The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 15 December 2015

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
36th 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:

Paul Cackette (Scottish Government)
Joe FitzPatrick (Minister for Parliamentary Business)
Rachel Grant (R3 Association of Business Recovery Professionals)
Jane Martin (Scottish Government)
David Menzies (Institute of Chartered Accountants of Scotland)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 15 December 2015

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Nigel Don): Good morning, everybody. I welcome members to the 36th meeting in 2015 of the Delegated Powers and Law Reform Committee. As always, I ask members to switch off mobile phones, please.

Under agenda item 1, it is proposed that the committee takes items 10 and 11 in private. Item 10 will enable the committee to consider further the delegated powers provisions in the Burial and Cremation (Scotland) Bill at stage 1, and item 11 will enable the committee to consider the oral evidence that it heard earlier in the meeting.

Do we agree to take those items in private?

Members *indicated agreement.*

"The work of the Delegated Powers and Law Reform Committee in 2014-15"

10:00

The Convener: Agenda item 2 is consideration of the committee's work during the parliamentary year 2014-15. I welcome Joe FitzPatrick MSP, the Minister for Parliamentary Business, and his officials from the Scottish Government. Paul Cackette is deputy solicitor and head of group 2 in the directorate for legal services and Jane Martin is Scottish statutory instrument programme manager in the directorate for strategy and constitution.

Good morning, colleagues. It is good to see you for our annual discussion. Do you want to make any opening comments, minister?

The Minister for Parliamentary Business (Joe FitzPatrick): I will make some brief comments if I may. I am pleased to be here to discuss the committee's annual report. This is my third appearance at the committee since I was appointed as Minister for Parliamentary Business, and I look forward to our usual healthy exchange of views on the legislation that the committee has considered and how we can continue to improve quality.

As the report that we are discussing is the committee's final annual report of the current parliamentary session, I start by thanking you for the commitment and the professionalism that you have all demonstrated in your careful scrutiny of primary and subordinate legislation. The committee's work should not be underestimated. It provides thorough exploration of the delegated powers in a wide range of bills and brings that knowledge to the huge range of subordinate legislation that is introduced as a result of those powers.

My colleagues and I welcome your commitment to detailed consideration of everything that comes before you, which can only help to improve the standard of our bills, delegated powers memoranda, instruments and other documents that are laid before Parliament. Alongside your assessment of individual pieces of legislation, the feedback in your annual report provides me and Scottish Government officials with an overview of where things have gone well, so that we can build on those successes, but also of where things have not gone so well, so that we can look at how we can improve things in future.

On where there has been particular success during the most recent period, I highlight the co-operation in September that brought new

disclosure procedures into force in record time. On that occasion, the committee not only did its usual job but took on the role of being the lead committee. That was an important role on an important piece of legislation.

As I said, you also identify how procedures can be improved, and we are taking those points on board. A good example is the routine implementation meetings that my officials and policy leads have with your clerks and the clerks to other relevant committees. Those were instituted as a direct result of the committee's intervention and they have been a significant benefit, improving communication in both directions.

I also want to reflect on the significant role of Nigel Don, as convener, in leading the committee. Mr Don has always been fair, patient and, most important, unrelenting in his efforts to improve standards of scrutiny and, as a result, to raise the quality of legislation. The convener has also been instrumental in raising the committee's profile and widening its scope. That includes leading the committee in scrutinising Scottish Law Commission bills, which is a new role that has been positively received. I look forward to hearing your views on that this morning.

I assure members that we will continue to work with the committee to ensure that future legislation that is introduced to the Parliament is of the highest possible standard. We may not always agree with the committee's views but, nonetheless, they are always welcomed by me, my fellow ministers and the Parliament as we strive to produce good-quality, easily understandable and fair legislation. I look forward to answering your questions.

The Convener: Thank you for those kind words. John Scott will begin our questions.

John Scott (Ayr) (Con): I associate myself with the minister's words about the convener, who is extraordinarily diligent.

The committee was disappointed to note that, after a two-year decline in the percentage of instruments reported, the percentage last year increased. What does the minister think precipitated that increase?

Joe FitzPatrick: Obviously, we are pleased that, despite last year's increase on the previous year, the committee has acknowledged that overall the quality is better this session than it was in session 3. That is a point worth holding on to. The vast majority of subordinate legislation is fit for purpose. I appreciate that quality is an important issue for the committee. It is important to ensure that all the legislation that we bring forward is robust and fit for purpose, and we will continue our efforts in that direction. Our aim is to reduce errors across the board, but it will never be practical or possible to eliminate every error.

One of the main areas where errors were reported—45 per cent of the total—was instruments on pensions. Those sets of regulations were particularly complex and difficult, and there was a time pressure that was not entirely within our control. In addition, the tax laws made it very difficult to have retrospective provisions. We have learned lessons from that process. When there is a challenge, such as occurred with those regulations, we will use those lessons to improve our process.

John Scott: I will ask you a specific question on that area. Nineteen instruments, representing 52 per cent of the instruments reported last year, were reported on multiple grounds. The Teachers' Pension Scheme (Scotland) Regulations 2014 (SSI 2014/217) alone accounted for five reports. Why was such a significant proportion of instruments reported on multiple grounds? Does that raise concerns about the Scottish Government's quality assurance process?

Joe FitzPatrick: In relation to the instruments on pensions, there was a particular time pressure. We have tried on several occasions to persuade the United Kingdom Government to take cognisance of the Scottish Parliament's time scheduling. We continue to work with the UK Government to make sure that its timetabling requirements and ours are understood. There may still be some cases in the future where we cannot meet the usual timetables. We have learned lessons from those cases.

I will ask Paul Cackette to say a little more about the specifics.

Paul Cackette (Scottish Government): Our experience of the first quarter of 2015 in relation to the pensions regulations was a salutary lesson in balancing what we had to deliver. We were constrained by UK timetables. Last year, there was a particular tax-related reason why the normal ability to make retrospective pensions regulations was not open to us, and the package of regulations was also larger. Those considerations do not come into play to the same extent for 2016, although there will be other challenges because of dissolution.

We are focusing on the need to get ahead of the game. We are working with the UK Government to ensure, as far as we can, that that happens. As the minister rightly points out, however, the Treasury and UK Government are driven by timetables that are different from ours.

We have spoken with the Scottish Public Pensions Agency and the particular area of my directorate that has responsibility for pensions regulations to try to manage and monitor that. We

are rolling up the instruments for this year. It will be a smaller package, but it will have its challenges. We are tidying up all the commitments that arose from last year in the instruments that will be put in place by 1 April. That is an indication that the pensions agency is taking seriously the issues that arose last year.

As the minister says, there are still some challenges with timings, but we have focused quite a lot on the instruments this year. We have a smaller package, which will, I hope, be more manageable. What happened previously was not our finest hour, but we have looked long and hard at what we have learned from that, to ensure that we do things better in future.

John Scott: Have you learned any other lessons that you want to talk about? You said that there are outstanding challenges for this year's bundle. Will you talk about them?

Joe FitzPatrick: We have a continuing programme to make improvements. When problems such as those that we had with pensions instruments happen, we need to feed that in. One important thing that we continue to do is have monthly discussions between the Parliament legislation unit and the Scottish Government legal directorate, to ensure that we identify issues before they happen. We can split them into policy issues and other issues. We have detailed guidance on policy terms, which we have kept up to date. We are continuing to emphasise to bill teams their need not just to take ownership of their bill but to ensure the quality of their Scottish statutory instruments and ensure that accompanying documentation is clear and comprehensive. We are making sure that bill teams look at the whole package.

We are also looking at how we can ensure that the quality control processes that we have put in place are constantly being reviewed. If we see that something has happened that we have not caught, we need to look at how processes can be improved.

John Scott: The quality assurance process is a particular concern of the committee. The multiple failure of different instruments gives us huge grounds for concern about your and the Government's quality assurance processes. Of course, we understand that you do not wish such failures to happen. Do you have new measures in place that mean that we will not have such problems again?

Joe FitzPatrick: We certainly hope that we will not have such problems again. We discussed the issues and new measures were put in place. Unfortunately, they had not been put in place in time for these particular problems, as the Deputy First Minister made clear when he wrote to you. We have now got more robust processes in place.

Paul Cackette: We have new measures and we have tightened up existing measures. We are trying to manage this phase of instruments a lot more closely from the centre, to ensure that the part of my directorate that deals with this work can get the documents into the process as early as possible and give an adequate period for the centralised processes to add value. One of the pinchpoints last year occurred when time ran out, for reasons of which we are all aware. That made it difficult to apply a rigorous enough process. We are doing what we can to build in proper time in order that on this occasion the instruments get the external scrutiny within the directorate that they need.

John Scott: You probably have answered this question, but nonetheless I want to put on record our concerns. You may or may not wish to respond to it, as you have perhaps already done so.

So far this session there has been a reduction in the proportion of instruments reported. In the first quarter of this year, only 10 per cent of instruments were reported. Balanced against that improvement in the percentage of instruments reported there has been a continued increase in the number of instruments being withdrawn or revoked. In 2012-13 and 2013-14, only five instruments were withdrawn. Last year, 21 instruments were withdrawn or revoked, and, in the past few weeks alone, seven instruments have been withdrawn—one on two separate occasions.

On one hand, the committee welcomes the fact that instruments are withdrawn to make the law clear and accurate. However, it also means that instruments that contain errors are being laid, so what is being done to improve the quality of instruments that are laid and why has there been such an increase in the number of instruments that are withdrawn or revoked? In essence, it is almost becoming an iterative process. The committee is, dare one say it, sometimes doing the Government's work, and I strongly regret that we are in that position.

10:15

Joe FitzPatrick: There have always been instruments on which there has been a difference of opinion and others on which we agree with the committee's view that provisions could be cleared up. We agree with the committee that legislation should be clearly drafted and, as far as possible, easily understood. Therefore, if we agree that the drafting could be clearer, it is better that we withdraw an instrument and replace it. We have talked about how we are trying to improve quality

and we regard the committee as part of that process. We have discussed how we have made efforts that, we hope, will improve quality in the future.

Perhaps there has been a change of attitude in the Government. In the past, we might have said, "Here's what we mean by this and that's fine." We have now got to the point of saying that the committee is right and, although the way in which we have drafted a provision might work in law, the committee's suggestion makes it clearer and more easily understood. In those circumstances, it is better that we withdraw the instrument and lay something that is clearer and more easily understood. That might not have happened in the past to the same extent. There might have been a feeling from the Government that it was a confrontation and the Government might have been more defensive. That is not helpful to anyone.

I value the committee's input and, particularly, the way in which, in this session of the Parliament, we have developed a relationship between the committee and Government. We are now producing a final product of a higher quality. The final product is what members of the public and of the judiciary have to use.

John Scott: I welcome your candour. We share the desire to get things right but it concerns me hugely if, rather than instruments being laid, we are now being given sets of proposals. That is possibly overstating the case, but you take my train of thought. The committee's workload is enormously greater than it was. Of course, the burden of work falls on our clerks and legal advisers. Without being unkind, I feel that that is work that the Government should properly do.

Joe FitzPatrick: There are two issues. As I said in answer to your previous question, we have put in place mechanisms that we hope will drive up the quality of instruments and continue to drive it up. However, ultimately, if we agree with the committee and its legal advisers that there is an error, it is better that we withdraw an instrument and replace it if we can do that. Notwithstanding that, we have put in place new procedures to improve quality and will continue to review those to ensure that the legislation that we produce and that comes before the committee is of the highest possible standard. The overwhelming majority of the instruments that are laid have no errors.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I want some additional clarity on the timetabling for the pensions orders. It is clear from what has been said that there was less time than would have been scheduled for the work had the Government been given a free hand. Was the issue simply that there was less time or was there also an element of the Government being unclear at an early enough stage what the timetable would be?

Joe FitzPatrick: One of the things that I perhaps did not put on the record when we talked about the matter earlier is that the time pressure that we had was a hard target. Her Majesty's Revenue and Customs had confirmed that the new schemes had to be legally established by 1 April 2015, so it was not a soft target but an absolutely hard one. We always try to make sure that we have as much notice as possible from the UK Government about its proposals. In this case, that did not happen as early as we would have liked.

Paul Cackette: That is fair. It was a big package as well. The issue was a combination of a number of things. There was a series of regulations that covered a series of schemes and they were all very chunky instruments, which put more pressure on the committee as well, for obvious reasons. We can see the benefits of that scrutiny. We probably anticipated that time was going to be tight and that we were going to come close to the wire. It was unusual that we could not utilise retrospectivity in the same way that is often the case for pensions. It was a combination of a number of those things.

Stewart Stevenson: On quite a narrow but very important point, in essence you could not plan the schedule of work sufficiently early because you did not know the dates. Although you knew the drop-dead date for completion, you could not start on the activities until you had things from the UK Government. In essence, you are telling the committee that the difficulty was in not having that information to allow you to plan at an early enough point.

Paul Cackette: Yes.

Joe FitzPatrick: In part.

Stewart Stevenson: I am just trying to pin down that that was a key part of the problem. I am not trying to oversimplify what is clearly a very complex issue. That is helpful, thank you.

John Mason (Glasgow Shettleston) (SNP): Mr Scott's questions were largely about the past. I am especially interested in the next few months, which have already been referred to. From what we understand, a large number of instruments are still to be laid before the end of the session. Obviously, it is critical that Parliament and this committee have sufficient time to scrutinise all the instruments that are laid. Experience has been that when a large number of instruments has been laid over a short period, it has been challenging for Parliament to apply effective scrutiny, leading to a negative effect on the quality of the legislation passed. What is being done to ensure that the instruments are laid in a managed way, so that the

committee and Parliament are able to cope with them all?

Joe FitzPatrick: I will let Jane Martin come in in a minute, but I will say first that we think that we are in a better place than we were at the end of session 3, although we understand that the committees are under pressure and are very busy. We have written to ministerial colleagues and bill teams to ask them to make sure that, if they are bringing forward subordinate legislation projects, those are pieces of legislation that have to be dealt with this side of the election. If something can wait until after the election, we suggest that it should wait until then so as not to compound the situation at what is already a busy time. That point certainly should be considered, and we are continuing to remind colleagues about it.

We have also set deadlines for laying instruments that take into account committees' need to discharge their responsibilities. The deadlines allow a small margin, which we hope will ensure that there are no significant pressures on this committee when it comes to considering instruments in March.

Jane Martin (Scottish Government): We are working very closely with your clerks and with lead officials to try to make sure that where there is any slippage, you are advised of it; that people are adhering to the timetables that they have provided to us; that people are working with legal colleagues to make sure that instruments are being produced and cleared; and that ministers—Mr FitzPatrick's colleagues—are aware of the pressures that are on the committee, in terms of not only the secondary legislation but the primary legislation that you need to deal with.

John Mason: You refer to the pressure on the committee. What about the pressure on the Government staff or whoever it is that drafts all the instruments? Is there capacity to make sure that that is done—and done properly—and that there is enough time to double-check and so on?

Paul Cackette: We are putting in place additional processes within the overall styling process. Our business division is looking closely at where the pinchpoints are both in subject areas and for the individual lawyers who are responsible for instruments. We have engaged in a dialogue with those who will be drafting four or more instruments between now and dissolution to find out whether their preparation is sufficiently advanced and whether they feel that they are on track to deliver on time. In some cases, we have offered additional support to help people get to a better place.

We are trying to manage the process by tracking work across the board to ensure first and foremost that those in our styling resource in the directorate get a proper break with time off at Christmas—because when they come back early in the new year they will be working hard on the instruments—and to ensure that we have in place an adequate staffing resource, supported by our deputy director lawyers in the directorate, and, if need be, that additional resource at a senior level can be utilised to help with the styling process and take pressure off the stylists, many of whom are involved in drafting secondary legislation and instructing bills in the Parliament. Staff have many pressures on them, so we are endeavouring to ensure that senior managers in the directorate are alert and aware of the pressures on their staff so that we can manage the process centrally as far as we can.

John Mason: I understand that a package of instruments are due to be laid that emanate from the Tribunals (Scotland) Act 2014. Given what happened with the pensions instruments, to which Mr Scott referred, is there likely to be a similar pinchpoint with those instruments?

Jane Martin: We are very keen to continue to lay packages of instruments to make sure that the committee sees what the Government is proposing in the round. The difference with the tribunals instruments is that they are part of the implementation of a bill that was introduced by the Scottish Government and passed by the Scottish Parliament, which means that the timing has been rather more in our control than it was with the pensions instruments, which did not take account of the Scottish Government's different timescales for parts of its process.

John Mason: That is reassuring.

John Scott: I want to return to the previous question. Minister, Mr Cackette said that you are considering engaging additional resources to get through the workload. We need to consider whether we are in a position to respond to the extra workload that is coming down the track. Can you put a number on how many instruments you are expecting between now and dissolution?

Joe FitzPatrick: I am not sure—

John Scott: Can you give us an estimate?

Joe FitzPatrick: I am not sure that I would be able to give you an accurate number—that would be challenging—but we are in regular liaison with the clerks.

John Scott: Are we talking about tens of instruments, or is the number in the twenties, fifties or hundreds?

Joe FitzPatrick: It would not be fair to put a number on that at this stage. One of the processes that we have in place is to have clear discussions with the clerks of this committee and any other relevant committees. We have made a specific

request to my colleagues in the Government not to bring forward statutory instruments that are not required in this session. There is an on-going process to make sure that any instruments that are brought before Parliament are brought forward because they need to be dealt with before the election. We are trying to manage that process, and I do not think that it would be fair for me to give you a figure that might not be accurate.

John Scott: Notwithstanding all that, it does rather point to your anticipating an additional workload, which we will have to deal with. As the Minister for Parliamentary Business, is it your advice to the committee that we should envisage seeking extra resource to deal with what is coming down the track?

Joe FitzPatrick: We will make sure that we keep in close contact with the clerks so that they have the information that they need to make any request to the parliamentary authorities.

Paul Cackette: We are not envisaging additional styling resource. My reference to resource at deputy director level is about providing support resource for the stylists themselves, to make sure that they are available to do the work, rather than necessarily saying that additional people will take the work off them. It is about making sure that we plan our resource better. As I say, there is no suggestion that we are going to be tooling up with additional stylists in that period. It is just about making sure that we can manage the process as well as we can.

10:30

John Scott: Thanks.

The Convener: The word "stylist" is not one that I am familiar with in this context. Can you tell me what a stylist does and what someone who is not a stylist does in the context of drafting, please?

Paul Cackette: Of course. There is a long-standing process that existed pre-devolution for the UK Government and is still applied by it. An instrument is drafted by the principal drafter and is finalised in conjunction with policy colleagues, who decide what the content of the instrument should be. It is then approved by the divisional head.

We have a cross-cutting process that is external to the division whereby someone with a fresh pair of eyes looks at the instrument from a legal perspective. They look at particular issues such as the vires—the powers—and they ensure that the instrument is drafted in accordance with standard drafting styles, meets requirements and follows the expectations and indications of this committee as to what good drafting practice is. They double-check the references to other legislation and do internal cross-checking. That external pair of eyes adds additional value.

Obviously, things look obvious to the drafter of an instrument. They can get too close to it sometimes, and a bit of external analysis from someone who is aware of the developing practice of the committee and in relation to drafting generally can, and does, add significant value. It is quite rare that an instrument will go through a styling process without some questions being asked or changes being made to it. With that process, we are endeavouring to ensure that we meet as high a standard as we can before matters are put to ministers for signing.

The Convener: Thank you. That is helpful. It is good to know that these things are cross-checked. The minister's response just now might have been seen as evasive in other contexts and I want to make the point that he was reflecting how those of us at opposite ends of this table actually talk to each other to make sure that things work. However, I suspect that there is still quite a large number of instruments and that we will all be working very hard over the next two or three months.

John Mason has a further question about commitments.

John Mason: The final area that I want to touch on relates to annex B of our report, which has a list of all the commitments that have been made. We are keen as a committee that those commitments do not get forgotten about. In one of the previous answers, there was a suggestion that you might have caught up with all the commitments by the end of March but I am not sure whether—

Paul Cackette: It was the commitments on pensions.

John Mason: It was just the commitments on pensions—I was not quite sure about that. Can you clarify what is happening with the commitments? One or two of them have been outstanding for a wee while. I think that a couple of them are from 2011. When will you catch up with those commitments?

Joe FitzPatrick: We agree that when a commitment to correct a minor error is made, that commitment should be met. I understand that the committee would like to know when those commitments will be met. I think that nine of the commitments that remain outstanding relate specifically to pensions, so they are covered by Paul Cackette's comment. There are a few others that still need to be met.

We need to maintain a sense of proportion. If the error was small enough not to require immediate amendment, it is not necessarily a

good use of everybody's time to then introduce another instrument to fix that error on its own simply because a period of time has elapsed. The point is that we are waiting for another appropriate instrument where that amendment could be tied in. In a couple of the cases, that opportunity has not yet arisen.

I think that one of the later examples was the 2011 commitment relating to the marketing of horticultural produce. No further regulations have been needed around that topic thus far, but the commitment remains that, as soon as there is an appropriate instrument, we will tidy that up. The legislation is working and is understood, but that does not mean that we should not continue to tidy it up. We could say that we are not going to change it but given that we have recognised that, in an ideal world, we would change it, I think that we should keep that commitment in place and continue to look for an appropriate opportunity to make the correction.

John Mason: That is a reasonable answer. I take the point that we need to be proportionate and that some things relate to bigger issues and need to be amended more quickly than others. I do not want to get bogged down in the wording, but the 2011 case, to which you referred, said "the earliest opportunity" and another one talked about the "next available opportunity". I think that we just hope that the process will not drag on too long.

Joe FitzPatrick: There are two cases in relation to which we have not yet identified a suitable opportunity. Our aim is to use an opportunity when one arises. If we do not take that approach, we will end up using an instrument to address something extremely minor that does not appear to be having any effect on usability.

The Convener: I want to take us from subordinate legislation to legislation and bills.

The committee was pleased to note that, last year, slightly more than three quarters of its recommendations on delegated powers provisions were acceded to by the Scottish Government. Do you have any reflections on how you will implement or consider the recommendations that we will make on the significant number of bills that will be dealt with in the Parliament in the coming few months? That seems to represent a different kind of challenge, which is a significant one for both of us.

Joe FitzPatrick: Obviously, we always consider what this committee and other committees say in their stage 1 reports. At the end of a parliamentary session, we face a challenge in relation to time but we nevertheless value the input of this and other committees, so we need to consider how we can take account of any recommendations about the bills that are still going through Parliament.

The Convener: An on-going issue that we have previously discussed both within and outside the committee concerns the need to arrange the timetable so that there is space between stage 2 and stage 3. On occasion, there simply has not been enough time for us to consider the amendments that have been made at stage 2 and do anything meaningful before stage 3. You are well aware of the issue, minister. Can you reflect on what the Scottish Government is going to be doing in that regard over the next three months? I think that the standing orders might be changed in the fullness of time, but I am concerned about the coming period.

Joe FitzPatrick: The Standards, Procedures and Public Appointments Committee recommended that we should seek to allow 14 days between stages 2 and 3. We have been trying to do that, and have done so in most cases. There are rare occasions on which we do not manage to meet that target and even rarer occasions on which we have had to suspend the standing orders and introduce stage 3 even earlier.

If we are unable to meet the 14-day period, we must make this committee and others aware of that so that they can make arrangements around that. There will be a lot of pressure in the coming period. We are still trying to work to the 14-day target, in the main, but I think that it is likely that we will not be able to do so in relation to a couple of bills, and there might even be an occasion on which, in consultation with the relevant committee, we will not be able to ensure even a 10-day gap. We need to ensure that this and other relevant committees are aware of the discussions that we have had with the subject committees, so that you can plan your workload. I think that there was one occasion last year on which you felt the need to speak in the chamber at the start of stage 3 because you felt that we had not got that process right and had not given this committee the time to arrange its work programme so that you could properly consider instruments.

I hope that we are now in a much better place, and we will make sure that those communications happen so that there are no surprises. That is the big thing as we move forward. As we all know, we have a lot of work to do to finish the legislative programme, and if we can ensure that we share as much information as we can with you and other relevant committees, there will—I hope—be no surprises.

The Convener: That is good. Thank you.

John Scott: In order to reduce the element of surprise, then, can you tell us what the two bills are likely to be?

Joe FitzPatrick: We are still trying to aim for the 14 days, but we have had informal discussions with the Health and Sport Committee about one of its bills being a challenge. Obviously, it will depend on the time that is taken for stages 1 and 2, and not all of that is within our gift just now.

John Scott: So one of the bills might be a health one. What might the other one be?

Joe FitzPatrick: There are no specifics on this. What I am saying is that the specific timings are not entirely within our gift, because of the committee processes.

John Scott: Right. I am sorry, minister, but I do not find that answer entirely helpful. Can you not, in the interests of openness and transparency, just tell us what the bills are?

Joe FitzPatrick: In the interests of openness and transparency, I can tell you that we are aiming to work towards the 14 days. That is our target. In our discussions with the Health and Sport Committee, we have identified how it intends to schedule things, and there might be a problem with one of its bills. On the other hand, there might not be a problem, because it all depends on how long the earlier stages take. If stage 2 takes less time, that gives us a number of days, but in the worst-case scenario, there could be challenges. However, we will absolutely ensure that any relevant committees—of which this committee is one—are kept in the loop as circumstances arise.

John Scott: Forgive me for saying so, but as a member of this committee, I have to say that I am not aware of those challenges. Perhaps the people behind the scenes are.

Joe FitzPatrick: You would become aware of them if they were to arise.

John Scott: Thank you.

The Convener: Just before I leave the issue, I make the obvious point that delegated powers memoranda and supplementary delegated powers memoranda are absolutely crucial to our understanding of what is there. I simply make the request, which you will already be well aware of, that those memoranda are made available as soon as possible, regardless of the rules, to allow us to scrutinise what is being proposed for stage 2, possibly before it even happens, and to let us get ahead of the game.

Joe FitzPatrick: Absolutely. If it looks as though there is going to be particular pressure on a particular bill, the onus is on us to try even harder to ensure that you have that information in as good time as we can provide it.

The Convener: I believe that Stewart Stevenson wants to consider community empowerment et cetera.

Stewart Stevenson: Indeed, convener. I want to raise two topics with the minister, the first of which relates to three bills: the Community Empowerment (Scotland) Bill, the Land Reform (Scotland) Bill and the Burial and Cremation (Scotland) Bill. The general point is that the committee found the detail explaining a number of the powers in the bills to be insufficient. With the Land Reform (Scotland) Bill in particular, it was clear that the policy was still being developed, and that was the reason for the lack of explanation on the operation of powers. Without straying into policy matters, which are for other committees, can the minister assure us that we will see less of that in future, given that we do not regard that to be a particularly satisfactory way of proceeding?

Joe FitzPatrick: I certainly understand the committee's concerns about those bills and about members not always being able to scrutinise the detail of how legislation will be implemented. However, your concerns about framework bills are not new; in 1932, a UK Government committee reported on delegated powers in legislation and expressed many of the same concerns about excessive use of skeleton legislation, inadequate scrutiny in Parliament, lack of public consultation and loose definitions of what delegated powers could be used for.

That said, I think that there is a place for bills that provide an opportunity for policy to be developed. We recognise that there is a balance to be struck between clarity and detail and the level of scrutiny. However, there are a range of reasons why the flexibility that is offered by secondary legislation is valuable with regard to those three bills. The Community Empowerment (Scotland) Bill and the Land Reform (Scotland) Bill both contain framework elements.

10:45

Stewart Stevenson: Perhaps, after 83 years, we might have learned lessons from the Ramsay MacDonald Administration of 1932. Someone has whispered to me that Ramsay MacDonald was the Prime Minister at the time, but I am not sure that that is the case.

There is a serious point that I invite you to consider. One of the committee's duties is to look at whether legislation is compliant with the European convention on human rights. That takes us into the broader consideration of policy beyond simply the processes of secondary legislation or, indeed, of primary legislation. We should put on the record that we find it fundamentally difficult to give an informed opinion when the policy has yet to be developed. In a strict sense, we can say that there is nothing in the secondary legislation that would breach the ECHR, but we cannot say what

is going to come, and that is where the difficulty lies.

We recognise that the Government is responding to our concerns, particularly in relation to the Land Reform (Scotland) Bill, in respect of which there is a clear indication that some of the policy vacuums, if I may so describe them, are likely to be filled. However, the minister should note that we will continue, with the historical support of that committee report from 1932, to make that point whenever we need to do so. It would be interesting to hear from the minister whether there is more that the Government can do in this matter.

Joe FitzPatrick: We have welcomed the committee's views throughout the stage 1 process of the Land Reform (Scotland) Bill, and we have responded to those specifically. We take the committee's views very seriously and, wherever possible during the passage of that bill, our officials will provide further information to the Parliament on the detail that will potentially be contained in regulation. Consideration will be given to the Rural Affairs, Climate Change and Environment Committee's recommendations in its stage 1 report and the views that emerge during the stage 1 debate. We will also consider the practical implications of accepting the recommendations that are made or the amendments that are lodged by the committee ahead of stage 2. We are very much hearing the points that are being made, and we will try to address some of those as the bill goes ahead.

Stewart Stevenson: I move on to a second matter that relates to the Management of Offenders etc (Scotland) Act 2005 (Commencement No 8 and Consequential Provisions) Order 2015. The Government accepts that there are concerns—let us not make them absolutes—about the vires of whether the primary legislation grants the power to make the order in the form in which it has come forward. We understand that the Government intends to address the matter according to a timetable that will not compromise the implementation of the policy. We are satisfied with that. However, we have a technical concern, which we think is a matter of principle, that we would like to put to you. Although that piece of secondary legislation will never be acted on, the present procedure—it is a negative instrument—means that it will end up on the statute book as legislation, and we are quite strongly of the view that we should seek to remove it.

Joe FitzPatrick: We accept the vires point, and accepting the vires point means that the instrument does not exist, so it will not appear on any statute book.

Paul Cackette: The vires issue is a valid point. We sometimes get borderline vires issues, but in this case the wrong parliamentary procedure was used. That was drawn to our attention and we accepted that. As you say, that has led to technical difficulties, one of which is the fact that the instrument, in technical terms, does not exist because the wrong procedure was used.

It was assigned a number, but it will not appear in the published versions of the statute book in due course. You are quite right to identify it as a technical issue that creates a difficulty. The committee describing the circumstances of the instrument as unsatisfactory, and that is absolutely right: it is unsatisfactory. The challenge is in working out the best way to go forward in such a way that the concerns can be reconciled and a useful and helpful outcome can be achieved for the user.

The technical difficulty is in how to revoke an instrument that does not exist. That needs to be worked out. People have taken different views on that, but our approach has led us to two conclusions. The instruments that we intend to make to properly implement the policy using the proper procedures, which are a commencement order and a secondary legislation instrument using powers that can be used in this context, will legislate in identical terms to the instrument that was made using the wrong procedure. For the user, therefore, there is no risk of any ambiguity, inconsistency or doubt about the meaning of the instrument. From that point of view, the outcome is as good as it can be in unsatisfactory circumstances.

Given that we want to rectify the problem while keeping to the March date, the other issue is the question of how confusing it will be for the user of the statute book. If we now take forward a negative instrument that seeks to revoke the instrument that was made wrongly, that will probably make the same mistake as we made last time around. Should it be an affirmative instrument? If it is affirmative, it will come in later than the corrective instruments. It will also confuse the users because they will see an instrument that revokes something that does not exist and is not on the statute book. It might lead users to think that it revokes the corrective instrument that we are about to put on the statute books.

Joe FitzPatrick: The instrument does not exist so it cannot be revoked. That is the short answer.

Stewart Stevenson: So for clarity, and given that commencement order 8 will not exist, will the instrument that is brought forward to replace the non-existent instrument also be number 8?

Paul Cackette: The existing instrument number 8 is a consequential provisions order. Our

intention is to bring forward a commencement order, which will be the number 8 order. I emphasise that it will have a different name because of the way in which it is being done, but because the number 8 order never existed, our thinking is that the new order will be number 8.

Stewart Stevenson: So, it will appear as C 8 in the statute book.

Paul Cackette: Yes.

Stewart Stevenson: Even though the non-existent order appears under that nomenclature.

Paul Cackette: It will be C 8 but the instrument will have a different name.

Stewart Stevenson: Is putting it on the record at this meeting the process by which Parliament becomes aware that an order has never been made? In a sense, Parliament has been formally notified of the laying of this order, so how is it formally notified that an order was not laid? We need some clarity, minister.

Joe FitzPatrick: The circumstances are unusual, but we are making that point today. That might help, but we will need to consider whether there needs to be any other process.

Stewart Stevenson: Well, with the convener's consent, I suggest that a formal letter might help to put it on the record and give you time to consider. If the order is in the parliamentary record as having been laid, we need a formal parliamentary process to make it clear that it has not been laid.

Joe FitzPatrick: That is a helpful suggestion.

The Convener: I think that that is right. I am not sure that we need a formal parliamentary process, but we would like some parliamentary evidence. What you have just said will go into the *Official Report* and it makes some sense, but it might be that one side of a piece of paper could clarify thinking so that, in future, we all know what was said and what was meant. However, that explanation was helpful.

John Scott: I want to take you back to the previous series of questions about replacing policy as explained on the face of a bill by regulation. We are aware of three bills in which that has happened: the Community Empowerment (Scotland) Bill, the Land Reform (Scotland) Bill and the Burial and Cremation (Scotland) Bill. One event is an incident, two events are coincidence, but three events are a pattern. Does that essentially represent a different style or a different way of creating legislation by the Government? We would not necessarily want to see that approach.

Joe FitzPatrick: No. When I mentioned what was said in 1932, my point was that such bills are not something new. There are different reasons why those three bills were introduced in the way that they were. It was coincidence. There is no design or intention to legislate via framework as the default. Obviously, only some parts of the Burial and Cremation (Scotland) Bill—

John Scott: Forgive me for saying so, but it is beginning to appear that there is a pattern, given that three such bills have been created in that way.

Joe FitzPatrick: It is entirely coincidental that they came around at about the same time.

John Scott: There have been three coincidences. I suppose that we will not expect any more.

Joe FitzPatrick: There has definitely been no policy decision to use the framework as a way forward in introducing bills.

John Scott: That is clear—thank you.

The Convener: I find it fascinating that you quoted from 1932, which was shortly after a comprehensive rewriting of English land law, trustee law and all the rest in the previous decade. If ever we want an example of how things might be done properly, surely the 1925 legislation is the model.

Richard Baker (North East Scotland) (Lab): You will be aware, minister, that the committee has expressed concern about the inconsistency in the drafting of ancillary powers. That concern has arisen in relation to a number of bills, and it arose in the committee again quite recently. Obviously, we believe that, where the effect of the ancillary powers is intended to be the same, there should be consistency in drafting. We appreciate that the Scottish Government has been examining that issue, and it would be helpful to get an update from you on it.

Joe FitzPatrick: Yes. I am grateful for the opportunity to update the committee on work in that area.

The Government aims for consistency whenever that is appropriate. Consistency is helpful to drafters, to Parliament when bills are being scrutinised and, most important, to the end user. Work on the standard ancillary provisions section is nearing completion, and the Government will share that with the committee and other interested persons as soon as possible and certainly well before we adopt it. We plan to adopt the standard formulation for Government bills from the start of the next session, and we are well progressed on that. We will also share that with Scottish Law Commission drafters so that there is consistency in the bills that it brings forward, and with the Parliament's non-Government bills unit. I hope that we will have something that provides the

consistency that the committee is looking for in time for the start of the next session.

Richard Baker: So stakeholders are involved in that, but you are confident that you can work to that timescale to complete that work.

Joe FitzPatrick: Yes.

Richard Baker: At the beginning, you said that you would welcome our thoughts on Scottish Law Commission bills. I certainly think that the process through which the committee has taken on Scottish Law Commission bills has been very productive, and I am sure that other members of the committee agree that it has gone smoothly and has been productive. Given that we are coming to the end of our consideration of a second Scottish Law Commission bill, we would welcome your reflections on the process and how well it has worked so far.

Joe FitzPatrick: I think that the process has worked really well and that it has been one of the committee's successes, as I said in my opening remarks. There was a feeling that the Parliament was maybe not giving as much care to the law as it should have done. The Scottish Law Commission bill process is a very important part of that. We expect that, after the next election, whichever Government is in power, there is likely to be one such bill every year. That is roughly the rate at which the committee has progressed such bills, and that is a reasonable way forward.

Richard Baker: So, on that basis, you are already looking ahead at which bills could be brought forward in the next session of Parliament.

11:00

Joe FitzPatrick: That will help the Scottish Law Commission to ensure that its work is suitable for the parliamentary process. In the past, the commission has produced reports that sit on a bookshelf and get dusty, by which time it becomes too late to use them.

At some point, Parliament will need to consider the specific requirements for bills that come to the committee from the Scottish Law Commission. The requirements are quite tight and restrictive just now, so we might want to consider whether they can be relaxed to an extent in the next session of Parliament.

Richard Baker: I guess that that will be partially down to the new committee structures—whatever they are—that are brought into effect.

Joe FitzPatrick: I think so, yes.

Richard Baker: But it is fair to say that the Scottish Government, in looking at which bills might be brought forward in the next session, is taking advice from the commission on what it views as the priorities. The commission may have drafted some of the legislation a long time ago, so it may be on the edge of being relevant or it may be progressed if that is possible.

Joe FitzPatrick: We are working in partnership with the commission to ensure that its efforts are productive.

The Convener: That takes us neatly on to Stewart Stevenson.

Stewart Stevenson: I just want to correct something that I said previously. The Management of Offenders etc (Scotland) Act 2005 (Commencement No 8 and Consequential Provisions) Order 2015 would not necessarily be C 8—it would be C plus whatever the next number in the sequence is.

Paul Cackette: Sorry.

Stewart Stevenson: The numbers are allocated by commencement order in the year. In other words, it is not C 8—well, it might be.

Paul Cackette: That is correct.

Stewart Stevenson: I got that wrong. However, that is neither here nor there.

I want to ask the minister for his personal view, and that of the Government, on matters of parliamentary concern in relation to the committee. The committee is now dealing with Scottish Law Commission bills and consolidation bills. I wonder whether the minister, in addition to what he has already said about the committee's role in that respect, might wish to suggest to Parliament anything else that the committee might do, and to comment on what he thinks the result has been of those two additions to the committee's work.

Joe FitzPatrick: Obviously, specific committee remits are a matter for the next session of Parliament. The additional responsibilities that have come to the committee have been technical in nature and have complemented the skills of committee members, and that needs to be taken into account in considering whether to add anything different.

Given that additional powers are coming to the Parliament, it is very likely that the Parliamentary Bureau will have to look carefully in the next session at the range of responsibilities for all the different committees, including this one.

Stewart Stevenson: That will of course be a matter for Parliament and not for the Government.

This committee is one of the smaller ones. I wonder whether, given your interaction and that of your officials with the committee members, the fact that it is a smaller committee leads you to say anything in that regard.

Joe FitzPatrick: A decision was taken midway through the current session of Parliament to reduce the size of the committee because of other pressures in the Parliament with new committees being formed. I think that we were particularly lucky that the members of this committee were up to the job of taking on that additional responsibility when the number of committee members reduced. The committee has developed specialist skills over the piece, and the fact that its membership has remained relatively static is probably helpful in enabling it to carry out the additional functions while having fewer bodies with which to do so.

The Convener: I thank you, minister, and your colleagues for an interesting session, which I am just about to draw to a close.

I will make a couple of comments first. On the committee's remit, it would clearly be a concern if the bills that we were able to consider were defined by restrictions. Plainly they should be constrained, and I recognise that the rest of Parliament does not want us to go too widely into policy areas. However, it would not seem to be the right way forward simply to see restrictions every time that we look at bills that could come to the committee.

Secondly, I echo your comments about the stable membership of the committee. Having five members has worked fine, but it has worked because we have had a very stable membership. We have developed skills and been able to use them as a team.

With that, I thank my team and your team, minister, because I recognise that this has been a team game. That is how we make it work. Thank you for your evidence this morning.

I will suspend the meeting briefly.

11:05

Meeting suspended.

11:12

On resuming—

Bankruptcy (Scotland) Bill: Stage 1

The Convener: Under agenda item 3, the committee will consider the drafter's response to the committee's questions on consolidation in parts 15 to 18 of the Bankruptcy (Scotland) Bill and on the schedules to the bill.

Members have no comments to make. Does the committee agree that I should write to the drafter to follow up on his response in relation to the committee's questions on section 206 and paragraph 5(4) of schedule 1?

Members *indicated agreement.*

The Convener: Members have no other concerns to raise.

We come now to agenda item 4, which is to take oral evidence on the Bankruptcy (Scotland) Bill. I welcome David Menzies, the director of insolvency at the Institute of Chartered Accountants of Scotland—ICAS—and Rachel Grant, a member and former chair of the Scottish technical committee of R3, the Association of Business Recovery Professionals.

It occurs to me that Mr Menzies might pronounce his name as "Mingis". Could I clarify that, please?

David Menzies (Institute of Chartered Accountants of Scotland): Either is fine, but I would prefer the "Mingis" pronunciation.

The Convener: That is absolutely fine. As I said "Menzies", I wondered, and I thought that we should at least make sure that we refer to you correctly. John Mason will start the questioning.

John Mason: Thank you, convener. I should declare that I am a member of ICAS, so I will be particularly harsh in my questioning of Mr Menzies. [*Laughter*.]

In your submissions, both your organisations said that they support the consolidation of bankruptcy legislation. Could you make a few comments as to why you support it?

Rachel Grant (R3 Association of Business Recovery Professionals): We very much welcome the bill. Indeed, it is probably overdue. There have been so many changes to bankruptcy legislation since the big change that was introduced in 1985.

As a lawyer who works with the legislation on a daily basis, I believe that it is unwieldy. It is not particularly accessible to anybody who has to use it. We think that the consolidation bill is very

welcome. We are impressed with the work that has been done on it to produce what we view as a properly flowing bill. As always, there are different views on some of the stylistic and structural points, but there is nothing really substantive about the bill that causes us any concern.

11:15

David Menzies: As Rachel Grant says, the bill is long overdue. Thirty years of various bills and enactments have made the legislation unwieldy. It has lost a lot of coherence. From the point of view of a practitioner using it on a daily basis, I would say that it is difficult to work with. Without the commercial consolidations that have been done in various textbooks, it would be virtually impossible for practitioners to work with the legislation as it is. The opportunity to re-base it, to bring it all back into a coherent structure and to make it much more accessible and user friendly for practitioners is much welcomed.

John Mason: You both used the word "unwieldy". From my perspective, lawyers and accountants are used to dealing with complex law a lot of the time and looking at law in a lot of different places. Has this area of law been exceptionally difficult to deal with?

Rachel Grant: You have only to look at the Bankruptcy (Scotland) Act 1985 to see that it is very unwieldy. Having to find provisions named something like 5(A)(c)(ii)(d) makes it very difficult to follow. That is the first reason for consolidation—it sets things out in a proper, flowing way, with no duplication of capital letters and section numbers and so on.

The second reason is that the legislation has changed over the years. For example, recently, the Bankruptcy and Debt Advice (Scotland) Act 2014 introduced a specific requirement for a debtor to co-operate. There had always been a requirement to co-operate, but it was not spelled out. The current legislation has the duty to co-operate set out all over the place. If we pulled that together into one specific part of a new act, it would be easier for stakeholders to follow.

It is not just lawyers and insolvency practitioners—IPs—who deal with the legislation; it is also the general public, and it has to be accessible to them. I am not suggesting that everybody wants to sit down and read the acts, but they should not be exclusively for lawyers and accountants.

John Mason: Fair enough.

My next question is whether this is the right time to be doing a consolidation. If it should have been done earlier, we cannot do much about that. There is a suggestion in the ICAS submission that we have also had from other people, which is that there will need to be further amendments to bankruptcy law, so one obvious suggestion would be to wait a bit longer before we do a consolidation. Is this the right time to be doing it?

David Menzies: This probably is the right time to be doing it. Our last major piece of bankruptcy legislation was passed last year, and I understand that there are no intentions on the part of the Scottish Government to make further major amendments to bankruptcy legislation in the short term, so it probably is the right time. The legislation will never stand still, but it is now so unwieldy that it needs to be re-based, so that subsequent amendments can be made in a coherent manner.

John Mason: Has the 2014 act—being so recent—settled down enough for us to go ahead with the consolidation? Should we have given it a wee bit longer to settle down?

David Menzies: While there may be some smaller tweaks that might come through in due course, I do not think that that should prohibit the consolidation happening at this time. Some issues have certainly been identified with the legislation as now amended, around the common financial tool, and it is thought that it is perhaps too rigid. There are some issues around the ability of insolvency practitioners to deal with the debtor contribution order, and that would require a change to primary legislation. However, the overall benefit of amending the legislation now will outweigh any time delay that might be required to make those amendments.

John Mason: Is that your feeling too, Ms Grant?

Rachel Grant: Yes, I agree with that. The fact that new legislation dating from 2014 has just come into force this year makes it better to introduce the consolidation act now, simply because people have only started becoming familiar with the new legislation or perhaps are not even familiar with it yet. That means that there will be a one-stop shop, if you like, and people will just learn the new provisions and new section numbers. I think that that is a good idea and that the 2014 act should not delay the new bill coming into force.

John Mason: You talk about people learning new section numbers and so on. Paragraph 18 of the ICAS submission talks about some of the practical difficulties that will arise because section numbers will change. You say how that would affect

"publications, websites, work programme, template letters, software, compliance checklists and other documents".

That sounds a wee bit scary. Are we talking about serious costs as a result of consolidating the legislation?

David Menzies: It is difficult to estimate the costs, because each firm will have different degrees of publication. Some will not make specific legislative references but will instead deal with the generics. It is difficult to make a firm estimate of what the cost is likely to be, but I do not think that the cost will be prohibitive. Changes are always required, and that is just a fact of professional life that needs to be taken into account. At the same time, the overall benefit of having a coherent, accessible and usable piece of legislation far outweighs those one-off small costs that will be incurred.

John Mason: You have answered my next question. You are clear that the benefits outweigh the costs.

David Menzies: Absolutely. The very fact that the legislation will be much more accessible and coherent will undoubtedly outweigh any one-off costs.

John Mason: My final questions are about promoting the consolidation and telling people about it. Our two witnesses are obviously right at the centre of things and know exactly what is happening. However, Ms Grant said that some people are perhaps not familiar with the 2014 legislation. Should the Government or somebody else be doing more to promote the changes, explain them to people and say what is happening?

Rachel Grant: The principal users of the legislation, who will be insolvency practitioners, other advisers and lawyers, will be able to promote the changes. They are not changes in substance at all; they are just changes in the structure of the legislation. The general public are more interested in the concepts and the substance of the law, rather than whether apparent insolvency is under section 7, as at present, or under whatever the new section is—I am afraid that I do not know off the top of my head.

My experience from advising people is that nobody is interested in section numbers; they just want to know what the law is. I suspect that the same is true for insolvency practitioners who have to deal with people in financial difficulty. It is not the numbers that are important; it is what the law actually says.

David Menzies: I do not have much to add to that. The profession will undoubtedly promote the consolidation bill. The Accountant in Bankruptcy, as the agency working on behalf of the Government, has very good channels of communication not only with the profession but with money advisers through the citizens advice bureaux and Money Advice Scotland. The word will get out to those who need to know it on a daily basis.

Rachel Grant: R3's technical committees are really what drives R3. Recently, when there were changes in corporate legislation, we issued technical bulletins highlighting the changes in what we hope was an easily understood manner for our members. We will certainly do something similar if the bill becomes law. That is part of R3's remit.

The Convener: Before I bring in John Scott, who wants to discuss the structure of the bill, I want to ask about its scope. Will you expand on whether the debt arrangement scheme should or should not be within the scope of the consolidation? I think that our witnesses might have slightly different views on that.

Rachel Grant: In summary, R3's view is that we do not believe that DAS should be included at this stage, but it could be included in future if that was thought to be appropriate. We believe that, if DAS were included, work would be required to go through the existing act and regulations to determine what should properly be in primary legislation and what should remain in the regulations. That is an exercise that I understand has not yet been done. Our concern is that that might delay the bringing into force of the consolidation act.

We see DAS as a separate procedure, if you like, and quite distinct from sequestration and protected trust deeds. There is clearly an overlap in that all three of those are designed to assist people who are in financial difficulty. DAS is primarily a debt restructuring tool, although it has a small amount of debt relief in it, whereas sequestration and protected trust deeds are primarily debt-relief tools.

Another point that we would make is that DAS was introduced in 2002 and it has its own distinct act and regulations—in effect it stands alone—whereas sequestration and trust deeds have been around for hundreds of years, although not in their present form. Their legislation is unwieldy and is based not just on the legislation but on quite a body of case law.

For those reasons, we think that the act as it stands is correct. We do not have any objections to DAS being included, but we would be concerned that introducing DAS now might delay the bill coming into force.

David Menzies: I think it is fair to say that our view differs slightly, but only in terms of the timing. As Rachel Grant said, R3 is potentially supportive of including DAS in the future. Our view in ICAS is that, as we are going through the procedure of consolidating legislation in relation to bankruptcy

now, this would be an opportune time to bring the debt arrangement scheme into that.

Some people say that DAS is a different scheme—it is not meant for bankrupts. The Bankruptcy (Scotland) Act 1985 is quite clear that it is about people who are unable to pay their debts, but in some ways that is also what the debt arrangement scheme is about. It is for people who cannot pay their debts at the time that they fall due. While the mechanics of the debt arrangement scheme are somewhat different in relation to the estate—the assets are not transferred across and controlled by a trustee—the end product is substantially the same. It is about debt relief and relieving people of those pressures when they have them.

A lot of harmonisation has been carried out between the debt arrangement scheme, bankruptcy and trust deeds as a matter of Government policy over the past few years, which is very evident in the Bankruptcy and Debt Advice (Scotland) Act 2014. That has brought together mandatory debt advice, all debts have to be included in all three procedures, the moratorium covers all three procedures, and the use of money advisers, the common financial tool and the Accountant in Bankruptcy's role are common across all procedures. It therefore seems to us that it would be better, for money advisers and for users of the legislation, for all that to be within the one piece of legislation.

That is not to say that having it in two separate pieces of legislation is detrimental. At the end of the day, professional advisers would be able to work with that, but we think that it would make more sense to have all three procedures within the one piece of legislation. Practitioners are now advised, as part of mandatory debt advice, that they have to consider all three options for the debtor.

In the written evidence that I submitted to the committee, I provided an example of a debtor who did not have much in the way of assets, but who was able to make a contribution. In that case, all three procedures were equally applicable. Therefore, it seems appropriate for all of that to be within the one piece of legislation.

The Convener: I am grateful for that. It suggests that maybe, if we were sitting here in 10 or 15 years' time, doing it again, we might be asking the same question and expecting the legislation all to be in one place. Perhaps by then it will all have been amended a bit more and it will all need consolidating.

David Menzies: I suspect so.

Rachel Grant: If I may, I will make the point that the bankruptcy legislation as it stands, and as it is set out in the bill, covers a lot more than the options open to a debtor. The bankruptcy legislation is also available for creditors; that does not apply to DAS. The whole structure is quite fundamentally different in that, as David Menzies said, with sequestration and, to an extent, with protected trust deeds, assets are transferred to a trustee. In effect, the trustee takes control of the debtor's assets—it is quite a draconian measure—whereas with debt arrangement, the debtor remains in control of his assets.

The provisions in the 1985 act and in the bill deal with the impact of that transfer of assets from a debtor to a trustee. A lot of the bankruptcy law would be irrelevant to DAS, so I question whether it would make life easier for those who advise on DAS to have to look at a bankruptcy bill that includes everything. If DAS were to be included, we suggest that it should perhaps be in a separate schedule or something like that.

11:30

The Convener: That is helpful. Let us leave that there.

John, I believe that you want to consider the structure of the bill.

John Scott: As we seem to be talking about rearranging the cards in the pack, so to speak, I think that both of your submissions suggest a number of ways in which the bill could be restructured. Will you expand, in general terms, on why the bill needs to be restructured in those ways and what challenges those using the legislation would face if the bill retained its current structure?

Rachel Grant: As stated by the drafters and the Government, the bill's aim is to have a properly flowing, logical and user-friendly piece of legislation. The bill follows the traditional 1985 act structure, which, although familiar to people like us who have been using it for a long time, is no longer necessarily the logical way to approach things. Over the past 30 years, there have been quite substantial developments in the law, and we suggest that it makes sense to change the structure to take account of those developments and follow a chronological sequence of events, starting off with the decision whether to enter bankruptcy or, for a creditor, to take bankruptcy proceedings, through to the appointment of a trustee, the role of the trustee and, finally, payment of creditors.

ICAS has set out quite a lot of useful examples. By way of example, I would mention section 209 in the bill, which relates to extortionate credit transactions. We think that it would be better to include that in part 7, on safeguarding the interests of creditors. There are various sections in the bill in which trustees can challenge a debtor's actions,

and extortionate credit transactions would sit very well in part 7.

Another example would be the duty to co-operate which, as I mentioned earlier, was introduced in 2014 and is now quite fundamental to the legislation. That duty could be put in a specific section on the debtor's responsibilities and, in that respect, we suggest part 9, which deals with examination of a debtor. Logically, you put the duty on the debtor to co-operate; if he does so, that is fine, but if not, the trustee can take various steps, such as having the debtor examined under oath in court.

A final example is apparent insolvency, which is a concept in sequestration—in fact, it is the gateway to sequestration. As a creditor who petitions for sequestration cannot get it unless they can establish apparent insolvency, it makes sense to put that at the beginning, given that it is fundamental to sequestration.

A moratorium on diligence is fundamental, as it has an impact on all sequestrations right at the beginning of the process when the applications are being made. Again, therefore, it would seem sensible to put that at the beginning. It would be an exercise for the drafters, but I do not think that it would be a particularly difficult one for them.

John Scott: Are you both content that such a reshuffling of the pack, as it were, would provide a more reasonable approach to the problems?

David Menzies: Absolutely. The drafters have done a good job in, for instance, moving the Accountant in Bankruptcy's remit slightly further into the bill instead of having it as the first thing in the legislation. That is helpful as it gets us right to the nub of the issue and ensures that the things that people who use the legislation day to day want to know are right at the beginning of the bill.

As Rachel Grant has said, other things could be shuffled slightly differently. That is not to say that where they are just now is not valid, but from a practitioner's point of view, moving some stuff from the part entitled "Miscellaneous" into the main body of the bill would provide coherency and be extremely beneficial.

The Convener: I think that John Scott's other questions might well have been answered.

John Scott: Yes. The witnesses must be psychic—they have answered my questions before I asked them. Thank you.

Rachel Grant: I omitted to mention a quite important change to the structure that we have suggested, although it is not fundamental and it would not be disastrous if the change were not made. Interpretation sections traditionally come at the end of legislation. When I look at a piece of legislation with which I am not familiar, I always read the interpretation section first. It seemed to us logical to break with tradition and put the interpretation section at the start, as it would set the whole bill in context.

Doing that might avoid the need for some of the extra definitions that are scattered throughout the bill. Sometimes we need specific definitions for specific sections, but in general we think that, if the interpretation section were at the start, separate definitions could be avoided and the length of the act could be cut down, making it a bit more user friendly.

The Convener: Thank you.

Richard Baker: I have a question for Rachel Grant. The R3 submission expresses concern about inconsistency in the language used, in particular the terms "forthwith" and "without delay". The committee, too, identified that as an issue. Will you expand on your concerns in that regard? Are there other inconsistencies in language that you would want to highlight?

Rachel Grant: "Forthwith" has been used in bankruptcy legislation for a long time, and people who operate in the area understand what it means. There is a huge body of case law in that regard, and there have been many disputes over the years about what "forthwith" means. For that reason, we are in favour of keeping the term, although we accept that it is slightly archaic. As far as I am aware, it does not cause huge problems for anyone other than lawyers. People get what it means.

Richard Baker: You think that people understand how it is interpreted, so, in that sense, it is a robust term.

Rachel Grant: That is right. In general, we think that, for clarity, the same terms should be used throughout the legislation. I have read some of the comments that have been made about that. For example, in one subsection the word "obligant" is used and in the next the word "co-obligant" is used. The language needs to be tidied up.

We also have concerns about the use of abbreviations that are not helpful and do not aid understanding at all. We suggest, therefore, that abbreviations be removed, with the exception of AIB, which is well known to mean the Accountant in Bankruptcy, and perhaps PTD, which stands for protected trust deed. Other shorthands such as "OC" for other creditor—and sometimes any other creditor—just add to the complexities.

The third point that I was asked to comment on was the question of actions falling asleep. Perhaps that just indicates what the law does to people.

Richard Baker: No, we are very alert.

Rachel Grant: Section 27(12), which is a carry-over from the 1985 act, says:

"Where sequestration has been awarded the process of sequestration is not to fall asleep."

Falling asleep means that if something has not happened with a piece of litigation for a year and any party to that litigation wants to take action, they have to give more than the normal period of notice. For example, if a person wants to enrol a motion in court, the usual notice period is 24 or 36 hours or possibly seven days; with actions that have fallen asleep, there will have to be a longer period of notice to give people the opportunity to think about things.

The concept of falling asleep was repealed in the sheriff courts in 1907, but it continued in the Court of Session for a longer period. More recently, however, the concept of falling asleep has been updated to refer to a case in which no order has been made for a period of a year. I realise that I am giving you a bit of a history lesson here, but I should point out that, when the 1985 act was drafted, the Court of Session and the sheriff court could deal with sequestrations. Now that only the sheriff court can do so, the concept is not relevant.

I do not know whether, in a consolidation bill, that provision could be deleted. It certainly has no role in legislation at the moment.

Richard Baker: Highlighting those points has been very helpful, and I hope that ministers take note of them as the bill progresses.

I see that Mr Menzies has also raised the same concerns about the use of the phrase "fall asleep" that Rachel Grant has outlined.

David Menzies: Yes. I am grateful to Rachel Grant for her knowledge of history, which is more extensive than I am able to provide. Suffice it to say that none of our insolvency practitioners was familiar with the concept of something falling asleep.

Richard Baker: The point is well made.

I note that you, too, are concerned about abbreviations, Mr Menzies.

David Menzies: Yes. Although abbreviations can be valid in certain circumstances, we do not feel that they add to the legislation's understandability or usability. Perhaps it is to do with familiarity with the current legislation. In particular, we feel that the definition of "associate" with reference to persons A through to K to highlight different people or complexities in relationships is simply too unwieldy to use on a practical basis.

Richard Baker: Given that the intention is to make the legislation more user friendly, that would seem to defeat the purpose.

David Menzies: Absolutely.

Richard Baker: Those very helpful comments will help our deliberations, and we hope that they will be noted by the Government, too.

The Convener: That brings us to the end of our questions. On the issue of abbreviations, am I right to distil what I think you have said as meaning that you are very happy for an abbreviation to be used if it is standard outside the legislation, as AIB would be, but that you are not very happy with abbreviations being put into the legislation otherwise?

David Menzies: That is correct. As Rachel Grant has said, the terms AIB and PTD are well understood and are fine. Beyond that, though, abbreviations are unhelpful.

The Convener: Is there anything else that you would like to put on the record? What you have said so far has been very helpful, but I would not want you to feel that you have not had the opportunity to add anything that we might have missed.

David Menzies: Nothing in particular, other than to say that we support the bill's principles and are grateful for the opportunity to provide evidence.

The Convener: Thank you for providing that evidence, which is much appreciated.

I briefly suspend the meeting.

11:44

Meeting suspended.

11:47

On resuming—

The Convener: Agenda item 5 is consideration of the draft section 104 order that has been provided to the committee and provisions that relate to or touch on the law on reserved matters that are restated in the Bankruptcy (Scotland) Bill. As the bill restates certain provisions of the Bankruptcy (Scotland) Act 1985 that have remained substantially unchanged since they were enacted by the Westminster Parliament, some provisions will not have been subject to scrutiny by the Scottish Parliament, including an assessment of compatibility with the European convention on human rights. The Presiding Officer and the Scottish Government have issued statements of their views on the legislative competence of the bill's provisions, as required by section 31 of the Scotland Act 1998.

Does the committee wish to ask the Scottish Government about its approach to assessing the compliance of the bill's provisions with the convention?

Members *indicated agreement.*

The Convener: Agenda item 6 relates, yet again, to the Bankruptcy (Scotland) Bill, but in this item, the committee is invited to consider the written evidence that has been received in response to the committee's call for evidence on the bill. We have just heard from two of the organisations that responded to our call. If members have no comments on the responses that we have received, can we agree that we are comfortable with the evidence?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

Microchipping of Dogs (Scotland) Regulations 2016 [Draft]

11:49

The Convener: No points have been raised by our legal advisers on the draft regulations, but members might wish to note that it has been withdrawn and relaid twice, first, because of an inadvertent failure identified by the Scottish Government to address certain minor drafting changes prior to laying and second, in order to address points made by the committee's legal advisers in correspondence, which is an issue that we discussed with the minister this morning. Is the committee content with the instrument?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Children and Young People (Scotland) Act 2014 (Commencement No 10 and Saving Provision) Order 2015 (SSI 2015/406)

11:49

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

Members *indicated agreement.*

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No 4) (Protective Expenses Orders) 2015 (SSI 2015/408)

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

Members *indicated agreement.*

Prisoners (Control of Release) (Scotland) Act 2015 (Commencement) Order 2015 (SSI 2015/409)

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

Members *indicated agreement.*

Procurement Reform (Scotland) Act 2014 (Commencement No 2) Order 2015 (SSI 2015/411)

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

Members *indicated agreement.*

Mental Health (Scotland) Act 2015 (Commencement No 2) Order 2015 (SSI 2015/417)

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

11:50

The Convener: Agenda item 9 is consideration of correspondence from the Minister for Environment, Climate Change and Land Reform in response to the committee's concerns on the delegated powers provisions in the Land Reform (Scotland) Bill. Do members wish to make any comments?

John Scott: I welcome the fact that, with regard to sections 36, 79, 82 and 83, the Government is moving more towards the position that we asked it to move to. However, I am still concerned that the committee does not seem to be making much progress on section 35, with regard to which the Government still has real questions to address. We would also like the Government to do more work on proposed new section 38M to the Agricultural Holdings (Scotland) Act 2003, as inserted by section 81 of the bill, and I hope that it will still have a change of heart in that regard.

The Convener: I note that we have the stage 1 debate on the bill later this week, and I wonder whether the committee agrees that I do what I can to speak in that debate as the convener of this committee and express those concerns in terms that I am sure will be well put together by our advisers. Of course, whether or not I speak is in the gift of the Presiding Officer.

John Scott: I would very much welcome it if you were able to address Parliament as convener of this committee, given that so much of the work that the Government needs to do relates to detail on which it is entirely appropriate for this committee not just to form a view but to express that view in the public forum of a stage 1 debate. As we know, there is still too much uncertainty about the development of policy in the bill and about policy essentially being replaced by regulation that will be introduced subsequently. I hope—indeed, I am certain—that you will manage to encapsulate those views and the other views that the committee has expressed.

As we said this morning when we were questioning the minister, we do not want this to become a trend in Government legislation, but it appears that it is becoming a trend by default. Having a lack of policy development in a bill and leaving things to subsequent regulation are not good ways of creating legislation, because, as we all know, such an approach is not subject to the same level of scrutiny as provisions that are on the face of a bill. It is vital that we have that in a bill such as this and, indeed, in other pieces of legislation that have very far-reaching consequences.

The Convener: Thank you for that.

John Mason: Clearly we are not touching on the policy areas, but I should say that there is quite a lot of public interest in the bill. Some people feel that the bill is too strong, while constituents have been in touch with me to say that it is too weak in its approach to land reform. The reality is that when we look at some of the bill we just do not know what impact it will have, because so much has been left to secondary legislation. I very much support the idea that as much as possible should be on the face of the bill, and I would be very glad if you could say so in the stage 1 debate.

The Convener: Indeed. That seems to be the committee's view, and I will endeavour to do that.

John Scott: I should add, convener, that there are also concerns about the bill's compatibility with the ECHR. We can accept in good faith the Government's assurances that it will subsequently do everything it can to make the bill ECHR-compatible, but as it stands, it is far from certain that the bill is, and we will very much want to hear in the stage 1 debate the Government's views on how the proposals, which, as I have said, are welcome, are going to deliver that compatibility.

The Convener: Indeed.

That concludes agenda item 9, and we now move into private session.

11:55

Meeting continued in private until 12:37.

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