiar set of circumstances, that would transfer to the trustee in sequestration in the way that the 1985 act intended. There was a concern that the effect would be altered. That was considered with the SLC at the time and the proposal that only the transfer of a legal right be referred to was taken forward in three of the

references in the 2014 act but not in the others. That approach is maintained in the bill.

John Mason: It was felt to be a bit safer to leave the provision as it was because there might be consequences if it was changed.

Graham Fisher: Exactly.

John Mason: Why were recommendations 32 and 37 not implemented?

Graham Fisher: That relates partly to the provision in the section 104 order. The situation as regards recommendation 32 is confusing because no provision in the section 104 gives effect to it. Essentially, it has been superseded by the repeal of measures for composition out of bankruptcy in the 2014 act.

Recommendations 32 and 37 would have fixed two very minor errors—one was introduced by the Bankruptcy (Scotland) Act 1993 and the other was introduced by the Bankruptcy and Diligence etc (Scotland) Act 2007. Recommendation 37 is the one that will be implemented in the section 104 order. A minor part of that order will achieve consistency with the law of England and Wales and Northern Ireland in relation to a particular cross-reference in the 1985 act and the way in which that has been amended. A level of consistency will be introduced on that point. That has been left to the section 104 order rather than being included in the bill because it deals with the law of England and Wales and Northern Ireland.

John Mason: Just to clarify that for all of us who are not terribly into all the legal side of the matter, is it that we are not changing the law in England, Wales and Northern Ireland, but that the law there will be changed as a consequence of our changing the law here? Is that how it works?

Graham Fisher: It is as a consequence of our changing the law here, but the section 104 order will change the law in England, Wales and Northern Ireland. That is precisely what that narrow aspect does—it fills in that gap.

John Mason: Can you give a practical example of what that would mean?

Graham Fisher: Yes. A particular example relates to concurring creditors, but not in relation to a debtor application for bankruptcy, and filling in that part of the limitation rules in the law in England, Wales and Northern Ireland. Under those rules, a creditor's claim expires after a certain amount of time if they do not pursue the claim. However, under Scottish sequestration rules, those limitation rules do not have effect if the sequestration has been entered into in Scotland. Therefore, a creditor does not have to worry about their claims ceasing to have effect; in other words, those claims do not lapse as they would under the rules in the law of England, Wales and Northern Ireland. The rules are effectively put on hold, because the bankruptcy has happened in Scotland.

John Mason: That is fair enough. Thank you.

Stewart Stevenson: Just to tie off the section 104 order issue, you are saying that the effect of the order will be not to consolidate but to change the law.

Graham Fisher: The order will have three different effects, the first of which is the change that I have just mentioned—that is, it will fill in the bits of the law of England, Wales and Northern Ireland where the Bankruptcy (Scotland) Act 1985 previously extended into the law of those countries. It will make a few free-standing minor provisions of that nature.

The order will also amend various statutes, largely in reserved areas, that apply across the UK. For example, it will update the references to the 1985 act to references to this legislation. Finally, it will fill in a minor part of Westminster procedure in which the bill maintains the secretary of state's powers to make various provisions by subordinate legislation, for example, in relation to fees on the reserved side.

Stewart Stevenson: What effect will the section 104 order have on the consolidation bill that is before us? The order sits outside that process, but if it is not passed—or if it is not passed timeously—will that in any way invalidate or require any change to the bill, or will that be essentially incidental?

Graham Fisher: It is essentially incidental—or, more accurately, consequential on those changes. The section 104 order is an important part of the package; it is important for it to be made to ensure that the overall package works, and we have obviously been working with the UK Government for a while to put the order in place. However, the content of the bill itself does not depend on the changes in the order.

Stewart Stevenson: To be absolutely clear, although the section 104 order and what it will do are important, its passage or non-passage need have no effect on the consolidation that the committee is considering and which the Parliament will consider.

Graham Fisher: I suppose that that is essentially right in terms of the bill's content.

Stewart Stevenson: I am sorry—do forgive me—but you have used that weasel word "essentially".

Graham Fisher: I was going to explain that it will be for Parliament to decide whether it is content for the material in the Bankruptcy (Scotland) Act 1985 to be consolidated in the bill.

As I have explained, part of the 1985 act will effectively be reproduced in the section 104 order. That is part and parcel of the devolution settlement. Those aspects are fairly marginal because we have been able to keep most of what is in the 1985 act in the consolidation bill. However, there are aspects where, because of section 29(2)(a) of the Scotland Act 1998 and the restriction on legislative competence, the Scottish Parliament cannot make provision to change the law of England and Wales. That is just the nature of the devolution settlement, and in those cases, the section 104 order is the mechanism that would be used.

The Convener: Am I correct in understanding that if, for any reason, the section 104 order is not made—I am not suggesting that it will not be—we would drop back to the 1985 act or something prior to that? Would there be a hole in the law?

10:30

Graham Fisher: There would be a hole in the law of England and Wales. It would be a fairly marginal hole and would create only a small difficulty in the workability of the law. However, the intention is for the package of measures, including the section 104 order, to address that.

The Convener: So the section 104 order is necessary to give the full range of powers and effective law that the package is intended to provide. We cannot just drop back to the way in which the law was previously written.

Graham Fisher: I suppose that that might be the case if there was some problem in extremis, but we have no reason to expect that to be the case and there are no concerns among our UK Government counterparts about the timescale for the overall package of measures, which has been planned for some time. We would not want to disrupt the law by not having the section 104 order.

The Convener: Coming back to the consultation on what we have in front of us, to what extent were the Accountant in Bankruptcy and the Scottish Government consulted about what should be consolidated—by which I mean, literally what is in the bill and what is not?

Graham Fisher: I suppose that the basic premise for starting the project was the consolidation of the 1985 act. The Scottish Government and the Accountant in Bankruptcy initially approached the issue because consolidating the 1985 act material was seen to be valuable. The proposal to add protected trust deeds material, which came out of the Scottish Law Commission's consultation, was taken up and supported by the Scottish Government.

I do not think that adding other material was ever seriously considered. There are one or two areas in the wider law—for instance, the debt arrangement scheme regulations, which one could argue are, in their overall effect, equally significant to the protected trust deeds material—that could be considered, but that issue is very much seen as not part of the bankruptcy statute. That is the main thing to say about where the material that is included in the bill has come from.

The Convener: Are the Accountant in Bankruptcy and the Government the same entity for the purposes of this discussion?

Richard Dennis: That is a tricky question to answer. Officially, do we have a separate view? No, we do not—we agree with the Government.

The Convener: That is helpful. I just wanted that on the record.

Have there been any comments from stakeholders about the information that you have just given me, Mr Fisher? Does anybody out there feel that we have missed a trick and should have done something else?

Graham Fisher: Not that we are aware of, although something might be thrown up in the committee's call for evidence. I am not aware of anything else that arose out of the SLC's consultation, other than the measures proposed for consolidation in the bill.

The Convener: It is good to see the measure of agreement.

Are we going back to Stewart Stevenson now?

Stewart Stevenson: I think that I have covered the points that I wanted to raise, convener.

The Convener: That is okay. If you are comfortable that the issue has been covered, we will go to John Mason.

John Mason: On a more general area, will anything be done to make insolvency practitioners and other stakeholders, perhaps, aware of the bill when it is passed?

Richard Dennis: Alex Reid will deal with that.

Alex Reid: The AIB has made a significant effort to make stakeholders aware of the consolidation of bankruptcy legislation. For example, we highlighted the bill's introduction to Parliament in news releases, on the AIB's website and, probably more important, in a wide range of stakeholder meetings that the AIB holds, including the debt insolvency stakeholder forum, at which progress on consolidation is a regular item for discussion. That forum includes key stakeholders from the insolvency practitioner, money advice and creditor sectors, and we are trying to keep in close touch with all those groups. The AIB also

hosts annual spoken stakeholder sessions, and we have workshops on a range of topics in Glasgow, Edinburgh and Inverness that will take place in January and February and which will be another opportunity to communicate information on the bill and receive feedback from stakeholders.

John Mason: Is the feeling that people who are most interested are up to speed and so there will be no need for a special push after the bill is passed?

Alex Reid: Yes. I think that people will be up to speed.

Richard Dennis: It is worth adding that this is a fairly small world to deal with. On the industry side of the sector, there might be between 100 and 140 licensed insolvency practitioners in Scotland, almost all of whom will be members of the Institute of Chartered Accountants of Scotland or the International Bar Association. The stakeholder communication channels are very easy and quick in the fee-paid sector. It is slightly harder to get to the free money advice sector, but we have good channels through Citizens Advice Scotland, Money Advice Scotland and so on.

John Mason: I realise that corporate insolvency is not included in the bill, because, as I understand it, a lot of that is reserved. Will there be a parallel process for consolidating that legislation?

Richard Dennis: There is a lot of interest among our stakeholders in the corporate insolvency world in our plans for that. Alex Reid can give you a brief outline of what we are planning to do on that over the next year or so.

Alex Reid: A corporate insolvency modernisation process is taking place. You are correct to point out that the area is broadly, but not wholly, reserved, but we are taking forward two main streams of work in relation to Scottish corporate insolvency. Through a public services reform order, we are making changes to the Insolvency Act 1986 as it relates to Scottish insolvency processes to try to modernise those processes and bring them into line with changes that have been introduced for practitioners in England and Wales. That will lay the foundation for the modernisation of Scottish corporate insolvency rules. Practitioners have been calling for that for a long time, because of the mismatch of corporate insolvency practices.

That programme of work will be taken forward in parallel with the modernisation of rules in England and Wales, with the intention of having revised and modernised rules commence at the same time.

John Mason: When you say “rules”, you do not mean primary legislation.

Alex Reid: They are not primary legislation. The public services reform order makes changes to the primary legislation—the 1986 act—as it applies to the devolved aspect of corporate insolvency. The rules will be secondary legislation that will cover the relevant processes of administration, receivership and winding up.

John Mason: Assuming that the bill is passed, will the secondary legislation need to be updated?

Graham Fisher: Yes. That is part of the intention of the package. When the bill—assuming that it is passed—comes into force, the subordinate legislation will be consolidated. We have done that reasonably recently in relation to the reforms introduced in the Bankruptcy and Debt Advice (Scotland) Act 2014, and that will help us with this work.

It will mean that a set of rules will sit between the bill and the subordinate legislation that points to it. Although such an approach might not be legally necessary, it will create a coherent package of measures for practitioners to look at in relation to the effect of the new bill.

John Mason: What process will that go through, and what will be the timescale for it?

Graham Fisher: The overall timescale is that, granted a fair wind, the act will come into force towards the end of next year. That will allow the Parliament to scrutinise the package of regulations and orders that is necessary in the autumn of next year. As for the exact way in which we will cut up the different provisions, we could work in different ways, but several different sets of measures will certainly be included in that.

John Mason: Will stakeholders get the opportunity to feed into that process?

Graham Fisher: Absolutely.

John Mason: Thank you.

The Convener: Do you expect that to involve any significant transitional arrangements?

Graham Fisher: Transitional arrangements are provided for in the bill. By and large, the bill will apply to new sequestrations that are applied for and trust deeds that are granted after the commencement date, which will be towards the end of 2016, as I have explained. The current measures will continue to apply to sequestrations and trust deeds that are in train.

The Convener: I did use a technical term, so forgive me. Am I right in hearing you as saying that, after a certain date, we will be in the new regime and that up to that point—and this will probably relate to the date of the sequestration—we will be in the previous regime?

Graham Fisher: Yes. There will be a continuing need to look at the old regime for existing sequestrations. For new sequestrations after that date, the bill will apply.

The Convener: So, returning to my original question, you do not expect those in the old regime to be subject to some of the new rules when they are in force.

Graham Fisher: I do not.

The Convener: There will simply be a clean break.

Graham Fisher: That is right.

The Convener: I am sure that that makes sense. That is fine—thank you.

Stewart, do you have a final question?

Stewart Stevenson: I do, convener. It is basically about the mechanical process. A decision has been made on what legislative provisions will be consolidated and taken into the consolidation bill. I am parking section 104 considerations—we have covered that, so let us not go there. I just wonder, in the significant process of lifting from old legislation into new, whether anyone, independent of the drafter, has checked three things.

First, has someone independently verified that all the relevant provisions in what is claimed to be being consolidated have been transferred? Secondly, has the check included verifying that nothing outwith what is claimed to be being consolidated has inadvertently been transferred in the consolidation bill? Finally, has someone independently verified that, leaving aside the broader issue of clarifying words, the transcription has correctly transferred the legal effect to the consolidation bill? In other words, given that someone has sat in a darkened room for a considerable time making the transcription from the existing law to the new, what independent check has there been of that process? I have yet to meet someone who is not fallible.

Graham Fisher: Given that this is a long and technical bill, I understand the question. As I have said, it is a Government bill and the Government has been taking it forward. We have looked at it and we are happy that it is a consolidation. I do not know what degree of independence you are looking for beyond that, but the parliamentary process is part of that scrutiny.

Stewart Stevenson: "Independent" is perhaps not the word that I want to focus on; I am talking about someone other than the person who did the transcription. Has somebody subsequently looked over their shoulder? I will say, hand on heart, that it is not something that I could do, but it is important that the committee knows that it has been done. Perhaps you can say a little about who functionally—not a named individual—has looked at the process and satisfied themselves about it, because that is essential to our being able to tell Parliament that it is a proper transcription.

10:45

Graham Fisher: As I have said, the bill is a Government bill, and the Government has put it forward in the way that we would put forward any bill. It has been led by the drafter at the Scottish Law Commission, which is essential because of the nature of the consolidation work, but the bill itself is a Government bill and, obviously, it has been checked by us and the Government's lawyers.

Stewart Stevenson: Yes, but I come back to the question "Quis custodiet ipsos custodes?" Who will guard the guards? I really want to hear about the separation between the person who has been charged with lifting things out of the existing legislation and putting them into the new legislation and the person who has looked at that output so that we have the best possible assurance that somebody with a neutral point of view who has not been part of the transcription process has given such professional assertion as it is possible to make that the transcription has been correctly undertaken.

Graham Fisher: If the Scottish Law Commission drafter is the guardian, part of our job as Government lawyers in looking at the consolidation is to guard that guardian, and we have checked the bill to ensure that it matches your three criteria.

Richard Dennis: I suspect that you will get some reassurance on that when the draftsman come before you. It is not as if he goes into a darkened room and never consults any of his colleagues.

The SLC published a draft bill. Members will see in the supporting papers some curious things called the "Table of Derivations" and the "Table of Destinations", which are allegedly there to make it easy for all of us to check that there is nothing in the new legislation that was not in the old legislation and that every bit of the old legislation has been taken forward into the new legislation. Unfortunately, there are people out there in the world who will spend their time going through those tables, and I am sure that, if they think that we have missed something, they will bring that to our attention.

Stewart Stevenson: I just wanted to get that on the record. We will return to the question on another occasion.

The Convener: There is one other thing that I would like to go back to. We have had an

extensive discussion of the proposed section 104 order, but do we necessarily have everything on the record that the witnesses might want to say about the law relating to reserved matters? Would they like to give any further explanation of how paragraph 7 of schedule 4 to the Scotland Act 1998 operates to allow restatement?

Graham Fisher: Yes. I welcome the chance to put that on the record.

I think that this is set out in the drafter's note on the bill, but it is true to say that, in some areas, the bill restates the law on reserved matters; however, in doing so, it is not beyond legislative competence. I suppose that that is slightly unusual for bills that are before the Parliament, but it is specifically permitted by paragraph 7 of schedule 4 to the Scotland Act 1998. That provision provides that the law as restated specifically remains reserved law, so Westminster can change that law as it could before.

In the wider terms of the tests for devolved legislation, the bill's aim otherwise is, of course, the consolidation of existing law. In this case, it is a fairly pure consolidation. Accordingly, there is no problem with the bill from the legislative competence point of view.

If it assists, I can flag up the matters of reserved law that are restated in the bill. They are principally the provision on preferred debts in schedule 3, the recovery of excessive pension contributions in sequestration in sections 101 to 107 and some other areas by virtue of the detail of the devolution settlement. The great advantage of that approach for a consolidation bill is that, as I have mentioned, it allows the great body of what was in the Bankruptcy (Scotland) Act 1985 to be transferred to the bill and kept together in one place. That is fairly essential to the exercise.

The Convener: Thank you. I am grateful to you for putting that on the record. As a former student of some of the subject—although never, I should say, bankruptcy—I know that it is awfully useful to have everything in one place at some point in one's studies.

I am conscious that this has partly been a putting-things-on-the-record session, but if colleagues have nothing else that they wish to put on the record, if the witnesses are comfortable that we have covered everything that they expected us to cover and given that we have finished with the questions that we wanted to ask, I will simply thank the witnesses very much for their evidence and briefly suspend the meeting to enable us to reorganise.

10:50

Meeting suspended.

10:55

On resuming—

The Convener: We come to agenda item 3, the purpose of which is to consider the Scottish Law Commission's recommendations in relation to consolidation in the Bankruptcy (Scotland) Bill. Of the 38 SLC recommendations, 32 have already been given effect prior to the bill. Of the remaining six SLC recommendations, five have not been given effect, or have not fully been given effect, in the bill for technical, legal reasons.

Does the committee agree that only SLC recommendation 38—the inclusion in the consolidation of the law on protected trust deeds—formally falls within the committee's remit for scrutiny?

Members *indicated agreement.*

The Convener: Does the committee agree to consider recommendation 38 in detail at a subsequent meeting?

Members *indicated agreement.*

The Convener: Agenda item 4 is also on the Bankruptcy (Scotland) Bill. The committee is to consider whether the consolidation in parts 1 to 4 of the bill correctly restates the enactments that are being consolidated and whether the consolidation is clear, coherent and consistent. The definitions that are used in parts 1 to 4 remain largely embedded in the provisions in which they appear in the Bankruptcy (Scotland) Act 1985. By contrast, the definition of

"debt advice and information package"

has been moved to the interpretation section.

Does the committee agree to ask the drafter why the approach has been taken of moving the definition of

"debt advice and information package"

to the interpretation section of the bill?

Members *indicated agreement.*

The Convener: Certain matters in relation to the consistency and clarity of the consolidation have been identified. Does the committee therefore agree to ask the drafter why the "subject to" wording that appears in section 5(2)(b)(i) of the 1985 act has not been restated in section 2(1)(b)(i) of the bill and whether the provision as restated is sufficiently clear as regards the qualification that is set out in section 3 of the bill?

Members *indicated agreement.*

The Convener: Does the committee agree to ask the drafter whether replacing the words

"at the date of the presentation of the petition, or as the case may be at the date the debtor application is made"

in the definition of "qualified creditor" in section 7 with a defined term—for example, "the relevant date"—would make this definition and the definition of "qualified creditors" clearer for the reader?

Members *indicated agreement.*

The Convener: Does the committee agree to draw the attention of the drafter to the wording of section 8(1) of the bill, which restates the words "A debtor application" as "Any debtor application", and to ask for an explanation as to why that change has been made?

Members *indicated agreement.*

The Convener: Does the committee agree to draw the attention of the drafter to the lack of consistency in drafting style between sections 11(1) and (2) and section 12(1) of the bill, which make almost identical provision, and to suggest that, in the interest of consistency, it would be preferable for the same drafting approach to be taken?

Members *indicated agreement.*

The Convener: Does the committee agree to draw the attention of the drafter to the lack of consistency in drafting style between subsections (2), (3) and (4) of section 13, and to suggest that, in the interest of consistency, it would be preferable for the same drafting approach to be taken?

Members *indicated agreement.*

The Convener: It appears that section 16(6) of the bill goes further than section 7(4) of the 1985 act, which it restates. Section 7(4) of the 1985 act provides that the apparent insolvency of a companies act company and any other entity in respect of which an enactment provides that sequestration is incompetent may be constituted under section 7. Section 16(6) of the bill, on the other hand, extends that to a limited liability partnership in addition to the other entities.

Does the committee agree to draw the attention of the drafter to that point and to ask for an explanation as to why it is considered that section 16(6) of the bill properly restates section 7(4) of the 1985 act?

Members *indicated agreement.*

The Convener: Section 16(7)(b) seems to go further than section 7(2)(b) of the 1985 act, which it restates, in that it provides for more situations in which a debtor's apparent insolvency will end when the debts are paid off.

Does the committee agree to draw the attention of the drafter to that point and to ask for an explanation of why it is considered that section 16(7)(b) of the bill properly restates section 7(2)(b) of the 1985 act?

Members *indicated agreement.*

11:00

The Convener: Section 22(5) of the bill provides that a sheriff must forthwith award sequestration on a petition that is presented under this section if they are satisfied on a number of points. One of the points—at section 22(5)(d)—on which the sheriff must be satisfied is that, in the case of a petition by a trustee, at least one of the two specified conditions applies and the petition contains a declaration by the trustee that sequestration would be in the best interests of creditors. The equivalent 1985 act provision appears to require the sheriff to be satisfied on one matter or the other but not both.

Does the committee agree to ask the drafter why section 22(5)(d) requires the sheriff to be satisfied on both the points that are set out while the equivalent provision of the 1985 act appears to require the sheriff to be satisfied on one point or the other but not both of them?

Members *indicated agreement.*

The Convener: Section 23 of the bill provides that sequestration must not be awarded by the sheriff if, "without delay", the debtor pays off the relevant debts. The equivalent 1985 act provision uses the term "forthwith" rather than "without delay". Elsewhere in the bill, the word "forthwith" is changed to "without delay", and in one case it is changed to "immediately".

Does the committee agree to ask the drafter for further explanation as to why the word "forthwith" has been changed to "without delay" in section 23 and elsewhere in the bill, and to "immediately" in section 70(1)(a)?

Members *indicated agreement.*

The Convener: Does the committee also agree to ask the drafter to comment on what effect that is considered to have on the meaning of the relevant provisions and on the consistency of the bill as a whole?

Members *indicated agreement.*

The Convener: In section 24(7), the name of the Debtors (Scotland) Act 1987 is incorrectly given an apostrophe. Does the committee agree to draw that point to the drafter's attention?

Members *indicated agreement.*

The Convener: The use of the phrase "fall asleep" in section 27(12) of the bill appears unusual. Does the committee agree to ask the drafter to consider whether the use of the phrase "fall asleep" in section 27(12) is sufficiently clear to

the reader, or whether further explanation could be helpful?

Members *indicated agreement.*

The Convener: Section 32 of the bill restates subsections (1) to (8) of section 17B of the 1985 act. However, subsection (9) of section 17B does not appear to be restated in section 32 or elsewhere in the bill. Does the committee agree to ask the drafter for an explanation of whether—and where—section 17B(9) of the 1985 act is restated in the bill?

Members *indicated agreement.*

The Convener: It appears that the word "have" in section 46(4)(a) may be an error and that it should instead be "has". Does the committee agree to draw that point to the attention of the drafter?

Members *indicated agreement.*

The Convener: The words "as soon as possible" in section 23 of the 1985 act have been restated as "as soon as may be" in section 48(5) of the bill. Does the committee agree to ask the drafter to explain why that change has been made and what effect it is considered to have on the meaning of the provision?

Members *indicated agreement.*

The Convener: Does the committee agree to draw the attention of the drafter to the wording of section 71(2) of the bill, which restates the words "An application" as "Any application", and to ask for an explanation as to why that change has been made?

Members *indicated agreement.*

The Convener: Thank you for your patience.

Burial and Cremation (Scotland) Bill: Stage 1

11:03

The Convener: Agenda item 5 is on the Burial and Cremation (Scotland) Bill. This is an opportunity to invite oral evidence on the delegated powers in that bill from Scottish Government officials. I welcome Simon Cuthbert-Kerr, burial and cremation bill team leader, public health division, and Graham McGlashan, principal legal officer, Scottish Government legal directorate. I invite questions from members. Somebody will have to remind me who is going first.

Stewart Stevenson: You are.

The Convener: I feared I might be. Give me half a moment to get to the right question.

Good morning, gentlemen, and thank you for your patience. The bill contains a large number of delegated powers—you do not need me to tell you that—relative to its size, and many of the powers are very broad. There also appears to be some inconsistency in the bill with regard to the amount of detail that is specified on the face of the bill and the amount that is left to be set out in subordinate legislation.

The delegated powers memorandum explains that the approach regarding the delegation of powers in the bill is informed by the need to allow for flexibility and to make appropriate use of parliamentary time. We understand those concepts. Can you explain further why it is considered that taking such a large number of wide-ranging powers strikes that balance appropriately?

Simon Cuthbert-Kerr (Scottish Government): In drafting the bill, the approach that we have taken to delegated powers is to look at each instance in its own right. For each particular policy outcome, we have considered whether delegated powers are the best way to achieve it. There are a number of delegated powers that do things such as prescribe the wording of forms or specify the type of information that is to be recorded in registers, and we feel that those things are more appropriate for secondary rather than primary legislation.

There are also several delegated powers that we expect to use to set out fairly large and detailed regulations about the operation of particular parts of the bill. For example, section 6 of the bill sets out a power for ministers to make regulations about the management of burial grounds. When we considered the matter, we felt

that it was better to set out that level of operational detail in secondary legislation.

The overall approach that we have taken to the bill is to consider in each instance whether using delegated powers or putting specific detail on the face of the bill is the right way to go. We have looked at each provision in its own right instead of taking the blanket approach of saying, "If the effect is X, we will use delegated powers, but if it is Y, we will put it on the face of the bill."

As a result, in the bill as a whole we have used delegated powers where we feel that there is an appropriate balance between primary and secondary legislation and where that will best serve a particular policy outcome.

The Convener: I suspect that that is the answer that the committee would have expected in the individual sections that we will explore separately. I merely observe at this stage that there seem to be a lot more delegated powers in this bill than there are in many. That might be appropriate to the subject matter, but it perhaps surprises us and it may surprise the Health and Sport Committee in due course.

I want to pick up on a particular issue that reflects the generality of the fact that a significant number of criminal offences are to be created by regulations. The powers in sections 6, 10, 22, 38, 41, 55 and 70 all authorise the creation of criminal offences in regulations, and the delegated powers memorandum provides little information as to how those powers are likely to be exercised or what activity will be criminalised. Why is it considered to be appropriate to do that?

Graham McGlashan (Scottish Government): We have certainly taken a few powers in each of the regulation-making powers to create criminal offences in secondary legislation. For example, as Simon Cuthbert-Kerr pointed out, the burial management regulations that are provided for in section 6 contain a power to create criminal offences. Given the range of matters that could be covered in those regulations, we thought it appropriate to take a power to create criminal offences so that we could tailor those particular criminal offences to the content of the regulations.

We also thought it appropriate to give an indication of the limit of the penalties. The offences are all summarily triable in the courts and subject to a maximum of a level 3 penalty. We felt that it was appropriate to set a limit on the penalties that may be imposed on any criminal offences that we create.

The main reason for taking that approach rather than taking a generic criminal offence on contravention of regulations was to give us the flexibility to tailor the criminal offences to each set of regulations that we bring forward. That is where we were coming from.

The Convener: Right. I am wondering to what extent those who drafted the bill gave thought to the fact that there is a general principle that it is Parliament that creates criminal offences in statute, and that it is not people who generate regulations who create criminal offences by regulation.

Graham McGlashan: We have other criminal offences on the face of the bill, but in those particular examples we thought that it was appropriate to take a power to set out the criminal offences in the regulations themselves.

I do not think that that is completely unusual. I do not have specific examples in mind, but I am certainly aware that there is secondary legislation that contains criminal offences, so although I appreciate the general principle, I do not think that it is unusual for criminal offences to be created in secondary legislation.

The Convener: I would not for one moment suggest that we have not done it but, as a parliamentarian, I worry about the idea that if we have done it once we can carry on doing it for ever. Exceptions should be regarded as exceptions.

I must also express concern about the fact that, and ask for some explanation of why, we now seem to have a class of criminal offence that is administrative or unlikely to be contentious. I speak merely as one MSP, but I am not used to the concept of a criminal law being created on the basis that it is administrative or that it is unlikely to be contentious. MSPs are elected precisely because it is our job to sort out such matters on behalf of those who elect us.

Graham McGlashan: I take that point on board. Perhaps it has been conflated a wee bit in the delegated powers memo, where we were talking about the content of the other parts of the regulations. I certainly did not mean to suggest that criminal offences are in any way administrative or uncontroversial.

The Convener: We still have the issue that you feel that they can be created extensively. I simply put on record the fact that putting the maximum penalty in the statute is not just to keep us happy; it is absolutely crucial. I am grateful for that, because this committee would have growled seriously had that not been included. However, that does not alter the fact that you are taking within regulations conduct of which the man in the street, whom I represent, would say, "If you don't do what the regulations say, that's a criminal offence." That is not the way that the law of the land is generally written and it is not the way that I

would want to see it, and I suspect that my colleagues would agree with me on that.

I want to ask another general question. In the delegated powers memorandum, there seems to be a suggestion that some of the regulations are kind of okay and could come through by negative procedure, because the Government will have had to consult other people. That is a fair point as far as it stands, but what is the logic in saying that consulting the general public or some organisation or group is any substitute for parliamentary scrutiny and therefore justifies the use of the negative procedure rather than the affirmative procedure?

Simon Cuthbert-Kerr: We have certainly not intended to suggest that consultation is any substitute for parliamentary scrutiny, and I apologise if the delegated powers memorandum is perhaps a little heavily written in that regard. The intention with the consultation was to offer Parliament some reassurance that any regulations that were laid had at least gone through a consultation process, so that the regulations that were then laid at least reflected a consensus viewpoint. To reiterate, it was certainly not our intention to suggest that that was equivalent to, or preferable to, parliamentary scrutiny.

The Convener: Let us leave the generality there. I turn to Stewart Stevenson.

Stewart Stevenson: I will start by exploring some of the implications of section 6, on the management of burial grounds. In particular, I note that there may be regulations to make extensive provisions and that those provisions appear to have no particular boundaries. Given that we have had burial grounds for a long time, one might have thought that we had a pretty clear policy view as to how to manage them. What justification is there for the amount that will be in secondary legislation in connection with managing burial grounds, given that there is nothing particularly novel—I would have thought—about managing them?

11:15

Simon Cuthbert-Kerr: Section 6 specifically addresses a recommendation made by the burial and cremation review group, which, as you know, made a lot of recommendations that have been taken forward in the bill. In England and Wales, the Local Authorities' Cemeteries Order 1977 sets out a framework for the management of burial grounds.

Stakeholders in Scotland—burial authorities in Scotland—have long argued that although, as you said, there are clear and well-established processes for managing burial grounds, the lack of any central guidance or regulation that sets out a framework calls into question some of the approaches that burial authorities have taken. In particular, how far they can go to maintain headstones is an issue. During the consultation, burial authorities asked us to set that out somewhere in the bill. Similarly, we also hope to address in the regulations the inconsistent approaches that various burial authorities take across the country.

It is not necessarily the case that the regulations will introduce entirely new concepts, but they will introduce valuable consistency and a new framework, and they will codify some of the practices that have been carried out for a number of years and are still thought to be fit for purpose.

Stewart Stevenson: You have said that what will be in the secondary legislation is well understood and that you know what will be in it, so why is that not in primary legislation? If, in effect, we appear to know what we want to do, why defer the matter to secondary legislation? In the nature of things, secondary legislation is not capable of amendment by Parliament; it is capable only of acceptance or rejection. If the provisions were incorporated in the bill, they could be dealt with in a much more detailed way by Parliament.

Simon Cuthbert-Kerr: One reason why we have taken that approach is the level of detail that we would expect to see in any regulations. Section 6 of the bill sets out quite a lot of detail, but we consider that to be the framework and we think that a lot more detail will need to be worked out. Regulations are a more suitable way to do that, rather than in the bill, given the nature and extent of the detail that we would expect to see.

Stewart Stevenson: Section 6 touches on places to keep bodies before burial. I take it that it is not intended that the secondary legislation that might touch on the issue would, for example, restrict the right of families to keep the body—as is traditionally often done—in the front room, from which it departs directly to burial?

Simon Cuthbert-Kerr: Nothing in the bill would prevent that from happening.

Stewart Stevenson: That is not quite my question. My question is: would the bill allow secondary legislation to be created that would restrict that right?

Simon Cuthbert-Kerr: If I am following your question, I do not think that the bill would do that, if I am following the argument properly. Section 5 is on places to keep bodies before burial and is intended to put burial authorities under a duty to provide somewhere where bodies can be kept temporarily before burial. The section was intended to restate a power in the existing Burial Grounds (Scotland) Act 1855. However, we have since discussed the matter with burial authorities, which told us that section 5 is unnecessary,

because the situation that it describes no longer arises. The body is now brought directly to the burial ground by the family or the funeral director and it is buried as soon as possible thereafter.

Stewart Stevenson: I move on to section 18(1), which relates to the suspension of private burials. The delegated powers memorandum explains that the power would be used only in emergencies, but we do not have much insight into what would constitute an emergency.

Simon Cuthbert-Kerr: The section is intended to react to public health issues, such as pandemics and so on. Having looked at the section since the bill has been published, we recognise that there may be a lack of detail. For example, when we contrast it with section 70, which clearly states the processes that are intended to be used in response to public health risks, we think that there is probably scope in section 18 to make the processes much clearer.

Stewart Stevenson: Perhaps there are three times at which the process might operate. First, when a private burial has already taken place, is it envisaged that the process could be used to exhume and move the body on public health grounds? Secondly, could it be used once agreement had been given to a private burial taking place but before it had taken place—in other words, when the corpse was waiting for private burial? The third is the obvious one where it is done in a more neutral environment. Would the scope of how the bill is drafted cover the first two circumstances—where the burial has already taken place, causing that to be undone, and where permission has been given but the burial has not yet taken place?

Simon Cuthbert-Kerr: On the second point—where permission has been given but the burial has not taken place—the answer is yes. Our policy intention is that there might be instances where we would have to intervene to prevent that burial from taking place.

The first point was about this being a process to allow the body to be exhumed. That is certainly not the policy intention and I do not think that the bill would allow for that.

Stewart Stevenson: To move on, section 70 appears to allow ministers to suspend a wide range of legislation for the purposes of public health requirements. If that is the case, that appears to cover the intention of section 18(1), so why are the powers in both places?

Simon Cuthbert-Kerr: When we were drafting the bill, given that this is the first time that we have legislated for private burial, our intention was to look at private burial as a distinct section. In doing that, we may inadvertently have provided for the same effect in two places.

Stewart Stevenson: The drafting suggests that there are emergencies covered by section 18 that go beyond public health, which is covered by section 70. Is that the intention?

Simon Cuthbert-Kerr: No—it is not the intention.

Stewart Stevenson: So the emergencies that are envisaged in section 18 relate to public health and to nothing else.

Simon Cuthbert-Kerr: Yes.

Stewart Stevenson: In that case, perhaps the Government should consider whether it is necessary to have the provision in section 18.

Simon Cuthbert-Kerr: Absolutely—I think that we could consider that.

John Mason: The disposal of ashes has been a sensitive question that has created quite a public reaction, so I am interested that section 37(1) says:

"The Scottish Ministers may by regulations make provision about—"

and lists a number of things, including

"the disposal of ashes by cremation authorities".

The issue is hugely important and sensitive and is very much in the public awareness. Why is it in regulations rather than in the bill?

Simon Cuthbert-Kerr: Broadly speaking, section 37(1)(c) is intended to allow cremation authorities to take action to dispose of ashes when ashes have been left with them and are unclaimed. It is not generally intended to apply to how ashes would be ordinarily managed.

The process that we intend to follow, which is very much in line with the recommendation made by Lord Bonomy's infant cremation commission, is to redraft the cremation application form so that the applicant will have to specify what should happen to the ashes. The current draft of the form offers a number of options, including applicants retrieving the ashes themselves, the funeral director retrieving them on the applicant's behalf and the crematorium holding on to the ashes until the applicant and the family have decided what should happen.

That is the process by which we expect ashes—and what should happen to ashes—to be managed in each instance. However, we are aware of situations where ashes, for whatever reason, are left at crematoriums. Cremation authorities have told us that they have no route by which to return the ashes to any particular place, other than to the funeral director, if they lose contact with the applicant or the family.

Section 37(1)(c) is intended to make it clear that, when ashes have not been collected, either because that is in line with the wishes that the applicant expressed through the application form or because the ashes have been left behind, the crematorium will be allowed to return those ashes to the funeral director or to take steps to bury or scatter them in the grounds of the crematorium.

John Mason: I am even more mystified now. You have given a pretty clear explanation, and you and your colleagues have obviously thought through what might happen and what the options are. That makes it even stranger to me that the provisions are not in the bill. For example, if the cremation authorities have to hold on to the ashes for five years and then take some action, the period of five years is pretty critical. Could that not be on the face of the bill?

Simon Cuthbert-Kerr: The key to the matter is the new application form, which will ask the applicant to express what they want to happen to the ashes. Quite a range of options is available. To allow for flexibility and to reflect the variety of potential outcomes, we have drafted the bill on the basis that we feel that regulations are the way to go. Nonetheless, we can certainly consider whether that would be preferable and more appropriate to have in the bill.

John Mason: I appreciate it if you are going to reflect on that. I have certainly found the drafting surprising, and I have a feeling that some of the families who have been involved in such issues might find it a bit surprising as well.

The Convener: I reinforce the view that if you are clear what the policy is—about its range and scope—it is not obvious why that is not in the bill. We well understand that administrative things such as writing forms need to be done—nobody has the slightest difficulty about that. However, if you are clear in policy terms about what you are trying to do, surely we should be asking Parliament at this stage to agree—or disagree—with that.

Simon Cuthbert-Kerr: We can certainly look at that. As I said, the approach that we took in drafting the bill was to allow for the diversity of potential situations and outcomes; we felt that some flexibility was needed. We can look at whether it would be better to have the provisions on the face of the bill.

John Mason: I understand that the regulations under section 37 are subject to the negative procedure, whereas similar regulation-making powers in section 6, on the management of burial grounds, are subject to the affirmative procedure. Why is there a difference between the two?

Graham McGlashan: The existing cremation regulations under the 1902 act are subject to the negative procedure and have a similar range of coverage to the power that we are taking now, so it was felt to be appropriate that we attached the same procedure to it.

John Mason: Did you refer to the 1902 act?

Graham McGlashan: It is the Cremation Act 1902.

John Mason: That is from rather a long time ago. I wonder whether the view of cremation might have changed, in the light of recent events.

Graham McGlashan: We can certainly reflect on those things.

John Mason: I appreciate that.

I will touch on how the following two sections of the bill—sections 38 and 39—relate to each other. Section 39 is pretty clear about offences and refers back to section 38 offences. For example, it says:

"A person commits an offence if the person provides information in, or in connection with, an application under section 38(1) which the person knows to be false or misleading in a material way".

That is fine; it is pretty clear. In section 38, on an application for cremation, I find it a bit puzzling that subsection (2) says:

"The Scottish Ministers may by regulations make provision for or in connection with an application mentioned in subsection (1)".

Subsection (4) says:

"Regulations under subsection (2) may in particular"

and it lists a number of things, including item (g), which is to

"create criminal offences to be triable".

If we have section 39, which is pretty clear, why do we need section 38(4)(g)?

11:30

Graham McGlashan: As we stated at the outset in relation to the general approach to regulation-making powers, we wanted flexibility—in this case to create criminal offences in the regulations that we will bring forward on applications. That is the aim, but I can certainly see that we have a specific offence in section 39, so we might reflect on whether the power to create criminal offences in section 38 is necessary. We can reflect on that and consider whether there is anything that section 39 does not cover for which we would need further regulations.

John Mason: That answers my supplementary question. Section 38(4)(g) implies that there might be other criminal offences, and I think that you have already picked up from the convener that we are not wildly enthusiastic about criminal offences

being created by regulation. Therefore, we would be interested in having any examples of criminal offences other than the clear ones that are set out in section 39.

Stewart Stevenson: I have a question on section 60 and the powers that are to be conferred on inspectors. As the bill is drafted, there appears to be absolutely no limit to the powers that could be conferred on inspectors. An example that came to my mind—it might be at the margins—is that an inspector could be given the power to inspect a coffin before burial to ensure that no stolen goods were being buried. That might be beyond what one would imagine, but it appears to be permitted by the regulations that the Government could make under the power. Why are there not more specific provisions on the limits of the powers that inspectors might have?

Simon Cuthbert-Kerr: The framework for the powers of the inspectors is set out in sections 61 to 64. It is certainly not the intention that an inspector would be used for the sort of purpose that you highlighted, although I understand your general point. The framework for the inspection regime that is set out in sections 61 to 64 is about the processes that various parties in the funeral industry use and the quality of services that are provided. We want to use regulations for that because we feel that a level of detail is required to give effect to the broad framework that is set out in the bill.

Stewart Stevenson: I am not questioning the need for a relatively broad framework; I merely wonder why the bill is relatively silent on the boundaries of the powers that might be given to inspectors. There can be unexpected effects. From ancient history in my life, when I was a water bailiff, I had the power to enter any premises without cause shown or without any particular purpose being described. That was regarded as unsatisfactory and was corrected in later legislation.

The provisions in the bill kind of smell much the same. Although I am relatively confident that no Government would be likely to give the inspectors powers that the police could only dream of having, would it not be helpful for the primary legislation to draw boundaries round the powers that might be given before a Government of whatever hue in future draws up the regulations?

Graham McGlashan: To go back to the example that you cited about powers of entry and inspection, those are set out at section 62 and they are limited to

"premises ... associated with the management or operation of"

burial authorities, cremation authorities or businesses of funeral directors. We have set out fairly specific powers of entry in the bill, so that will not be dealt with in regulations at all.

I think that we intend to exercise the powers that relate to sections 60 and 61 in one set of regulations, as regulations made under both sections will be subject to the affirmative procedure. That will give members the complete picture about inspectors' functions.

We have examples of how the power in section 61 may be exercised, to give a flavour of the sorts of things that inspectors will do, in relation to frequency of inspections, reports and enforcement. We have set out the types of functions that we would expect inspectors to have.

There might be a structural issue. I see that section 60 sticks out on its own, and we might reflect on the structure of sections 60 and 61 and whether we can make the powers a bit clearer.

The Convener: You will appreciate that it is not the committee's purpose to worry about policy, but we are always concerned that legislation should be drafted in such a way as to make the boundaries clear and reasonable in light of the policy, even if it is not our job to worry about what the policy is.

You talked about what is set out in the provisions, which use the word "management". That made me want to ask whether we are clear about what "management" means. Could the meaning be wider than is intended? If so, there should perhaps be other constraints in the text, to limit what the regulations can cover.

That is the principle to which we parliamentarians adhere—forgive me for getting rather philosophical. We are in the business of giving the Government powers, and when the Government asks for powers we want to give it only the powers that we are happy for it to have. We are not in the business of giving the Government an open-ended power to do things that it might happen to think are appropriate. That is not what the Parliament does. On that happy note, we will move on.

Richard Baker (North East Scotland) (Lab): I will continue on the same theme. The delegated powers memorandum describes the proposed regime for licensing of funeral directors' premises as "extensive" and "administrative". The creation of a licensing regime that will apply to an industry that currently operates on an unlicensed basis could have a significant impact on individuals who operate as funeral directors. Given that, why is it considered appropriate to delegate the matter almost entirely to regulations?

Simon Cuthbert-Kerr: We have in mind a clear model of how the scheme might operate, which is

set out in the financial memorandum. Our financial estimates are based on a particular model.

As Richard Baker said, there is currently no licensing whatever. There is also little external scrutiny of funeral directors. The policy intention therefore is to introduce inspectors, who would not just inspect individual funeral directors but would have an overall perspective on the funeral directing industry and consider whether licensing might be necessary.

In setting out the regulation-making power, our approach is to put the scheme in a clear framework while providing sufficient flexibility that any recommendations that inspectors might make about the shape, form or functioning of the licensing scheme can be given effect.

Richard Baker: I appreciate the policy intention, but the question is why so much should be left to regulation rather than set out in the bill. You said that the Government has "a clear model" in mind for how the scheme will operate. Other licensing schemes are set out more fully in primary legislation—I am thinking about the Civic Government (Scotland) Act 1982, the Licensing (Scotland) Act 2005 and, most recently, the Air Weapons and Licensing (Scotland) Act 2015. What distinguishes the licensing regime for the premises of funeral directors from those other licensing regimes that makes it more appropriate that it be set out in regulations, rather than in a bill? You said that you have "a clear model" in mind.

Simon Cuthbert-Kerr: We do have a clear model in mind, but as I said in my previous answer, that model may have to change on the basis of the inspection regime and any recommendations that are subsequently made by inspectors.

Richard Baker: That would also apply to the other regimes that I mentioned. There must be similar circumstances in relation to those regimes, but those regimes are established in primary legislation.

Simon Cuthbert-Kerr: We have looked at those other regimes in trying to develop models and approaches. One of the key differences between the schemes that you mentioned and this one is that it can be operated by the Scottish Government, rather than by local authorities. We can achieve our policy intentions with a relatively unbureaucratic system, which would not need the scale of scheme that some other licensing regimes have created.

The approach that we have taken so far, and our examination of other schemes, suggests that those schemes are much bigger and have far greater amounts of bureaucracy around them than we think is necessary in the approach that we intend to take.

Richard Baker: I will move on to section 67—

The Convener: I am sorry—Stewart Stevenson wants to come back on that point.

Stewart Stevenson: My point relates to the fact that we are talking about licensing funeral directors, rather than the activities that funeral directors undertake. Almost all the activities that are undertaken by a funeral director—the only exception in my mind is embalming—can be undertaken by a private individual. Is it envisaged that the regulations would catch private individuals who undertake activities such as laying out, arranging for burial and transporting remains to the place of burial? Virtually every step of the process could be undertaken by private individuals. Are those individuals to be outside rather than inside the regulations? If they are a private individual, why should they come under the regulations? In other words, what is the intended scope of the powers in secondary legislation?

Simon Cuthbert-Kerr: Our approach is that particular activities should be licensed—for example, laying out of the body or transporting the body from one place to another. Those are functions that we would want to consider within a licensing scheme, because it is about ensuring that the deceased is treated appropriately and with dignity. At the moment, we do not know the extent of the dignity and respect that the deceased is treated with because there is almost no external scrutiny of funeral directors. Rather than looking at funeral directors as a specific function, we have in mind specific activities that are carried out in relation to funerals, so we would not look to license only funeral directors as recognised by the general public, but anyone who is carrying out particular tasks.

Stewart Stevenson: So the scope of the secondary legislation might include an individual who lays out the body, which was traditionally done in the deceased's home, and a nurse who does the laying out in a hospital before collection by an undertaker—I do not know if that is still done, but it certainly was when I was a nurse. I am not saying that it is particularly common, but I can well see such tasks being undertaken by people other than funeral directors in rural and island communities. Is it intended that the secondary legislation will cover activities that private individuals might undertake in exchange for no financial reward or equivalent benefit?

11:45

Simon Cuthbert-Kerr: I ask my colleague to answer that question.

Graham McGlashan: As the powers are set out, they relate to where a funeral director carries on a business. That is how the powers in respect of the scope of the licensing scheme are set out.

Stewart Stevenson: So, in essence, the power is being created to create regulations for the limited circumstances in which someone is undertaking those activities for reward. Is that the intention?

Graham McGlashan: Yes. The powers relate to carrying on a business. That is certainly how the powers are currently framed.

Stewart Stevenson: Just to be clear in my mind, the test would be that the activity is done for reward. I am not looking at the bill.

Simon Cuthbert-Kerr: I think so. To take your examples, I do not think that anybody would regard a nurse who was laying out a body in a hospital as carrying out funeral-related activities. They would be doing their job as a nurse.

You mentioned people in rural communities. We considered the diversity of funeral businesses, which vary from massive organisations down to people who do a handful of funerals each year and whose main business is something else entirely. We want to capture anybody who does the work in question essentially as a business. It may be a small element of their business; they may only transport the deceased from hospital to their home for a small sum of money. The key policy aim is to ensure that that kind of function is done properly. If somebody charges for such a service, from a policy perspective we should consider that to be within the scope of the bill.

Stewart Stevenson: We as a committee are interested only in how powers derive to create secondary legislation. Am I right that the policy intention is that secondary legislation will relate only to people who are undertaking those activities for reward?

Graham McGlashan: Yes. The licensing scheme relates to funeral directors' premises, and the test is laid out in section 65(2), which states:

"references to a funeral director's premises are to any premises ... owned or occupied by a funeral director, and ... used primarily for ... carrying on the funeral director's business".

That suggests rewards.

The Convener: If we are talking about the premises, but not about the undertaker or the activities, surely most of the transport cannot be covered.

Graham McGlashan: Section 65(2)(b)(ii) refers to premises that are used primarily for

"carrying on any activities relating to the funeral director's business."

That may suggest the hearses that are used.

The Convener: Forgive me, but I do not have that detail in my head. That makes perfectly good sense, but is there a risk that there will be some door in a hospital beyond which a nurse will not go because that is somehow somebody's else's job and people have to be licensed to go to that place?

Simon Cuthbert-Kerr: I do not think so. As the bill is constructed, that type of place would not be regarded as being primarily used by the funeral director or for the funeral director's business. It would certainly be used for the deceased, but not necessarily primarily by a funeral director or as part of their business.

The Convener: Okay. I will leave it there.

John Mason: My question is related to that. This may not commonly happen, but theoretically somebody who makes a living as a full-time funeral director may have no premises, so they would not need a licence.

Graham McGlashan: The way that the power is drafted means that it relates to licences for funeral directors' premises and the carrying out of their business on those premises.

John Mason: It is very much about the premises, and not the person or the activity.

Graham McGlashan: That is how the power is laid out in the bill.

The Convener: We are collectively straying fairly close to policy, but we are bringing up some interesting points, which the witnesses might like to reflect on. Shall we come back to the codes of practice?

Richard Baker: Section 67 creates a power for the Scottish ministers to issue codes of practice regarding the exercise of functions by burial authorities, cremation authorities and funeral directors. Section 67(5) states that

"a burial authority, cremation authority or ... funeral director must ... comply with any code of practice applicable to it".

Why is it considered appropriate to issue a legally binding code of practice to which no form of parliamentary procedure is attached? How, is it expected, will compliance with the code be enforced?

Graham McGlashan: There is parliamentary procedure in that when the code of practice is published, it will be laid before the Scottish Parliament. I appreciate that that is not negative or affirmative procedure, but there is a publication element to the code. I cannot comment on the policy intention, but I point out that part of the provision.

Simon Cuthbert-Kerr: We would expect enforcement of compliance with the code of practice to fall to the inspectors.

Richard Baker: So the inspectors will enforce the regime with the appropriate penalties.

Simon Cuthbert-Kerr: Yes.

Richard Baker: However, the code itself will be published and laid before the Parliament with no possibility that Parliament will be able to amend it or reject it. There will be no procedure beyond the laying of the code.

Graham McGlashan: That is how the bill is drafted. Section 68 provides for consultation of people who would be affected by the code of practice, before it is published, but the parliamentary procedure under section 67 is the laying before the Scottish Parliament of the code.

Simon Cuthbert-Kerr: In drafting the provisions, we gave particular consideration to recommendations that Lord Bonomy made about codes of practice that should be issued to various parts of the funeral industry. Many of those codes of practice have now been developed with stakeholders and are in place.

In sections 67 and 68, we sought to give some sort of statutory footing to those codes to try to underline their importance and the value of stakeholders complying with them. Section 67(1) talks about

"(a) the carrying out by a burial authority of functions …

(b) the carrying out by a cremation authority of functions …

(c) the carrying out of the functions of a funeral director."

In drafting that, we had in mind the codes of practice working in conjunction with regulations that we set out elsewhere. However, with hindsight, I can see that in trying to provide additional strength to the codes of practice we may inadvertently have made the situation slightly less secure in that there would be no full scrutiny by Parliament. We could reconsider that.

Richard Baker: You will reflect on that further.

Simon Cuthbert-Kerr: We will.

The Convener: If you will forgive me, I will extend that point. This is a jurisprudence morning, but since when has legislation's purpose been to "underline" something of importance?

Simon Cuthbert-Kerr: I am sorry—I may simply have misexpressed the policy intention. I am trying to suggest that, as the codes of practice are already coming into force, there is value in giving them a statutory footing.

The Convener: I am not trying to pick over your words, so forgive me if that was the impression that I gave. It was more that if there is no procedure for enforcing something, saying that it is enforceable does not help.

Simon Cuthbert-Kerr: Do you mean enforceable in terms of compliance with a code of practice?

The Convener: If somebody has to comply with something, unless not complying with it has some repercussion that is on the face of whatever they are dealing with, why does it exist?

Graham McGlashan: Simon Cuthbert-Kerr mentioned that the intention is that the inspectors enforce the legislation and the codes of practice.

There is a specific power in section 61(3) where we illustrate all the matters that might be covered in the regulations. It refers to

"steps that may be taken by inspectors for the purpose of ensuring compliance with requirements or conditions contained in enactments, codes of practice or guidance applicable to relevant bodies".

The enforcement part of it would be in terms of the functions placed on inspectors under the inspection regulations. That is where the link is made between the two.

The Convener: I am with you there. What are the inspector's powers to enforce compliance?

Graham McGlashan: The steps that the inspector may take to comply with the requirements will be expanded on in the regulations. That is for secondary legislation and will have to be considered in light of the inspection models that we are considering at the moment.

The Convener: I hesitate to draw the analogy, but I take it from that that we may in time end up with the same kind of system as with factory inspectors who are able to stop something happening or prosecute someone—and all that will come in through regulations.

Simon Cuthbert-Kerr: From a policy perspective, that would be the intention and, as Graham McGlashan has explained, we would look to set that out in more detail in regulations.

Richard Baker: You said that you will reflect further on simple publication and the laying before Parliament of the code of practice. That is welcome, and I am sure that the committee will want to return to it in future.

My next question is on the application of the provisions in this bill to future circumstances and new methods of disposal of human remains as practice develops. Why has the decision been made that the provisions of this bill should apply to such practices rather than that primary legislation on the matter should be introduced at such time in the future as is considered necessary? Which provisions of the bill are likely to be applied in

respect of any new methods of disposal of human remains?

Simon Cuthbert-Kerr: We drafted the section with our eye on future proofing the bill. A number of different techniques for the disposal of human remains are either in use in other countries or being developed. As far as we are aware, there is no particular barrier to any of those techniques being implemented.

For example, resomation is a process whereby the body is dissolved in a chemical solution until there are only the bones, which are then ground up to make ashes. Various states in the USA use the technique already. We are aware that some companies in Scotland are interested in that. As far as we are aware, there is nothing to prevent them from offering that service at the moment.

The power in the bill will mean that, if anybody brought forward such a technology and started to offer it, we would be able to regulate the process quickly. The provisions in the bill do not preclude primary legislation being brought forward to cover the process specifically, but they are certainly intended to allow a process to be regulated for, at least in the short term.

The answer to the question of what parts of the bill would apply would depend on the particular technology that was introduced. For example, resomation is arguably closer to cremation than it is to burial, so perhaps if it was offered by a cremation authority, burial authority or funeral director, the parts of the bill that relate to cremation and could be read across to resomation might be the parts that are used in that way.

Richard Baker: Thank you.

My final question relates to section 70, and it comes back to the creation of penalties and whether they are in regulations or on the face of the bill. Section 70 permits the suspension of certain enactments when ministers consider such action to be necessary or expedient for the purpose of protecting public health. Such regulations may include provisions that create criminal offences that would be, in this instance, punishable by a fine.

The regulations may also impose other penalties or sanctions in respect of any contravention of, or failure to comply with, specified provisions. Those additional sanctions and penalties are not set out in the bill. Why is it appropriate to take a power to impose unspecified penalties or sanctions for non-compliance in addition to any criminal offences? Why are the additional penalties or sanctions not set out in the bill?

12:00

Graham McGlashan: Again, I think that the answer is to create flexibility to allow us to respond to emergency situations. Beyond creating criminal offences, we may need that flexibility to impose other sanctions in an emergency situation.

Richard Baker: I presume that having additional sanctions in regulations would not help if there was an emergency covering a 24 or 48-hour timescale, so I would be interested to know what sort of emergency situation you foresee.

Graham McGlashan: We can certainly reflect on that. I do not have a specific example, as we would be responding to specific circumstances that are unforeseen. It is therefore hard to come up with a specific example on the spot, but we can reflect on your point.

Richard Baker: That is appreciated. This brings us back to the general point that the convener made at the beginning of the meeting about whether it is appropriate for some things to be in regulations rather than in the bill.

The Convener: Yes. I have no idea what the answer is, but I presume that the Government has statutory powers to do some fairly extreme things in emergencies, and it seems to me that the kind of thing that Graham McGlashan has talked about might well be covered by existing legislation. That sounds a far better place for it to be than in regulations under section 70. However, I think that you will reflect on that, as you will on many other things. We are grateful for that.

That is the end of our questioning. I thank the witnesses for coming along and for their illuminating answers. I will suspend the meeting for a couple of minutes.

12:01

Meeting suspended.

12:03

On resuming—

Instruments subject to Affirmative Procedure

Adoption and Children (Scotland) Act 2007 (Amendment of the Children (Scotland) Act 1995) Order 2016 [Draft]

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

Members *indicated agreement.*

Justice of the Peace Courts (Special Measures) (Scotland) Order 2015 [Draft]

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

Members *indicated agreement.*

Instruments subject to Negative Procedure

Designation of Nitrate Vulnerable Zones (Scotland) Regulations 2015 (SSI 2015/376)

12:03

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

Members *indicated agreement.*

Snares (Training) (Scotland) Order 2015 (SSI 2015/377)

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

Members *indicated agreement.*

Sheriff Appeal Court Fees Order 2015 (SSI 2015/379)

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

Members *indicated agreement.*

Civil Legal Aid (Scotland) (Miscellaneous Amendments) Regulations 2015 (SSI 2015/380)

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 (Eligibility for Appointment) Regulations 2015 (SSI 2015/381)

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

Courts Reform (Scotland) Act 2014 (Commencement No 5 Transitional and Saving Provisions) Order 2015 (SSI 2015/378)

12:04

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

Members *indicated agreement.*

Lobbying (Scotland) Bill: Stage 1

12:05

The Convener: Under agenda item 9, members are invited to consider the delegated powers provisions in the Lobbying (Scotland) Bill.

The committee is invited to agree the questions it wishes to raise with the Scottish Government on the delegated powers in the bill in written correspondence. The committee will consider the responses at a future meeting to inform a draft report.

Sections 15(1), 20(1) and 41 all relate to powers exercisable by resolution of the Parliament. Section 47 of the bill makes general provision in relation to those powers. The committee might wish to seek explanation in relation to three points.

First, the delegated powers memorandum does not explain the type of procedural detail that could be included in Parliament's standing orders on making parliamentary resolutions. Secondly, section 47(2)(b) confers wide power to make ancillary provision under such parliamentary resolutions, but the delegated powers memorandum does not explain why that is needed. Lastly, section 47(4) provides that part 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 is to apply to a resolution as if it were a Scottish instrument; again, the purpose of that is not explained in the delegated powers memorandum.

The committee might wish to ask the Scottish Government the following questions. What further procedural provision is envisaged to be required in the Parliament's standing orders, and why is it considered appropriate that those matters are subject to provision made in the standing orders rather than set out in the bill?

Why is it considered appropriate for the Parliament to make the full range of ancillary provision in a resolution under the bill, a power that is provided for in section 47(2)(b)? Can the Scottish Government give an example of the sort of provision that it is envisaged might be made under the ancillary powers?

Can the Scottish Government explain the purpose of the provision in section 47(4) of the bill that provides that part 1 of the Interpretation and Legislative (Scotland) Act 2010 is to apply to a resolution as if it were a Scottish instrument?

Is the committee content to ask those questions?

Members *indicated agreement.*

The Convener: Section 15(2) enables primary legislation in sections 4 to 14 of the bill to be

modified by a parliamentary resolution that is made under section 15(1). Does the committee agree to ask the Scottish Government to explain further why it is considered appropriate for the Parliament to have a delegated power to modify provisions of the act as passed, and, regarding the choice of procedure, to say why it is considered appropriate that the power in section 15(1) is exercised by parliamentary resolution notwithstanding that it includes provision to modify primary legislation?

Members *indicated agreement.*

The Convener: Part 3 of the bill makes provision for the investigation of complaints and reporting to Parliament by the Commissioner for Ethical Standards in Public Life in Scotland as part of the oversight of the registration regime. Section 31(1) provides that the commissioner, in carrying out those functions, must comply with any direction that is given by the Parliament. Section 24(5)(a) empowers the Parliament to specify in a direction certain classes of case in relation to which the commissioner is required to report to Parliament in specific circumstances.

The committee might wish to ask the Scottish Government the following questions. In relation to the power in section 31, why is it considered appropriate that provision regarding the handling of complaints is dealt with in directions rather than set out in the bill? Further, can the Scottish Government give examples of the sorts of cases under which it is envisaged that the Parliament might direct the commissioner not to carry out an assessment of a complaint or an investigation into a complaint?

In relation to section 24(5)(a), in what sorts of cases where a complaint is inadmissible by virtue of the rules in section 23(3) is it envisaged that the Scottish Parliament would direct the commissioner to report, and why is it considered appropriate to specify those classes of case in directions rather than in the bill?

What further procedural provision for directions under the bill, including as regards publication, is envisaged to be required in the Parliament's standing orders, and why is it considered appropriate that those matters are subject to provision made in the standing orders rather than set out in the bill?

Do we agree to ask those questions?

Members *indicated agreement.*

The Convener: Section 44(1) provides that the Parliament must publish a code of conduct for persons lobbying members of the Parliament. Does the committee agree to ask the Scottish Government for an explanation of why it has been considered appropriate that the section does not include requirements for persons to comply with the code or have regard to the code, and why it has been considered appropriate that the section does not contain any sanction or enforcement provision in relation to a breach of the code?

Members *indicated agreement.*

The Convener: That completes the public part of the meeting; we will now move into private.

12:09

Meeting continued in private until 12:50.

Published in Edinburgh by the Scottish Parliamentary Corporate Body

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

Information on non-endorsed print suppliers
Is available here:

www.scottish.parliament.uk/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk