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Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 1 December 2015

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
34th 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:

Gregor Clark (Scottish Law Commission)
Graham Fisher (Scottish Government)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 1 December 2015

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the 34th meeting in 2015 of the Delegated Powers and Law Reform Committee and ask them to switch off mobile phones, please.

Agenda item 1 is a decision on taking items 9, 10 and 11 in private to enable the committee to consider further the delegated powers provisions in the Lobbying (Scotland) Bill at stage 1 and in the Private Housing (Tenancies) (Scotland) Bill; and to allow the committee to consider a draft report on the Transplantation (Authorisation of Removal of Organs etc) (Scotland) Bill. Does the committee agree to take those items in private?

Members *indicated agreement.*

Bankruptcy (Scotland) Bill: Stage 1

10:01

The Convener: Agenda item 2 is the Bankruptcy (Scotland) Bill. The committee has the opportunity to consider the drafter's response to its questions on the consolidation in parts 5 to 8 of the bill.

As members do not have any comments, are we content to note the response and to raise any issues in the normal way?

Members *indicated agreement.*

The Convener: Agenda item 3 is oral evidence on the Bankruptcy (Scotland) Bill.

I welcome Gregor Clark, who is parliamentary counsel at the Scottish Law Commission, and Graham Fisher, who is head of branch 1 of the constitutional and civil law division of the Scottish Government legal directorate. Good morning, gentlemen.

I recognise the scale of what you have put before us, that we have come up with a very small number of questions, and that that means that an enormous amount of very good work has plainly been done. I thank you for that.

That seems to be a good preliminary comment before we move to the one or two questions that we have. I invite questions from members.

Richard Baker (North East Scotland) (Lab): Good morning, gentlemen. My first question is about the general approach to the drafting of the bill. Did any overarching aims or principles inform the approach that has been taken to drafting the bill?

Gregor Clark (Scottish Law Commission): The obvious one was to try to write in plain English without being able to change absolutely everything—I did not have a totally free hand in that. There was an attempt at consistency, and gender neutrality came into it, but the biggest difficulty was breaking up the really unstructured form that the Bankruptcy (Scotland) Act 1985 ended up in. We have tried to simplify the layout and to delete unnecessary words, and there have been problems in doing that. As the committee is no doubt aware, we had certain difficulties with some words that have a sort of jurisprudence of their own, as the courts have looked at them. There was the question of how one translates the word "forthwith" in the question of when the sequestration is awarded, which is an important point. Sometimes there is a fine balance in knowing just quite how to do things and whether

consistency should take the place of trying to preserve existing uncertainties.

Richard Baker: You have mentioned some barriers and challenges that you found in applying the principle of consistency to the drafting of the bill. Were there any other areas—to do with application or the overarching principles—in which you found challenges and difficulties in achieving your goals?

Gregor Clark: Obviously, there are always challenges with a very big body of text that has been drafted by many different hands over 30 years, but it is an administrative process. There are no huge policy issues behind it; people are taken through it.

The biggest advantage of the bill is that it will give people a fresh start. They will not have to concoct their own version by starting with the 1985 act and adding layers as they come, because they will now be presented with a text that is up to date and a starting point. No doubt the process will go on and amendments will continue to be made, but it should be far simpler for a long time.

Richard Baker: As the convener touched on at the beginning of the meeting, drafting the bill has been an immense task given the scale of the consolidation that you have undertaken. As part of what has been achieved, was a checking and quality assurance process in place to ensure an accurate consolidation? Was everything that you intended to come within the parameters of the bill brought in through the consolidation process, given what a massive task it must have been?

Gregor Clark: I was helped by the fact that informal consolidations had been done on a commercial basis, which gave a starting point. However, once we had that, everything had to be checked against what had happened to the provisions of the 1985 act in order to ensure that we could justify every provision that went into the bill. Tables of derivations and destinations are part of the bill's accompanying documents. Although they are a little dense and rather daunting at first glance, by working through them people should be able to focus on a particular section in the bill and see where it has come from and whether we can justify it. So, that is a sort of audit.

Richard Baker: Thank you very much.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I absolutely accept what you have said, Mr Clark, but I have a question about the informal consolidations that have taken place over the years. I think that the consolidated bill before us is a fundamentally different thing from the informal consolidations in that it incorporates secondary legislation. Did the informal consolidations deal with secondary legislation? Is a particular benefit of the approach that has been taken the fact that secondary legislation has been drawn into a single document in the form of the bill?

Gregor Clark: The commercial consolidations of the 1985 act concentrated only on what is in that act. We have not been terribly ambitious in bringing subordinate legislation into the bill. In essence, we have gone back to the position before 1997, when the provisions in relation to protected trust deeds were largely in the 1985 act. In the main, they were taken out of the act in 1997, although the core provisions remained and there was some provision for protected trust deeds. We have simply upgraded the material and brought it back in. Of course, there is far more than there ever was, and one of the bill's parts is a very large body of text.

John Mason (Glasgow Shettleston) (SNP): I note that you said to Mr Baker that the 1985 act was largely unstructured. Obviously, it had a structure of sorts; it started, I think, with the role and functions of the Accountant in Bankruptcy, the trustee, the commissioners and so on, and the process of sequestration came later on. You have decided to start in the bill with the sequestration process. Why did you choose that structure?

Gregor Clark: I was not saying that the 1985 act was unstructured as it first appeared; I was saying that over 30 years it had lost structure and coherence.

The change in order to which you referred just seemed to be the logical way to start. Instead of introducing the cast, as it were, we just get into the sequestration process itself and leave the rather less important elements until later in the bill. I do not think that we have interfered very much with the structure, because we start with an application and go on to award of sequestration. I think that it is all fairly logical. Obviously, choices were made about where to put particular elements, but it would be fair to say that we were not trying to be anything other than straightforward in how we set out the bill.

John Mason: That is fair enough. Presumably, the order that you put the different parts in does not change the substance, does it?

Gregor Clark: No. I cannot think of any way at all in which putting things in a different order would affect the meaning.

John Mason: Great. Thank you.

John Scott (Ayr) (Con): The short title of the bill does not include the word "consolidation". In the previous consolidation bill that the Parliament considered, the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill, the word "consolidation" was included in the short title, so why is it not included in the short title of this bill?

Gregor Clark: We already have one set of brackets around the word "Scotland", and somehow putting in a second set of brackets seemed a bit unnecessary. The bill is not a document that, once enacted, will be any different from any other body of law. It does not have special properties because it is a consolidation—with one qualification, which is that the courts need to be aware that it is a consolidation, because there are certain rules of construction that then operate, but that is adequately met by the reference to consolidation in the long title.

I am sorry; I have rather lost the thread of what I was going to say.

John Scott: You mentioned the long title and the need to draw to the public's attention the fact that it is a consolidation.

Gregor Clark: That is right.

John Scott: Let us just leave it at that. We are perfectly happy with that response.

Graham Fisher (Scottish Government): It might be helpful to mention that there are precedents for both approaches—having "consolidation" in the short title and not having "consolidation" in the short title. There are Scottish precedents for both approaches and more recent United Kingdom examples. I cannot speak for Gregor Clark, but one reason for not including it that comes to my mind is that the bankruptcy acts are used day in, day out by practitioners, and having a short handle is probably helpful for them. That is a simple point, but it might be relevant.

Gregor Clark: I have remembered the point that I was going to make. The word "consolidation" is useful if there are two bills going through, say, on criminal justice—a straight programme criminal justice bill in the same year as a consolidation. Otherwise, I would have thought that there was little need to put the word "consolidation" in because, as far as practitioners are concerned, it is a law that is to be regarded as any other law.

John Scott: On a similar but different theme, the bill does not consolidate only the law on bankruptcy but also the law on protected trust deeds in Scotland. As we heard in oral evidence from the AIB and the Scottish Government on 17 November, protected trust deeds are considered to be a major alternative route into insolvency protection, although they are not a form of bankruptcy but a distinct statutory insolvency procedure. Can you explain to the committee why the short title of the bill refers only to bankruptcy, while the bill itself consolidates the law on bankruptcy and the law on protected trust deeds, which are distinct from bankruptcy?

Graham Fisher: Gregor Clark referred a moment ago to the fact that the material on protected trust deeds was built into the Bankruptcy (Scotland) Act 1985. The view was taken at the time that the protected trust deed material should fall under the term "bankruptcy". You referred to what we said on 17 November, and there are probably different ways of using the terms for different processes. You might say that sequestration is a process that is sometimes called bankruptcy—certainly colloquially, and in England, of course—but we distinguish the sequestration process from protected trust deeds. There are different ways to argue about it, but protected trust deeds can be accommodated under the term "bankruptcy". Obviously, in 1985, the view was taken that both separate and important processes could be covered under the short title of "bankruptcy". The bill replicates that position.

10:15

John Scott: Okay. Thank you for that explanation.

Gregor Clark: A further point is that you do not need to cram absolutely everything into the short title, so long as it is not misleading and does not give an impression that it is not covering major areas. Even though there may be slight differences between protected trust deeds and bankruptcy, the thought was that a short clear title of that kind would not mislead anyone.

The Convener: Indeed. Thank you. That conveniently takes me to the line that I want to pursue.

First of all, can I confirm that the long title is, as it were, part of the text of a bill for construction purposes?

Gregor Clark: Yes, it is.

The Convener: That long title includes various acts, as you would expect, and the Protected Trust Deeds (Scotland) Regulations 2013.

Gregor Clark: Yes.

The Convener: It then says "and related enactments", which is fair enough because undoubtedly there is secondary legislation that you have brought into the bill. My first question is, on what basis do you believe that you have caught everything that should be in the bill—the related enactments?

Gregor Clark: The starting point was always the 1985 act. Where the 1985 act is supplemented in some way, we have tried to take account of whatever it is that supplements it. It is a huge package. An enormous amount of material has been built into the 1985 act quite deliberately over the years. It includes all the material about pensions, and an act that is not in itself about

bankruptcy but still impinges very widely on it. We have looked at the matter over really quite a long gestation period. Nothing has emerged in any way that we have missed—we have worked through a lot of acts and subordinate legislation. It may be possible to quibble and say that something or other might be in or it might not, but I am confident that we have the bankruptcy law of Scotland expressed in that document.

The Convener: I do not doubt you. I am not in a position even to dream of doubting you apart from through my requirement to do so, as it were, from this end of the table.

I thank you for confirming that there are things in the bill that were not in any way described as bankruptcy when they were first written down—for example, in relation to pensions. If we were to find that something had fallen through, how could that flow back into the document? If we—or the courts—found that something was missing, would it have to come in through some kind of statutory instrument that modifies the bill?

Gregor Clark: If something is missing, it has not been got rid of; it is still sitting there. There are provisions towards the end of the bill that deal with continuity of the law. I refer you to section 235. It takes account of the fact that something might be done under existing provisions. If those provisions are overtaken by provisions in the bill, nevertheless the whole thing is intended to be continuous. The subsections, which are pretty much in a standard form—they appear in consolidation after consolidation—are intended to make sure that things are not lost and do not just fall away. If there are references to the old act, they are also regarded as referring to the corresponding provisions of the new one.

The Convener: So you will only have specifically repealed things that you have specifically consolidated.

Gregor Clark: That is right—or things that obviously had no further utility.

The Convener: Anything that you have missed will, by definition, not have been repealed, because you will have missed it and not repealed it.

Gregor Clark: Yes.

The Convener: Thank you. I just wanted to check the logic of that. Anything that still needs to be there and that we, or you, might have missed will still be there, because we cannot have repealed it by accident.

Gregor Clark: Yes. I cannot put my hand on my heart and say that absolutely nothing has been lost; it is difficult. However, as far as we are aware—we have done the exercise very thoroughly with a lot of people checking a lot of documents—nothing has been lost. Certainly, nothing is being repealed that ought not to be repealed.

Stewart Stevenson: Just to get absolute clarity, is the purpose of the consolidation to allow in total the repeal of all the enactments that are consolidated?

Gregor Clark: Yes, that is right.

The Convener: Would you like to say anything more about the inclusion of protected trust deeds in the consolidation? That has probably been adequately discussed, and it seems sensible.

Gregor Clark: The main question is why they were ever out, because they are so much of the same order as the other provisions of the 1985 act. Of course, that is historical and it happened in 2007, but it just seems so right that they are in the bill.

The Convener: The provisions of the Debt Arrangement Scheme (Scotland) Regulations 2011 are not included in the bill. Is there not an arguable case for putting them in?

Graham Fisher: I think that I mentioned when I was at the committee previously that, as Gregor Clark said, the exercise is based on the Bankruptcy (Scotland) Act 1985. We accept that the debt arrangement scheme is a significant body of law in its own right, but we see it as part of wider debt law rather than purely bankruptcy or insolvency law. On that basis, I do not think that it was ever seriously considered for inclusion in the bill. That is not to say that it could not be. For instance, the Insolvency Act 1986, which covers personal bankruptcy in England, includes personal insolvency and other wider material on issues such as company insolvency.

I do not want to speak for the Law Commission but, basically, entry into the debt arrangement scheme is not necessarily through insolvency, although it might well catch debtors who are in a very similar position to insolvency. On that basis, the Scottish Government sees the debt arrangement scheme as not being about insolvency; its overall genesis was about people deciding that they want to pay back their debts, so it should be seen slightly differently. There is no overriding legal reason why the provisions could not be included in the statute, but we do not think that that would be the better approach.

The Convener: Thank you. It is useful to know where the boundary is and to have it on the record that you have considered where that should be.

I want to pick up on one relatively minor point. Recommendation 1 from the Law Commission's report on the consolidation of bankruptcy legislation commented on the use of the phrase "right or interest". We have heard from the

Government about the extent to which right in land and interest in land are the same thing. Mr Clark, do you have any comments on how you see that discussion?

Gregor Clark: There was an initial feeling that the word "right" would suffice in all contexts in the bill but, subsequently, experienced practitioners were rather nervous about that and were afraid that something might be lost in the case of a small number of the provisions. The commissioners were happy to compromise and to take account of the possible uncertainties. It was very hard to form a complete picture of whether the uncertainties were justified. We thought it much safer to preserve the wording in a number of the provisions.

The Convener: Thank you. That is helpful.

Richard Baker: The definition of "debt advice and information package" has been moved to the interpretation section of the bill. That does not appear to be consistent with the approach that is taken to other definitions that are used in parts 1 to 4, which are restated where they appear in the 1985 act. Can you explain why that approach has been taken?

Gregor Clark: My whole approach was based on the fact that section 5 of the 1985 act had become something of a monster with many subsections. To get rid of some of the material, our initial view was that we should put a definition of that kind with the definitions in the interpretation section.

Richard Baker: You wanted to make it more user friendly.

Gregor Clark: Yes. That was part of the whole business of breaking up section 5 into smaller units. Looking at how the bill has turned out, however, I would not be unhappy to see the definition included in section 3, which is another part of the original section 5 of the 1985 act. That proposal would certainly be regarded with sympathy, and we could reinsert the definition in a subsection. Apart from anything else, that would give more substance to what is a very small section at the moment.

Richard Baker: So you might consider changing your approach on that.

Gregor Clark: Yes.

Richard Baker: It is not a huge point, and you might give further consideration to it.

Gregor Clark: Yes. It is a good point. It would be perfectly reasonable to include it there. The original purpose of putting it in the interpretation section is no longer an issue now that we have broken up section 5 of the 1985 act so much.

Richard Baker: Thank you. Generally, can you explain the approach that has been taken to the definitions that are used in the bill and where those are defined? Is the approach that has been taken consistent overall? If it is not consistent overall, is there some particular reason for the inconsistency?

Gregor Clark: Normally, the user of a statute will look to the interpretation section for anything that comes up. They will find most provisions at least referred to there; at least the section in which a definition is presented is referred to in the interpretation section. However, occasionally one comes across an important element of the bill that is a block to understanding if it is not explained the moment that it occurs. Some of the really important concepts and identities are, therefore, defined as one comes to them. For example, "qualified creditors", which appears in section 7, is very much worth defining where it occurs because it is important to understanding the whole provision. The definition is not a bolt-on; it is of the very essence of the thing that is being described.

Richard Baker: The priority has been to ensure that the bill can be easily used and the legislation understood in the most accessible ways.

Gregor Clark: That is right. If you overdo it by putting too many definitions into the text before you come to them, it becomes a very dull read—if anyone ever does read it from start to finish.

Richard Baker: I am sure that we will all read it page by page.

The Convener: I like the idea that one might do that. It seems admirable to try to draft the statute in such a way that someone could read it from beginning to end and get some sense out of it.

John Mason: You mentioned the word "forthwith", and I want to ask you about that. I completely accept that two of your guiding principles are consistency and bringing up to date language that may be a bit archaic. You have, in most cases, replaced the word "forthwith", which is used consistently throughout the 1985 act, with "without delay", but in section 22 you have left the word "forthwith". You appear to have introduced an inconsistency that was not there before. Will you give us your thinking behind that?

10:30

Gregor Clark: I start from the basis that "forthwith" is a word that one would not ordinarily use in standard English. We no longer tell people to do things forthwith, unless we are being humorous. In the context of section 22, the word has been argued over. There is an obvious element of immediacy to it, but does it mean "without delay", in which case there is a whole

argument about what constitutes delay, or does it mean "there and then"?

With a process of the nature of sequestration, there must be very few instances in which it is absolutely vital that something is done at once. Sequestration is an administrative process, and the sheriff needs time to come to his decisions. As I said in my note to the committee, "forthwith" has at least two meanings: it can mean "at once" or "without delay". The whole argument about section 22 is around that point. If it means "without delay", what is delay, and how long can the intervening period be? Many contradictory views have been taken. It would be nice to settle the debate and say that "forthwith" means "at once" or "without delay", but the question has arisen in the context of section 22 and we should not be settling the question in the consolidation.

On the other hand, we should not be forced into using the word "forthwith" elsewhere in the bill. It is not a major issue in other provisions and it is perfectly reasonable to modernise the language generally, while taking account of the fact that the distinction has particular importance in section 22.

John Mason: I understand what you are saying about section 22. Both "forthwith" and "without delay" seem to me to be quite vague terms, but I think that you are saying that "forthwith" is vaguer or wider than "without delay". I suppose that that leads me to ask whether we are certain that in every case in previous legislation where the word "forthwith" is used no one is too worried about it and therefore the slight change to the tighter term "without delay" in other sections will not impact on the law.

Gregor Clark: I think that one has to come to a view about what one is dealing with, as a whole process. The suggestion that "without delay" is tighter is not quite right. It is just that "forthwith" has been open to different constructions. In almost every other instance, "without delay" carries a meaning that I do not think anyone will be in any doubt about. In an administrative process, it means, "Get on with it; don't hang about." However, it would be difficult to suggest that "at once" would have been an adequate substitution throughout the bill; "without delay" seems much more natural, having regard to the whole process and the way in which things are done.

The Convener: Does it perhaps come down to the fact that there is no litigation on the subject and therefore no one is greatly exercised about it anywhere else?

Gregor Clark: I think that that is right, yes.

The Convener: Therefore, "without delay" seems to encapsulate what we believe we know, and no one has ever challenged that, so it just does not matter.

Gregor Clark: That is right. It is a modern way of expressing "forthwith". However, we must take account of the fact that, in a very narrow context, people have tried to argue that "forthwith" is much more urgent than "without delay".

John Mason: We could go on all day on this—I think that we just have to accept that there is not a tidy solution. I am not really challenging the solution that you have come up with. I suppose that the very fact that we have changed "forthwith" to "without delay" elsewhere implies that this "forthwith" does not mean "without delay"—it means something else. My fear is that the courts could look at the difference and think that we are trying to say something. However, I am not sure that there is a tidy answer.

Gregor Clark: That is right. I have agonised over this. The first thing that the court will do is to look at the "Oxford English Dictionary" and find both meanings: "instantly" and "without delay". The court will be very well aware that, first, a consolidation bill is not trying to change anything. It will also be aware that this is a provision that has been argued over and that solutions have not been found, and that there is reason, therefore, for keeping "forthwith" and waiting for the courts to come to some answer as to what is to be preferred.

John Scott: We move on to consequential amendments in section 16 of the bill. In written questions, we asked for an explanation as to why, specifically at section 16(6) and section 16(7)(b), it goes further than the equivalent provision of the 1985 act. It would be useful for the committee if you would explain why that approach has been taken.

Graham Fisher: I will let Greg Clark think about the bill.

The issue goes to a missed consequential amendment that was identified in the way in which the Bankruptcy and Debt Advice (Scotland) Act 2014 picked up on material that was in the wider consolidation bill published by the Law Commission. As the committee has usefully pointed out, there are minor omissions in the way in which that was done. For that reason, the bill, by adopting the previous approach, has followed through on the intended approach to consolidation. The best approach is to correct those minor omissions. The bill comes forward as a consolidation bill, which reflects recommendations 4 and 5 of the Law Commission's original recommendations. For that reason, we do not see a difficulty with the bill adopting that approach.

The other issue is the extent to which the current law should be updated in order for the consolidation to be pure consolidation. In these

cases, we would see some merit in doing that as well. Obviously, there is a timing issue involved in putting through the very minor changes needed to pave the way for that.

John Scott: Will you say more about the alternative route, which would involve the Scottish Government making the necessary consequential amendments under section 55 of the 2014 act, rather than directly into the bill? Will you expand on how that would work and the timings that might be involved?

Graham Fisher: Yes. It would be affirmative procedure, but it would be a short order just to change these two very short points. That could be done. I do not see difficulties at all with the bill proceeding as drafted; in any event, it reflects the commission's recommendations.

John Scott: I do not doubt you in any way. I just seek your reassurance that there is no risk that the changes fall outside the scope of the consolidation bill.

Graham Fisher: If the change was made, there would be no prospect of that at all. For the rest, if there are commission recommendations, minor changes to the law are possible. On that basis, that alternative, if you like, would be within the scope of the consolidation exercise.

John Scott: That is great. Thank you.

The Convener: Is there not an arguable case that, if changes were not made when they should have been, Parliament meant not to make them? We know that it was inadvertent but, nonetheless, we could argue that they are things that Parliament did not do, and therefore we should not pick them up now in a consolidation bill. The argument would be that we should have picked them up then, but we did not and, therefore, we meant not to do them and they should not be consolidated now.

Graham Fisher: That is an arguable case. I do not know whether Gregor Clark wants to come back in, but my view is that, in this context, the position is reasonably clear. One of the provisions is merely a for-the-avoidance-of-doubt provision, so there will not be any difficulty there. There would be benefit in making the other one clear but, in any event, I would hope that the courts would come to the right conclusion if they ever had to look at it.

The Convener: You will understand, though, that the committee would prefer it if the courts did not have the opportunity of coming to the right decision.

Graham Fisher: Yes—absolutely.

The Convener: We would much prefer the law to be so unambiguous that it is clear that the court does not need to make that decision. That would be our default.

Graham Fisher: The law would certainly be clear after the consolidation, but I quite take the point. As I said, I think that there would be benefit in amending the law in any event.

Gregor Clark: The changes might be made in an order under the 2014 act to take account of things that ought to have been done in that act to the 1985 act. That is clearly the sounder way to go because, apart from anything else, the provisions of the 1985 act will still have some application in relation to transitional provisions and proceedings that are continuing.

It is certainly desirable, if it proves practicable, for the Government to use the provisions on consequential amendments and ancillary provision in section 55 of the 2014 act. It would be unfortunate if the consequential provisions in the commission's bill, which are part of the package to implement the recommendations, were missed altogether. It is hard to say why we would mention some paragraphs and not others. It is unfortunate that they were missed, but the whole thing can easily be remedied.

The Convener: It will be interesting for the Government to read that on the record. I suspect that we are going to suggest that the Government does that, just to make sure that there is nothing else to argue about.

Gregor Clark: That is very much the proper way to go, provided, as I said, that it is practical from the point of view of business management and so on.

The Convener: Okay. Let us leave that point there. I think that the Government will reflect on it.

We move on to the subject of "and ... and ... or"? I suspect that the youngsters in the gallery are wondering what parliamentary committee discusses the meaning of the words "and" and "or". It is this one. Their meaning in legislation is hugely important—as Mr Clark does not need me to tell him.

Our advisers have pointed out to us that there may be one or two inconsistencies in the bill, but that there is also a general point about whether "Tom, Dick or Harry" is, in the grand scale of things, the preferred way of drafting legislation. You have made your position clear, and I respect that.

Does, however, the suggestion that we get from "Craies on Legislation: A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation" that, generally speaking, there should be a list separated by semicolons, have merit, except where there is a specific reason for doing

something different? Would you like to reflect on the general principle?

10:45

Gregor Clark: I regard it as being a matter of standard English. If one strips out the paragraphing and has a continuous line of text, the "ands" and "ors" are needed. That is how one would construct large complex sentences. One certainly would not have repeated "ors" and "ands" with every item. The "and" or "or" in a list in a long and complex English sentence tends to come only between the final two items.

The Convener: We would not dispute that. The question that the logicians among us worry about a great deal is whether, in a list of three or four things, if you put an "or" at the end, the items above go together and it is only the last one that is the "or". We know that in normal English that is not generally the case. Would it not, however, be prudent, particularly where the provision is a power and there is a list of things that can be done separately to select from since all are allowable, to make it clear that the items are all separately available? That is to say, the meaning of "this, this, this or this" is not limited to "the first three or the last one".

Gregor Clark: The provision in question is written as statutes are written and interpreted. The practice that I follow is standard throughout the statute book.

Occasionally, "ands" and "ors" are missed, and there are various ways of expressing things, but essentially statute is read as one would read any passage of English.

The form is used in the 1985 act itself. I would find it extremely odd to take an approach other than the one that I have used here. Occasionally, provisions can be introduced by saying "any or all of the following", but that is usually done only where there could be doubt as to whether that was the case.

I find it hard to adjust to the idea that one would draft the provisions differently.

The Convener: I do not want to extend the discussion now. It is one that we might want to put on paper and be clearer and more reflective about.

Section 103(4), however, is intended to provide that the secretary of state can make provision under paragraph (a) and under paragraph (b) and could do one or the other or both.

Gregor Clark: Yes. In that case, the power can be used on more than one occasion, and in part. The secretary of state could do one and then the other with no obligation to do both parts on the same occasion. There is no suggestion that, because paragraph (a) has been used, paragraph (b) cannot be used.

The Convener: Okay. Forgive me, I am just wondering what the "or" adds, because are not there many statutes in which "or" is not there at all?

Gregor Clark: I am sorry: are you saying that there are statutes in which it is not there at all?

The Convener: That is my suggestion. If that is the case, I am just wondering—forgive me; I know that we are picking over this—what "or" adds. Is there a risk that the "or" might tell the court something that it would not be told if "or" was not there?

Gregor Clark: I really cannot see it being misconstrued. One would have to go through the statute book striking out "or" all over the place.

The Convener: Okay. Thank you.

Gregor Clark: The power is to be given to the secretary of state; he will be able to do both; he will not be obliged to do just one of those things. There would be no logic in that because he could just come straight along afterwards and do the other thing. Nobody could construe the wording as banning him, after having made one choice, from then making the other choice.

The Convener: Thank you.

Stewart Stevenson: I take issue with that in one relatively narrow sense. The word "or" has two specific and different meanings, which are potentially in conflict with each other—not necessarily in terms of how a law is drafted and not even, perhaps, necessarily in plain English, but certainly in the mathematical world in which I have been trained, in that "or" can mean "one or both" or it can, in some circumstances, mean "only one of". Of course, in mathematics, to distinguish between the two uses of "or", the latter meaning is normally expressed as "XOR"—in other words, "exclusive or"—which means that only one is permitted, not both. However, that distinction is made in mathematics precisely because, in plain English, it is ambiguous in using the word "or" which meaning is intended. That is perhaps why there is a residual discomfort about the use of the word "or" without an explanation of what "or" means in the circumstances in which it might be used.

Gregor Clark: I think that you have to consider the context. In the particular context of section 103(4), it just would not make sense for it to have the other meaning because the secretary of state can use a power more than once. I could not possibly think of a situation in which, because he had used the power once in one way, he could not then come back and use it the other way.

Stewart Stevenson: Let me posit that it could mean that if the secretary of state wished to legislate for both the paragraphs, he would have to do so via two separate instruments because he did not acquire the power to put the two bits in a single instrument. In other words, he would need to exercise each power on a single occasion, there being no restriction on how many occasions he could exercise those powers, but it could be argued that there was a restriction on whether he could exercise them together, depending on one's interpretation of the meaning of the word "or".

I say all that not to cause us to reach a conclusion but to illustrate, at least in my mind, that use of the word "or" is ambiguous because its definition is not clearly stated.

Gregor Clark: I understand what you are saying, but I think that the ambiguity would be solved in this case by asking what Parliament intended. It would not intend to require the secretary of state to come back on two different occasions with two different documents.

Stewart Stevenson: I think that this is my final contribution on the matter, because we perhaps have more substantive matters with which to concern ourselves. The very fact that we are discussing what Parliament might intend illustrates the ambiguity that might exist through use of the word in this context, but I am really not looking for a particular response. That is all that I would say.

The Convener: Forgive us, but the point does slightly concern the committee and I could point to a number of sections in which it might cause a problem. However, I think that I am clear, Mr Clark, that you are suggesting that courts would not find that a problem. I am grateful for that advice.

That brings us to the end of our questions at this stage, so I thank the witnesses very much for their attendance.

10:54

Meeting suspended.

10:58

On resuming—

The Convener: Agenda item 4 is for the committee to consider whether the consolidation in parts 9 to 14 of the Bankruptcy (Scotland) Bill correctly restates the enactments that will be consolidated and whether the consolidation is clear, coherent and consistent. The committee is invited to agree the questions that it wishes to raise with the drafter of the bill in written correspondence.

First, it appears that the reference in section 119(7) to "subsection 75(a)" should be to "subsection (6)(a)". Does the committee agree to draw that to the drafter's attention?

Members *indicated agreement.*

The Convener: Does the committee agree to ask the drafter why, in section 168, one reference to "a living individual" is retained while the other such reference is restated as "an individual" and whether there is any reason for that difference in terminology?

Members *indicated agreement.*

The Convener: The wording of section 170(1) of the bill is relevant to determining the date by which documents must be sent to creditors under that section. Does the committee agree to ask the drafter why the words

"not later than 7 days after registration"

in regulation 10 of the Protected Trust Deeds (Scotland) Regulations 2013 have been restated as

"not later than 7 days after the date of publication"

in section 170(1) of the bill and whether it is considered that that will have any effect on the meaning of the provision?

Members *indicated agreement.*

The Convener: Section 184(6) appears to contain a drafting error. The section provides that

"The letter of discharge does not discharge the debtor from …

(d) affect the rights of a secured creditor."

Does the committee agree to draw that to the drafter's attention?

Members *indicated agreement.*

The Convener: The wording of section 186(8) of the bill is relevant to determining the time by which the discharged trustee must perform various duties under that section. Does the committee agree to ask the drafter why the words

"within 28 days of the date of discharge"

in regulation 25(7) of the 2013 regulations are changed to "without delay" in section 186(8) of the bill and what effect it is considered that that will have on the meaning of the provision?

Members *indicated agreement.*

The Convener: Agenda item 5 is for the committee to consider the delegated powers provisions in the Bankruptcy (Scotland) Bill at stage 1. If members are content with the recommendations in the paper that we have seen, it will form the basis of a report to Parliament. The draft report will not be discussed by the committee

before it is published. Is the committee content with the delegated powers that are restated unchanged and continued in the consolidation?

Members *indicated agreement.*

The Convener: Is the committee content with the delegated powers that will be modified or created as a result of the consolidation?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

General Dental Council (Fitness to Practise etc) Order 2015 [Draft]

11:01

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

Members *indicated agreement.*

Public Appointments and Public Bodies etc (Scotland) Act 2003 (Treatment of Community Justice Scotland as Specified Authority) 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.*

Secure Accommodation (Scotland) Amendment Regulations 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.*

Instruments subject to Negative Procedure

Plant Health (Import Inspection Fees) (Scotland) Amendment Regulations 2015 (SSI 2015/392)

11:01

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

Members *indicated agreement.*

Animal By-Products (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/393)

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

Members *indicated agreement.*

Litigants in Person (Costs and Expenses) (Sheriff Appeal Court) Order 2015 (SSI 2015/398)

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

Members *indicated agreement.*

Trade in Animals and Related Products (Scotland) Amendment Regulations 2015 (SSI 2015/401)

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

Members *indicated agreement.*

Land Reform (Scotland) Bill: Stage 1

11:02

The Convener: Agenda item 8 is for the committee to consider the Scottish Government's response to its stage 1 report on the Land Reform (Scotland) Bill. Do members have any comments?

Stewart Stevenson: It continues to be a matter of concern that significant powers will be given to the Government by subsequent secondary legislation. Clearly, we can make a judgment on the bill in relation to the European convention on human rights, but I think that we will continue to be exercised by what the process of scrutiny should be for Government powers that will be introduced by secondary legislation. The Government should take note of our desire to ensure that we have perhaps more opportunity than we would have in the standard process to consider the ECHR in relation to the secondary legislation. I think that that is the overarching point about the bill, as it stands.

The Convener: Do members concur with that?

John Scott: Yes. I agree with all that Stewart Stevenson has said, but would perhaps put it a little more strongly than he has. It is of great concern that a number of areas are still under policy development. It is also of great concern that instead of powers being included in the bill, they will be introduced subsequently in secondary legislation, which means that they will be subject to much less parliamentary scrutiny. That is a recurrent theme in the bill. However, I am particularly concerned about part 10, which I think has been poorly put together.

My particular concern is that the bill has the capacity to bring our Parliament into disrepute because it is not clear whether many aspects of the bill are compliant or non-compliant with ECHR. As Stewart Stevenson said, the committee does not have the ability to scrutinise that, which is a matter of great regret. Huge potential exists to bring Parliament into disrepute, which I would not wish to see. That is why I think that we have to make our views known in the strongest possible terms. I think that I am correct in saying that Parliament has been rebuked previously by the Court of Session with regard to this area of law for not making ECHR-compliant legislation. I would not wish for that to happen again.

I am concerned about both the tone and the content of the Government's response to the committee's stage 1 report; it seems to indicate a lack of willingness to address the points that we have raised, which is a matter of great regret. I

have been a member of the committee for only five years or thereby, and I do not recall any previous instance of the Government taking such a cavalier view of suggestions that the committee has properly made to it. That, too, is a matter of great concern to me.

John Mason: There is always a balance to be struck between what is on the face of a bill and what is in secondary legislation. However, I think that the committee is disappointed that, comparing the Land Reform (Scotland) Bill with other bills, there appears to be less on the face of the bill and more being left for secondary legislation. For me, that is the key point.

The Convener: We have already written to the Government, but the suggestion is that we pursue the various issues that members have just commented on directly with the Cabinet Secretary for Rural Affairs, Food and Environment, and the Minister for Environment, Climate Change and Land Reform. Are members happy for me to write in appropriate terms on their behalf?

Members *indicated agreement.*

The Convener: That completes agenda item 8 and the public part of the meeting. We now move into private session.

11:07

Meeting continued in private until 11:40.

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