OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 18 April 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 18 April 2017

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DELEGATED POWERS AND LAW REFORM COMMITTEE

12th Meeting 2017, Session 5

CONVENER

*John Scott (Ayr) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

Alison Harris (Central Scotland) (Con)
*Monica Lennon (Central Scotland) (Lab)
*David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Hew Dundas

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 18 April 2017

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (John Scott): I welcome members to the 12th meeting in 2017 of the Delegated Powers and Law Reform Committee. We have received apologies from Alison Harris.

Agenda item 1 is a decision on taking business in private. It is proposed that the committee takes in private item 6, which is consideration of a draft report on the Child Poverty (Scotland) Bill. Does the committee agree to consider agenda item 6 in private?

Members *indicated agreement.*

Contract (Third Party Rights) (Scotland) Bill: Stage 1

The Convener: The next item is our third session of oral evidence on the Contract (Third Party Rights) (Scotland) Bill at stage 1. We welcome Hew Dundas, honorary vice-president at the Scottish Arbitration Centre. Good morning, Mr Dundas, and thank you for taking the time to come and give evidence today.

My first question is about the move from common law to a statutory footing. The bill team and the Scottish Law Commission have indicated that case law is unlikely to develop quickly enough to deal with the problems identified in the law and that statutory rules are needed. Will you outline your views on the need for statutory rules for contract third-party rights?

Hew Dundas: I had a quick look at Gloag and Henderson's "The Law of Scotland" over the weekend and I see that cases are quoted back to 1861 relating to jus quaesitum tertio. In 21st century Scotland, we genuinely do not want ancient case references still to apply, because they were decided in a different world and different legal circumstances, and they often have little to do with the modern world. In the run-up to the Arbitration (Scotland) Act 2010, we could go back to case history from the year 1208. Such ancient cases do little for Scotland's reputation as an international jurisdiction.

The Convener: Good, and so now is the time to do this.

Stuart McMillan (Greenock and Inverclyde) (SNP): We understand that, under the current law, a third party would not be a party to an arbitration agreement unless that was expressly dealt with in the contract. Do you agree with our understanding? If so, can you explain what the impact is on third parties?

Hew Dundas: Yes, I agree. That is as stated in Gloag and Henderson and has been the position in Scots law for centuries. To explain the impact, let us step back a little. If parties have entered into an arbitration agreement so as to avoid the courts, that was their choice in making their contract. If circumstances then arise in which a third party becomes entitled to certain rights under that contract and is not caught by the arbitration agreement, there is a big loophole in the system. Therefore, it is essential that the bill substantially brings the third party in, as it does, under the arbitration agreement.

An important additional point—let us forget the third party bit for a moment—is that if two parties have an arbitration agreement and one starts court proceedings, then, under the Arbitration (Scotland)

Act 2010, a complete defence to the litigation is to say, "Mr Judge—your honour, my lord—here is the arbitration agreement," and the judge is obliged to sist the litigation. It is necessary that substantially the same should apply to the third party: it has inherited some rights under the contract and so those were and are subject to the arbitration agreement.

That has particular significance if one is dealing with foreign parties, because courts worldwide are obliged to stay, as it is called in England, or sist, as it is called in Scotland—other terms are used elsewhere—litigation in the face of an arbitration agreement. One could, therefore, imagine a third party from, say, Kazakhstan wandering off to the Kazakh courts on a purely Scots matter, because it has acquired some third-party rights under a particular contract. If the foreign party is tied into the arbitration agreement, it cannot litigate on a worldwide basis.

Stuart McMillan: Do you agree with the SLC's suggestion that it would be beneficial for all disputes that arise from a contract to be decided in one forum? If so, can you explain the advantages of such an approach?

Hew Dundas: Let me give you a little example of what the worst-case scenario might be. In, I think, 2001, an oil tanker crashed into an oil refinery jetty in southern Italy. The contract between the oil company and the refinery company included a London arbitration agreement; the Italian insurers paid out $26 million for damage to the jetty and commenced legal proceedings in a district court in southern Italy in breach of the arbitration agreement. Their argument was that under Italian law the insurer did not become party to the agreement; however, in English law, through a process called subrogation, the insurer steps into the shoes of the assured with regard to both the rights to pursue the oil company for damaging the jetty and the obligations to comply with the arbitration agreement.

In that disaster scenario, therefore, there was parallel arbitration in London and litigation in southern Italy. The arbitration in London finished ages ago; in Italy, however, the case was filed in 2002 and, 15 years later, there has still been no substantive hearing. That sort of parallel dispute resolution must be avoided; it is time consuming and immensely expensive and there is a serious risk of completely contradictory outcomes. There is a Scottish case from the early 1920s in which the judge said that if parties have agreed to arbitration, they shall go to arbitration. It is a fundamental principle.

The Convener: And this piece of legislation will cover all such eventualities.

Hew Dundas: It will substantially cover them. I am not persuaded that it will cover the Italian insurer case, but it is possible to achieve that end. My understanding of Scots law is that it is not as clear in this area as the law in England is.

The Convener: Would you like to develop that theme with regard to this bill? We have discussed with other witnesses the clarity and directness of the English legislation that has been in force since 1999. Others have suggested that this is perhaps a more subtle piece of legislation. Would you care to comment on that view?

Hew Dundas: In England, insurance law, including the principle of subrogation, dates back to the Marine Insurance Act 1906—and possibly beyond that; I cannot remember what its predecessor was called. In England, the Contracts (Rights of Third Parties) Act 1999 had no need to address that area, because it was already well covered in insurance statute dating back nearly a century.

As we have no equivalent of the 1906 act, we do not have the statutory certainty that the insurer becomes party to the arbitration agreement if it has paid out on the claim from the assured. It might be possible that we get there through application of common-law principles, but my reading, and my colleague's reading, is that that is not clear. It will be possible to make it so in a few lines in the bill; it is not a difficult principle.

The Convener: So the bill is a welcome step in the right direction, at the very least.

Hew Dundas: Yes. The bill is almost there, and a little fine tuning could dot all the i's, cross all the t's, tie up the loose ends and close the loopholes.

The Convener: Have you made specific suggestions in that regard, or do you want to make suggestions now?

Hew Dundas: My colleague and I would be delighted to come up with a proposal for some drafting, but my understanding of the procedure is that the principles are put forward, through your good selves, to the parliamentary draftsman, and he or she comes up with the drafting. We are happy to make a suggestion as to drafting; equally, we are happy to leave the principle for the parliamentary draftsman to address.

Stuart McMillan: You are absolutely correct in relation to stage 1 of the bill, Mr Dundas, but on previous committees that I have been a member of, external organisations have suggested amended wording or new provisions. If you and others submitted such suggestions, that would be advantageous for the committee in its consideration of the bill at stage 2 and for the Parliament at stage 3.

Hew Dundas: We will be happy to oblige. Some of the drafting in the Arbitration (Scotland) Act 2010 is very familiar to me, for a reason that you can guess.

Stuart McMillan: Thank you.

Monica Lennon (Central Scotland) (Lab): Mr Dundas, in your written submission you said that the bill will bring advantages for businesses that trade across the United Kingdom, because it will bring Scots law closer to English law. You also said:

"this could be beneficial in relation to family law matters."

Can you expand on that?

Hew Dundas: I am afraid that I cannot; I am not a family lawyer. However, in both England and Scotland arbitration in family law is developing. Historically, arbitrators like me have been excluded from that area, along with matrimonial law and all those areas, but, with family law arbitration gaining ground north and south of the border, it seems self-evident that the equivalent legislation should be very closely in step.

Monica Lennon: You also said that there would be advantages for businesses that trade across the UK.

Hew Dundas: There are advantages to harmony. In a related context, there was a case some years ago in which the question was whether the Scottish courts or the English courts had jurisdiction. In English law, there is a limitation of six years, whereas in Scots law it is five years, and the claims were not lodged until the sixth year. If the Scottish courts had jurisdiction, the claims were time barred; if the English courts had jurisdiction, they were still valid. In the present context, it would be unfortunate if we tripped up on a difference in principle between English and Scottish legislation, given that there is such a high volume of common trade.

Monica Lennon: Thank you for that useful clarification.

Hew Dundas: As some people around the table might be aware, the Arbitration (Scotland) Act 2010 was largely, although not completely, derived from the Arbitration Act 1996, which is applicable in England, for exactly the same reason. Apart from some significant improvements that we made in 2009 and 2010, the legislation is substantially similar north and south of the border, which gives businesses that trade on both sides of the River Tweed—I should say, the border—the advantage of a substantially common legislative environment.

In the same regard, the adjudicatory process for construction is virtually identical north and south of the border, because the same legislation applies in both jurisdictions, as you might have heard.

Monica Lennon: Thank you. Will the bill benefit arbitration in Scotland more generally? Will it make it more likely for the Scottish arbitration rules to be used in contracts?

10:15

Hew Dundas: That is possible, but the circumstances that we are considering, in which third parties suddenly appear, acquire rights under a contract and therefore acquire rights to arbitration or obligations to arbitrate, are relatively rare in practice and, given that the volume of Scottish arbitration is growing but is still relatively small, it is unlikely that there will be any visible outcome in that regard in the immediate future. However, the point is less about having an explosion of third-party arbitration cases to keep the Scottish Arbitration Centre busy; to me, the point is to close off the uncertainties of the old jus quaesitum tertio rule and to replace it with a statutory framework to prevent strange things from happening in the future.

The Convener: I want to go back to the impact of the proposals. In its written evidence, the Scottish Law Commission suggested that the new rules will not cover all eventualities, and it recommended that arbitration clauses should expressly deal with third-party disputes. Do you agree with that view?

Hew Dundas: Yes. I was legal head of a well-known Scottish oil company. If we were in circumstances that involved a potential third-party right, self-evidently—the same would apply to other areas of the contract—we would have drafted appropriately in the circumstance. It would be not quite negligent, but nearly negligent to import a standard arbitration agreement from a different contract between two parties into a contract with a potential role for a third party.

The Convener: In that case, is there not an argument that there is no need for statutory rules?

Hew Dundas: There is a need for statutory rules because of the uncertainties and the antiquity of the existing common law of jus quaesitum tertio. As I have said, I get very uncomfortable when I see a reference to a case in which the first two digits are 1 and 8.

David Torrance (Kirkcaldy) (SNP): Good morning, Mr Dundas. On the operation of sections 9(2) and 9(3) of the bill, we understand that section 9(2) is meant to allow disputes about a third-party right arising from the contract to be dealt with by arbitration. Can you outline how that section will work in practice and give examples of the types of disputes that it might cover?

Hew Dundas: The examples that are given in the leading textbook on the common law are

curious ones in that, in my experience at least, they rarely happen in practice. However, I come from the oil business, and I can imagine circumstances in which, in oilfield construction contracts, there might be at least a three-way relationship between the oil company, the construction company and the construction company's subcontractors. On a small point of clarification, the oil industry is substantially exempt from the adjudication process that arrives in the onshore construction industry.

That is a major way in which the provisions might apply and do not at the moment.

You might have heard from Mr Connal QC that substantially all construction disputes these days are covered by the adjudication process under the Housing Grants, Construction and Regeneration Act 1996. However, it is perhaps relevant to bear in mind that the adjudicatory process in that legislation is to provide a temporary decision that is binding until it is superseded by litigation or arbitration. In those instances, the arbitration provisions of the bill will potentially kick in to deal with the arbitration that flows out of an adjudication.

David Torrance: Will you outline how you envisage section 9(3) will work in practice where the dispute relates to non-contractual rights?

Hew Dundas: When the rights between the two parties to the contract are solely contractual, an example of a difficulty can be if a delictual matter arises. That could also apply if a third party is involved in the network. That is one area in which I think the bill could be a benefit.

The Convener: As there are no more questions on that subject, Monica Lennon will ask some questions.

Monica Lennon: Drafting was touched on. You and the Faculty of Advocates have indicated that the drafting of section 9 is not ideal. What are the drafting problems and how might the drafting be improved?

Hew Dundas: I understand that my colleague, who—unfortunately—could not join me today, was substantially involved in drafting that part of the faculty's response. The difference boils down to the fact that section 1 looks at the substantive rights of the parties, whereas section 9 is, in the view of the faculty—we agree with it—slightly confused between the substantive rights of the parties and the procedural rights. The drafting changes that the faculty has proposed would eliminate any confusion, so that substantive rights were dealt with through the bill in section 1 onwards and procedural rights were covered by section 9 as a separate matter but not otherwise covered in the bill.

My other small observation is that the faculty's proposal would substantially simplify the drafting. As you can see, it would involve some deletions but, when I reprinted the provisions yesterday with the deletions made, I saw that the position becomes a lot clearer as well as more accurately recording the principles that the Scottish Law Commission reached.

Monica Lennon: Do you have any other comments to make on the faculty's written evidence and its suggestions?

Hew Dundas: I re-read the faculty's submission last night and this morning and, although I must confess that I have not paid intense attention to the rest of the bill, I thought that the submission was strong. One of the faculty's previous comments that have been taken into account is that a previous draft of the bill, which it commented on in October, did not completely close off the old common law of jus quaesitum tertio. Section 12 now expressly abolishes the old and antiquated common law in that area. At least that excellent suggestion by the faculty has—commendably—been taken on board and the uncertainty has been removed. As an aside, on 1 January this year, the equivalent abolishment took place in relation to arbitration in Scotland, which removed the possible application of ancient law.

Stuart McMillan: In your written evidence, you explain that the bill complies with article 6 of the European convention on human rights, which is on the right to a fair trial, as it gives third parties a choice of using arbitration. Would you like to expand on that? Do you have any further comments on that?

Hew Dundas: Briefly, article 6 gives parties to civil disputes what appears to be an absolute right to have their dispute determined by an independent and impartial tribunal in public. Arbitration is in private, and the European Court of Justice has repeatedly accepted that some parts of article 6 can be derogated from by the parties by agreement. The right to a public hearing is part of that, but the right to an independent and impartial tribunal cannot be derogated from, and I do not imagine that that will change. We could imagine that parties could agree to go to a completely biased and one-sided tribunal, but you cannot have that in any form of dispute resolution.

What I said applies when the parties have voluntarily agreed to an arbitration agreement. However, there can be problems when parties are forced into arbitration by the application of statute. That has been tested in cases in the European Court of Justice. It is reasonably common in, for example, the medical professions, the dental professions and some teaching professions around the European Union for disputes between the individual and his professional association to

go to arbitration as a matter of statute. Those cases have caused difficulty. We have certain statutory arbitrations here in Scotland—agricultural holdings legislation is one area that has its own scheme—and the ECJ might object to them at a future date.

The idea of a party becoming party to an arbitration agreement is on the face of it consistent with the application of article 6 and in particular the derogation that the European Court of Justice has already permitted. To put that in example form, if parties A and B are engaging in a contract and party C is to have some rights under it, and if A and B have made an arbitration agreement, it is in principle self-evident that party C, which might benefit from the contract, should also be subject to that arbitration agreement. If party C will not countenance arbitration and is not prepared to follow the dispute resolution provisions in that contract, it is open to question whether it should be permitted to acquire any rights at all under the contract. That goes back to the insurance example, where an English law insurer steps into the shoes of the assured. The same applies to motor claims. If someone is rear-ended by a truck on the A90 or M90, their insurer pays out to them and can then sue the road haulage company, and it will become subject to any arbitration agreement.

The Convener: Given the complexity of agricultural law and the arbitration process therein, we have had difficulty in the past in being ECHR compliant with legislation. Do you see any other bear traps that we should avoid in that field of law?

Hew Dundas: There are none that I know of. My colleague has researched closely the areas in Scots law where there are statutory arbitrations. He is the expert, not me, on the ECHR and he is comfortable that there are no bear traps that we can see. However, as we well know, we can never entirely predict what the ECJ will do.

I mentioned the Italian tanker case. The English court issued an anti-suit injunction against the Italian insurer to prevent it from engaging in litigation in Italy, and that injunction was struck down by the ECJ, which in my view misunderstood the matter completely. That became a cause célèbre for a while, and it still is in academic circles. However, given the various areas where statutory arbitration takes place, it is possible to imagine that an individual or company would go all the way to the ECJ on the point. Neither my colleague nor I see any visible risk of that, but all things are possible.

Until 1995, it was thought to be the case that those who were wanted by foreign police for questioning in relation to mass murder could be automatically deported, but the ECJ decided in 1996 that we could not do that. Whether or not people agreed with that result, it was a major surprise—not just in the UK but around Europe—that killers could not be deported.

10:30

The Convener: As there are no more questions on that subject, I will take us on to adjudication and construction contracts. You referred to Craig Connal, who indicated that the arguments for allowing third parties to use arbitration may also apply to adjudication, which is used in the construction sector. What is your view on that point? Is it worth exploring further?

Hew Dundas: There might be benefit—I am not sure what it would be—but I do not think that the issue needs to be explored. To recap, adjudication provides an interim decision in a short time that is designed to move cash down the food chain of employer, contractor, subcontractor and so on. Adjudicators' decisions are interim only, until superseded in arbitration or litigation; the bill will kick in at the arbitration stage. In practice, more than 90 per cent of adjudicators' decisions stop there and do not proceed, but that is by the agreement of the parties to accept the adjudicator's decision and not take the matter on to arbitration.

In that context, I see no need for the bill to address adjudication at all, in the same way that, if we suppose that the parties were just to settle the dispute instead of going to adjudication, we would not even look at the bill. After the adjudication is complete, if the parties accept the adjudicator's decision, the outcome for the purposes of the bill is, in effect, that they have agreed a settlement themselves. I do not see why the bill should be engaged and I can imagine significant complications if it were suddenly, at this stage, to be expanded to bring in adjudication. I would need a little time to think about the matter. In summary, adding adjudication is not necessary and could be confusing.

The Convener: I am slightly out on a limb with my next question. At the beginning of the session, you implied that the Italian tanker scenario was almost a way to delay a decision, perhaps for financial reasons. As far as you can see, are there no opportunities for the process in the bill to be open to abuse or used for advantage? Maybe that is not even a reasonable question.

Hew Dundas: The question is extremely reasonable, convener. The essence of modern arbitration, as captured in the Arbitration (Scotland) Act 2010, is that the arbitrator has not only the right but the obligation to take control of the process and move the case on to a speedy conclusion. I recently handled a case in Singapore between an EU company and a far east company

in which the final award was issued 94 days after I was appointed, whereas litigation in the Italian tanker insurance case has still not had a substantive hearing after 15 years. That is the fault not of insurers but of systemic weaknesses in the Italian courts. That is the way in Italy—the norm is 20 years for a first-instance decision, and 30 to 40 years for a Supreme Court decision.

I appreciate that that is not the case in Scotland or England. Courts in both those countries are far more efficient, so we do not have to worry. The key point is that, once the third party is hooked into the arbitration, it is up to the arbitrator to run the case in a timely and cost-efficient manner.

In that regard, I point out one of the significant differences between the English and Scottish legislation on arbitration. In England, the arbitrator creates the procedure, but the parties can agree anything else at any time. For example, the arbitrator may order a statement of claim within 30 days and a statement of defence within a further 30, but the parties can agree to say one year plus one year, or five years plus five years. In Scotland, once rule 28 is engaged, the arbitrator is in control and the parties do not have the right to engage in delaying tactics.

I will explain the principle that is at work and the reason why arbitrators have to take on their responsibilities. If, for example, we go to the dentist to have a filling or something done to our teeth, we are entitled to, and do, rely on the professional skills of the dentist—as we would with a cardiac surgeon or a liver-transplant surgeon. I suggest that we do not expect to tell him or her how to do the business. The 2010 act says that that principle applies to arbitration, too—the arbitrator is the master of procedure.

To go back to the convener's question, it requires robust, energetic and fairly aggressive arbitrators to make sure that delaying tactics and the like do not derail the arbitration. To give one obvious example of that, I am aware of cases in which colleagues keep on extending the time for parties to do something. Sections 31 and 38 of the 2010 act give the arbitrator pretty fierce powers to deal with delaying tactics or non-replies.

The Convener: Does that also apply to crofting law?

Hew Dundas: I confess that I am no expert on crofting law.

The Convener: Neither am I.

Hew Dundas: I know that, in the village in the west of Scotland that I come from, we had no word in the Gaelic language to express the urgency of mañana.

Stuart McMillan: I have a question on a separate issue. Notwithstanding your earlier comments that the bill is fine and just needs some tweaking, does the bill that has been presented make Scots law more competitive in the international market when it comes to dealing with this particular issue?

Hew Dundas: We have to be clear that there are two separate things here: one is the substantive law of the contract and the second is the law of the arbitration. I do not have the latest edition, but in Scotland the principal text book on contract is about 3cm or 4cm thick. The equivalent book in England, printed on wafer-thin paper, is something like five times the length; every sentence has a footnote, every one of which is a judicial decision.

The tremendous appeal of English contract law worldwide is that there is such an enormous level of detail that almost, although not quite, all questions that might arise in a commercial relationship have an answer. That is why, for example, 85 per cent of world grain is traded on English law contracts giving London arbitration, and 60 per cent of the cases in the High Court in England in that area are between two parties from countries where they do not speak English.

Scots law does not have that level of precision in its contract law. However enthusiastic I might be about Scotland, I would be reluctant to advise a foreign party to use Scots law as the substantive law of a commercial contract, in preference to English law, the law of New York or one or two other United States laws, because of its lesser volume of detail.

To summarise, I am not persuaded that this change will significantly—or even at all—alter any outside party's view of Scots law.

The Convener: For the avoidance of doubt, do you nonetheless welcome this legislation?

Hew Dundas: Absolutely. For me, the big winner is the new section 12, in which we have extinguished a somewhat antiquated and not entirely fit-for-purpose principle of common law and replaced it with clear and precise—perhaps they could be made more precise, but clear and modern—statutory provisions, which, as the SLC has shown, are consistent with the laws of many other jurisdictions. If for nothing else, for that reason alone, this legislation is very strongly to be commended and applauded.

The Convener: As my colleagues have no further questions, it remains for me to thank you very much for coming to us and giving us the benefit of your self-evident wisdom and expertise in the area—particularly on arbitration. We are very grateful to you. We have covered a lot of ground, I know, but if, on reflection, you consider that there are matters on which you might wish to add to what you have said, or, on your way home

or subsequently through the night, you think that there are areas that we might not have asked you about but on which you might wish to comment, do, of course, come back to us. We would be very pleased to hear from you.

Hew Dundas: I have undertaken to provide some suggestions in relation to the Italian tanker case, which I will do. I am not sure that my colleague sees it in quite the same way that I do, but I was very close to people who were involved in that case, hence it is of particular interest to me.

The Convener: Okay.

Hew Dundas: Could I clear up one thing? At the beginning of the meeting, I was introduced as the vice-president of the Scottish Arbitration Centre, which is entirely correct. However, the views that I have expressed this morning are made on behalf of myself and David Bartos, as co-authors of a book on the subject. I assume that the Scottish Arbitration Centre has been consulted and has made its own representations, but, in this instance, I speak for the authors of the book and not for the arbitration centre. I strongly doubt that anything that I have said would cause any difficulty or difference with the centre, but, as an advocate would say, I am not instructed by it.

The Convener: Nonetheless, thank you for that disclaimer. We are very grateful to you for your evidence this morning.

Hew Dundas: Thank you. If the committee has any further questions arising from what I have said, of course, we would be delighted to assist. We would like to make a contribution and to assist on this and other related legislation.

The Convener: Many thanks. I suspend the meeting briefly, to allow our witness to leave.

10:43

Meeting suspended.

10:45

On resuming—

Instruments subject to Affirmative Procedure

Registration of Social Workers and Social Service Workers in Care Services (Scotland) Amendment Regulations 2017 [Draft]

The Convener: Agenda item 3 is consideration of an affirmative instrument. Is the committee content with the instrument?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Damages (Personal Injury) (Scotland) Order 2017 (SSI 2017/96)

10:46

The Convener: Agenda item 4 is consideration of instruments subject to negative procedure. The order was laid before the Parliament on 27 March 2017 and came into force on 28 March 2017. It does not respect the requirement that at least 28 days should elapse between the laying of an instrument that is subject to the negative procedure and the coming into force of that instrument.

Accordingly, does the committee agree to draw the order to the attention of the Parliament under reporting ground (j)?

Members *indicated agreement.*

The Convener: The order fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. Does the committee also agree to find the failure to comply with section 28(2) to be acceptable in the circumstances, as outlined in correspondence from the Scottish Government contained within our papers?

Members *indicated agreement.*

Bankruptcy Fees (Scotland) Revocation Regulations 2017 (SSI 2017/97)

The Convener: The regulations were made and laid before the Parliament on 27 March 2017 and came into force on 28 March 2017. They also do not respect the requirement that at least 28 days should elapse between the laying of an instrument that is subject to the negative procedure and the coming into force of that instrument.

Accordingly, does the committee agree to draw the regulations to the attention of the Parliament under reporting ground (j), as there has been a failure to lay the regulations in accordance with section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

The Convener: Does the committee agree to find the failure to comply with section 28(2) to be acceptable in the circumstances as outlined in correspondence from the Scottish Government contained within our papers?

Members *indicated agreement.*

The Convener: No points have been raised by our legal advisers on the following two instruments.

Regulation of Care (Social Service Workers) (Scotland) Amendment Order 2017 (SSI 2017/95)

Common Agricultural Policy (Direct Payments etc) (Scotland) Amendment Regulations 2017 (SSI 2017/98)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: I am not certain whether I should declare an interest at this point, but I would probably be well advised to declare that, as a farmer, I am affected by the common agricultural policy direct payment schemes.

Instruments not subject to Parliamentary Procedure

Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (Commencement No 1 and Transitional Provision) Regulations 2017 (SSI 2017/93 (C 6))

Carers (Scotland) Act 2016 (Commencement No 1) Regulations 2017 (SSI 2017/94 (C 7))

Criminal Justice (Scotland) Act 2016 (Commencement No 4, Transitional, Transitory and Saving Provisions) Order 2017 (SSI 2017/99 (C 8))

10:50

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: I now move the meeting into private.

10:51

Meeting continued in private until 11:09.

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