SUBORDINATE LEGISLATION COMMITTEE

Tuesday 3 November 2009

Session 3

£5.00

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

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SUBORDINATE LEGISLATION COMMITTEE
28th Meeting 2009, Session 3

CONVENER

*Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

DEPUTY CONVENER

*Ian McKee (Lothians) (SNP)

COMMITTEE MEMBERS

*Jackson Carlaw (West of Scotland) (Con)
*Malcolm Chisholm (Edinburgh North and Leith) (Lab)
*Bob Doris (Glasgow) (SNP)
Helen Eadie (Dunfermline East) (Lab)
*Tom McCabe (Hamilton South) (Lab)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Ross Finnie (West of Scotland) (LD)
Christopher Harvie (Mid Scotland and Fife) (SNP)
Elaine Smith (Coatbridge and Chryston) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Bruce Crawford (Minister for Parliamentary Business)
Fraser Gough (Scottish Government Legal Directorate)
Colin Wilson (Scottish Government Office of the Scottish Parliamentary Counsel)

CLERK TO THE COMMITTEE

Douglas Wands

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 3 November 2009

[THE CONVENER *opened the meeting at 14:04*]

Decision on Taking Business in Private

The Convener (Jamie Stone): I welcome everyone to the Subordinate Legislation Committee's 28th meeting this year. We have no apologies. I remind everyone to turn off mobiles, BlackBerrys and that sort of stuff. On the committee's behalf, I warmly welcome Rebecca Ross, who is sitting at the back and who is work shadowing. It is nice to see somebody young here.

Agenda item 1 is a decision on whether to take in private item 6, because it will involve discussing the evidence that we are about to hear. Do we agree to take that in private?

Members *indicated agreement*.

Interpretation and Legislative Reform (Scotland) Bill: Stage 1

14:04

The Convener: Item 2 is our second evidence session on the bill. I welcome the minister for Parliament—his proper title is Minister for Parliamentary Business—Mr Bruce Crawford. With him are Elspeth MacDonald, Madeleine MacKenzie, Alison Fraser, Fraser Gough and Carol Snow—[*Interruption.*] I am sorry—Colin Wilson is here in place of Madeleine MacKenzie. It would help if I put on the long-distance spectacles before the short-distance specs.

We have decided what questions to put to the witnesses. I am aware that the minister's time is limited, because of a Cabinet meeting. We will crack on and I will ask the first question, unless you want to say something first, minister.

The Minister for Parliamentary Business (Bruce Crawford): I have a few minutes of introductory remarks to set the tone and give the background to where we are. It would be useful to put on the record some information, particularly about amendments.

I thank the committee for inviting me and my officials to give evidence on the bill. As we know, the bill is especially technical. My officials and I will do what we can to help people to understand the direction in which we are going. I will give a brief overview of the bill's content and describe amendments that the Government will lodge at stage 2, if the convener wishes me to—I have already written to him about them.

As members know, the bill was introduced to Parliament on 15 June 2009. It deals principally with interpretative and procedural matters and has four main purposes. It deals with the publication, interpretation and operation of acts of the Scottish Parliament and with instruments that are made under them. It concerns the making and publication of subordinate legislation, the definition of a Scottish statutory instrument and the scrutiny procedures that will apply in the Scottish Parliament. The bill gives the Scottish ministers the power to make some amendments to enactments to pave the way for their consolidation. It also deals with the procedures that apply to orders that are subject to special parliamentary procedures.

Until now, most of those matters have been regulated under three transitional orders that were made under the Scotland Act 1998. They are: the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (SI

1999/1379), which is referred to as the interpretation order; the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096), which is referred to as the statutory instruments order; and the Scotland Act 1998 (Transitory and Transitional Provisions) (Orders subject to Special Parliamentary Procedure) Order 1999 (SI 1999/1593), which is referred to as the special parliamentary procedure order.

Broadly speaking, our approach has been to restate the content of the transitional orders on interpretation and special parliamentary procedure, which are familiar to practitioners. However, after 10 years, it is right to take the opportunity—where appropriate—to modernise our interpretation code and make it fit for future decades.

Part 1 will apply to the interpretation of future acts of the Scottish Parliament and instruments that are made under them. At present, such legislation is interpreted in accordance with the interpretation order. The bill will replace the order with part 1 of and schedule 1 to the bill.

Part 1 will apply only to future acts of the Scottish Parliament and instruments. Existing acts of the Scottish Parliament and instruments will continue to be governed by the interpretation order. Westminster legislation will continue to be interpreted in accordance with the Interpretation Act 1978.

There is no dispute about the benefits of having general interpretation provisions. As we know, the interpretation provisions in the bill are detailed. I will offer no more commentary on those provisions at this stage, as I am sure that members will ask questions about them.

The statutory instrument component is set out in part 2 and is based on the recommendations from the committee's 12th report of 2008. The provisions will simplify the definition of a Scottish statutory instrument. They will also streamline and bring clarity to procedures for SSIs. The intention is to use the bill to remove complexity and introduce flexibility when possible. As the consultation responses show, that aim has been broadly welcomed. My officials have worked closely with parliamentary clerks and their legal advisers on that component, which I hope contains no surprises for committee members.

The thrust of part 2 stems from our support for recommendation 1 in the committee's report, which was that, subject to improvements, the current arrangements and procedures for scrutinising SSIs should be retained.

As we know, part 2 applies to SSIs and United Kingdom statutory instruments that are subject to procedures in the Scottish Parliament. Its main features are simplification of the definition of an SSI and—quite rightly—simplification of current procedures for scrutinising SSIs, by providing for three procedures: negative; affirmative, which includes super-affirmative procedure; and simply laying.

The powers in part 4, "Pre-consolidation modifications of enactments", are intended to simplify and speed up the consolidation process. Part 4 gives ministers power by order, which by definition must be approved by the Parliament, to

"make such modifications of enactments relating to a particular subject as in their opinion facilitate, or are otherwise desirable in connection with, the consolidation of the law on the subject."

I wrote to the convener—on 8 June, I think—about the sequencing of that. I note that in its stage 1 report on the bill the Standards, Procedures and Public Appointments Committee expressed concern to the Subordinate Legislation Committee about the provisions. I intend to write to members of the Standards, Procedures and Public Appointments Committee shortly, to assist them with their deliberations and, I hope, to put their minds at ease.

Part 5 sets out the procedure for orders that are subject to special parliamentary procedure by virtue of their parent acts. Certain provisions in pre-devolution Westminster acts require an order that is to be made, confirmed or approved by the Scottish ministers to be subject to SPP. The SPP order made transitional provisions for special procedures. SPP has often been required in relation to major infrastructure projects, such as trunk roads and harbour developments, and part 2 of the Transport and Works (Scotland) Act 2007 abolished SPP in relation to such developments. However, SPP still exists in a number of areas. Members know from the evidence of the National Trust for Scotland that the trust has an interest in special powers to declare land inalienable and welcomes part 5, which maintains the status quo.

I wrote to the convener on 20 October to provide details of amendments that we propose to lodge at stage 2. I could go through what I said if you want me to do so, convener, but I think that we can let the matter rest with the letter. I am entirely at your service.

I thank members for their attention and I hand over to you, convener. My officials and I will do what we can to field members' questions. As members might expect, I might field questions to Elspeth MacDonald, depending on how technical they are. Forgive me if, on occasion, I try to find my notes and briefings—I guess that some members will be doing the same.

The Convener: Thank you. We might return to your offer to talk about stage 2 amendments,

depending on how the questioning goes. You are free to call on your officials to pick up on more detailed points, as you said.

Will the creation of a new set of interpretation rules that are different from the rules in the Interpretation Act 1978 and the interpretation order result in inconsistency and create confusion for practitioners and end users of the law?

Bruce Crawford: Let us start by considering part 1, which sets out a series of default rules for the interpretation of future acts of the Scottish Parliament and future subordinate legislation made under those ASPs. Most of the rules are identical or similar to the rules in the 1978 act and the interpretation order. After 10 years of devolution, it was right to take the opportunity to examine how we could best modernise the interpretation legislation and consider where improvements could be made.

The interpretation order differs from the 1978 act in some respects, so there is already inconsistency in the system. For example, the interpretation order sets out definitions of words and expressions for the purposes of the Scotland Act 1998, so the reader of Scottish legislation is aware that the interpretation provisions that apply to ASPs and SSIs are different from the provisions that apply to Westminster acts and subordinate legislation. Users have had 10 years' experience of dealing with different sets of interpretation rules and as far as I am aware the situation has not caused particular problems.

The interpretation order is mainly based on the 1978 act, which is now more than 30 years old. After 10 years' experience in the Scottish Parliament, it would be a bit strange if we could not change the rules or move to modernise the interpretation order, which was always seen as transitional and which requires to be modernised at some stage.

The current process is not consistent and the changes that we are seeking to introduce through the bill will provide greater clarity than exists at the moment.

14:15

The Convener: Thank you. My second question arises from something that Iain Jamieson said to the committee last week. Section 1(2)(b) provides that the provisions of part 1 do not apply in so far as

"the context of the Act or instrument otherwise requires".

Iain Jamieson suggested that that provision should be deleted entirely, partly because it creates confusion and is unnecessary. What is your reaction to that comment?

Bruce Crawford: I will let Colin Wilson respond to that.

Colin Wilson (Scottish Government Office of the Scottish Parliamentary Counsel): The first point to note is that the provision in section 1(2)(b) is not new; it simply replicates the existing position. It is a generalised version of the qualifications that currently appear throughout the rules in the 1978 act and the interpretation order.

It is worth noting that the rules in part 1 of the bill are merely default; they are not absolute. They are legislative presumptions, if you like, that can be departed from. They avoid the need for each act and instrument of the Scottish Parliament to repeat standard provisions. In many cases, the default rules will do all that is necessary, and it will not be necessary to do any more. In other cases, they might not go far enough and the act or instrument might need to make further or different provision to deal with particular circumstances. That situation is covered in section 1(2)(a).

I turn to section 1(2)(b). It is a fundamental and long-standing rule of statutory interpretation that a legislative provision must be read in the context of the legislation as a whole. In considering what a provision is intended to do, a court will look at the provision not in isolation but within the context of the act or instrument in which it appears. Section 1(2)(b) does no more than recognise that rule of statutory interpretation.

The Convener: Thank you. Again on section 1(2)(b), the Scottish Law Commission suggested to us that the provisions in part 1 would be more use to the reader if the qualifications in section 1(2)(b) were repeated in individual rules rather than being a general qualification that readers would need to be aware of and able to refer back to when necessary. What do you think about that suggestion?

Bruce Crawford: I will let Colin Wilson say something if he wants to, but I do not agree with the suggestion. The reader needs to be aware of the general provisions in section 1, such as those that explain which acts or instruments of the Scottish Parliament part 1 of the bill applies to, so that they can understand properly the effect of the detailed rules that will inevitably follow the rest of the legislation. Section 1(2) contains a general provision about the circumstances under which part 1 would not apply, and I think that that provision should be in section 1.

Colin Wilson: I do not have anything to add to that.

Bruce Crawford: I have probably shown the distinction. Because section 1(2) is a general provision about the circumstances in which part 1 does not apply, section 1 is the appropriate place

to put the provision, and I do not think that we need to put it in any other way.

Ian McKee (Lothians) (SNP): The concern that was expressed to us was that often a person who is not legally qualified reads the provisions, and it is sometimes difficult for them to realise that they have to go back to an earlier provision if they are discussing a specific aspect of legislation that might affect their business or whatever.

Bruce Crawford: When someone examines any piece of legislation, the appropriate place for them to start is at the beginning, where the ground rules are set and the foundations are laid. Frankly, anyone reading legislation who is not aware of that should be getting advice from other sources.

Ian McKee: The concern was put to us in evidence.

Bruce Crawford: Many—although perhaps not all—acts of the Scottish Parliament lay out the ground rules in part 1 and explain how they will apply to the rest of the legislation. Am I right about that, Colin?

Colin Wilson: Yes. There are other provisions, such as interpretation provisions, at the end of an act. There are real risks in looking at provisions in isolation without understanding the context in which they appear.

Bruce Crawford: That is the key point.

The Convener: We have a robust response from the minister.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): The application of acts and instruments to the Crown has been one of the more controversial aspects of the bill. That was reflected in the evidence that we took last week, when both the Scottish Law Commission and the Faculty of Advocates supported the status quo. In the third evidence session that we had last week, Iain Jamieson supported the change that is proposed in the bill. We know what your view is, but we would like to know why you are seeking to change the law in this regard.

Bruce Crawford: I was surprised by the strength of feeling on the subject. I would have thought that, after 30 years, we would want to modernise a piece of legislation and to bring it up to contemporary standards. Effectively, that is what we are trying to do. At present, the Crown is bound only by the terms of an act of the Scottish Parliament or instrument in which—I want to ensure that I get the terminology right—that is provided for expressly or by necessary implication. The Scottish Government and I, supported by the majority of respondents to our consultation—I recognise that a few took the minority position—believe that in a modern society the Crown should be in the same position as the general public in Scotland, unless there are exceptional circumstances.

I am strongly of that view, which has been reflected in legislation in recent years. In the bill, we are trying to set it out as a general proposition—it is the right place for a modern provision to be. As far as I am aware, no one from the Crown has complained about the provision. If it had real concerns, I am sure that we would have heard from that ilk. Let me put it this way—I have not been asked to Balmoral to give evidence.

The Convener: Now you may never be asked to Balmoral.

Bruce Crawford: That is probably finished now.

Malcolm Chisholm: I tend to agree with you on the issue, so I am probably not the best person to pursue it with you. I do not know whether my colleagues want to or whether they are happy with your explanation.

Last week, concern was expressed by witnesses about standardising ancillary powers on commencement and their being subject to no procedure. Gregor Clark said that transitional amendments should not be able to be made in that way. Iain Jamieson said that the relevant provision should be removed and that separate provision should be made on a case-by-case basis in parent acts, which is the situation at present. How do you respond to those suggestions?

Bruce Crawford: That is a technical question, so I will let Colin Wilson deal with it.

Colin Wilson: Section 8 deals with acts of the Scottish Parliament that are to come into force by commencement order. It allows commencement orders to make provision for different days to be appointed for different purposes and, as you mentioned, confers power for commencement orders to include ancillary provisions to make appropriate transitional, transitory and saving provisions in connection with the coming into force of provisions of the act. The provision is intended to provide for consistency of approach to commencement provisions and to ensure that powers are in place to bring acts into force in an appropriate manner. It has the benefit of simplifying the drafting of future acts of the Scottish Parliament, as the power would automatically be included in commencement provisions, without needing to be restated every time.

The question is, is it appropriate to include transitional, transitory and saving provisions in a commencement order that is not subject to parliamentary procedure? The answer depends to a great extent on the circumstances. In some cases, transitional or transitory provisions may be straightforward and obvious—it may be clear what

they will be and there may be no question of their requiring detailed and careful scrutiny.

There will normally be a power in an act to make ancillary provisions that are subject to more rigorous forms of parliamentary scrutiny. That power would be appropriate for the more complicated or difficult cases. The purpose of section 8(3) is simply to allow some flexibility to deal with the simpler cases alongside the commencement order, without the need for two separate orders, and to enable things to be done as a single package.

Malcolm Chisholm: So, it would not apply in general; it would just apply to certain transitional provisions. Is that what you are saying?

Colin Wilson: I am suggesting that if the power is there, it is a matter of judgment in each case as to whether its use is appropriate and whether the case is simple and straightforward enough. The acid test is whether the Subordinate Legislation Committee is likely to object to the power being exercised in that way. That would certainly be taken into account in deciding whether it was the right course to follow.

Jackson Carlaw (West of Scotland) (Con): I have a couple of questions on sections 12 and 14, which deal with references to European Union and other legislative provisions. In connection with section 12, the explanatory notes say that references to European Union instruments are not intended to be ambulatory. That is contrasted with section 14, which provides that references to UK legislation are ambulatory. I really just want to understand why you have adopted a different approach in relation to the two different legislatures.

Bruce Crawford: Given that we are talking about ambulatory issues in legislation, I will hand over to Colin Wilson.

Colin Wilson: It might be helpful if I provided a bit of explanation. It is worth setting out that section 12 creates certainty as to what is meant where legislation refers to an EU instrument. It makes it clear that such references are not to be ambulatory for the future. The references are to the EU instrument as it stands on the date when the act receives royal assent or when the SSI is made; they exclude any changes to the instrument made after that date. Section 12 replicates the current position, which was changed across the board in a UK act of 2006, so it is consistent with what happens in the rest of the UK and with the current position in Scotland.

The approach is felt to be appropriate for EU instruments because both the Scottish Parliament and the Scottish Government will have the opportunity to consider how best to make provision for any future changes to EU law and their implications for domestic legislation. Clearly, it is difficult to do that at the time when an act is being passed or an order is being made, without knowing what the future holds.

It is worth stressing that the rule, like the other rules in part 1, is only a default rule. If it is felt appropriate in a particular act, different provision can be made.

Section 14 deals with references to domestic legislation. It is intended to create certainty as to the statutory construction of cross-references to domestic acts and subordinate legislation. At the moment, the equivalent provisions in the interpretation order and in the 1978 act are unclear, as the textbooks on the subject bear out. It was felt appropriate in re-enacting the provision to make some attempt to clarify the position. In future, it will be clear that the reference to a piece of legislation includes subsequent amendments. The consultation on the draft bill sought views on whether the bill should make that change, and all respondents agreed that provision should be made to clarify the point. Again, it is only a default rule; it can be departed from and, to touch on a point that we made earlier, it applies unless the context otherwise requires. If, against a particular set of facts—when a court comes to look at an issue—it is clear that that produces a result that is not sensible, it will be displaced.

The difference of approach between sections 12 and 14 relates to the type of legislation that is being referred to. In the case of EU instruments, the Scottish Government and the Parliament have no direct control over any future changes. In the case of domestic legislation, however, most references will be to legislation in the devolved field, whether an act of or piece of subordinate legislation from the Scottish Parliament, or an act of or piece of subordinate legislation from the UK Parliament. It is worth noting that much of the principal legislation on core topics such as health, education and criminal procedure is still in UK acts from the pre-devolution period. It will be quite common to find an act of the Scottish Parliament that cross-refers to a UK act on the national health service or education or whatever. Future changes to such legislation will be made either by an act of or an SSI from the Scottish Parliament. If the change was to a UK act, it would be subject to a legislative consent memorandum. There is therefore control over the process.

I will stop at that point. If there are points that Mr Carlaw wants to come back on, I will try to answer them.

14:30

Jackson Carlaw: I think that you may have touched on my next point. A moment ago, the

minister referred to the passions that are aroused by certain references to the Crown. I suppose that I am curious to know whether he thinks it desirable that future changes made by another legislature—that is, by Westminster—to legislation that is referred to in acts of the Scottish Parliament will automatically be adopted through such references being ambulatory, without reference to the Scottish Parliament or its views in that regard.

Bruce Crawford: Colin, on you go.

Colin Wilson: The point follows on from what we have just discussed. As I said, a lot of legislation on devolved issues is contained in pre-devolution UK acts, so there will be many references to such legislation. Clearly, the Scottish Parliament has control over the content of any such change because it is devolved, so the Scottish Parliament will either have legislated for it or will have consented to it when it was made in a UK act.

The point that Jackson Carlaw may be getting at is where UK legislation deals with a reserved topic, to which there is a cross-reference. Of course, the Scotland Act 1998 contains quite clear rules on the extent of the Parliament's legislative competence, so I do not think that there is any risk of a cross-reference to a UK act importing reserved law by the back door, as it were, or anything like that. However, this is a default rule, as I have said on a number of occasions, and the point needs to be considered on a case-by-case basis when the nature of any cross-reference is being decided.

Jackson Carlaw: So we can assume that, as well as no calls to the minister from Balmoral, there have been no calls to him from Bute house.

Bruce Crawford: Not yet—although calls from Bute house are likely to be much more common.

Jackson Carlaw: I have a couple of questions on definitions of words and expressions. I think that you touched on this in an earlier response in relation to schedule 1, which is introduced by section 25. Previous witnesses have expressed some concern about the proposed power to allow ministers to amend the definitions in schedule 1 by order. What could be the effect of amending the definitions or adding new definitions in future? Might it not be very complicated to identify the provisions to which the new or amended definition, as opposed to the old one, apply?

Bruce Crawford: One of the reasons for giving ministers the power to amend schedule 1 was to give flexibility to take account of new issues that might arise—I am speaking of future events that we cannot yet foresee. It may be that, as time passes, we see the need to add further definitions to schedule 1, so the power to amend would give us the ability to do that. I think that it is right that we have that flexibility. However, as Ian McKee said in relation to a previous question, every addition would need to be looked at very carefully; it would also have to be made under the affirmative procedure, so Parliament would get the chance to look at any new definition. At this stage, I cannot envisage what any new definitions might be, but there may come a time when a different regulation or type of instrument is available and we need to change the bill, once enacted. The power to amend will mean that we will not have to introduce primary legislation to make any changes, because we will be able make changes under the affirmative procedure.

Jackson Carlaw: Would the inclusion of transitional or saving provisions be helpful in dealing with any complications of that sort?

Bruce Crawford: Yes, depending on the definition to be amended, a transitional and saving order would be very useful. We will consider carefully the exercise of the power. However, it would need to be done on a case-by-case basis.

Jackson Carlaw: You talked about the potential need for additional definitions. Iain Jamieson and the Scottish Law Commission suggested that certain important definitions are missing from schedule 1. How do you respond to the suggestion that fairly basic terms such as "the Scottish Parliament", "the Lord Advocate" and "legislative competence" should be included in the definitions?

Bruce Crawford: That question is on a technical issue, so I ask Colin Wilson to field it.

Colin Wilson: Questions about which words or expressions should be included in a list such as the one in schedule 1 are always subject to an element of personal judgment. We did not feel it necessary or appropriate to include a definition of "the Scottish Parliament" or "the Lord Advocate" in the bill. To some extent, that is a result of 10 years' experience of drafting bills for the Scottish Parliament. It is easy for a bill either to say "the Scottish Parliament" when that is meant or to define it for the purposes of the bill. As I say, what is in and what is out is a matter of judgment, and there is perhaps room for different views. The term "legislative competence" is not defined because it is not one that appears regularly in legislation.

Jackson Carlaw: It is interesting that frequency of use appears to be the test that is used for the inclusion of words or expressions. Is there a reason why you settled on that as the most appropriate judgment to apply?

Colin Wilson: The frequent-use test that underlies such a list avoids the frequent repetition of a term in lots of different acts or statutory instruments. If a term keeps cropping up, it becomes a candidate for inclusion in such a list; if

it is used relatively seldom, it is easy to define it in the individual act or instrument in which it appears.

Jackson Carlaw: Okay. Thank you.

The Convener: Minister, let us return to the letter that you wrote to me on 20 October. This question is about electronic communications versus ink on paper. In the letter you say that you intend to make minor amendments to section 26 to clarify that consent to service by electronic means requires to be in writing. The Faculty of Advocates told us that some of the issues that are raised by section 26, such as the proving of receipt, are not easily resolvable. How do you respond to that view?

Bruce Crawford: Section 26 expands the current provisions in the interpretation order, which provides for service by post only and creates a new default rule for the service of documents that covers personal delivery, postal service—including registered and recorded post—and service by electronic communication. The Law Society and the Faculty of Advocates raised concerns regarding the provisions relating to proof of delivery when electronic communications are used as a means of delivery. To address those concerns, I propose to lodge an amendment at stage 2 to provide that, in order to use electronic communication as a delivery method, the prior written agreement of all parties must be obtained.

However, providing the type of regime to deal with all technical issues, such as proof of delivery, as requested by the Faculty of Advocates, would make the provisions extremely complicated. It would also be questionable whether we could provide that sort of technical detail in a bill. As these are default provisions, it would be open to the users to agree terms between themselves—we would simply set the ground rules. To go further would be very difficult.

Bob Doris (Glasgow) (SNP): I refer the minister to section 28, which deals with the definition of Scottish statutory instruments that are subject to negative procedure. Last week, we heard evidence from Iain Jamieson that negative procedure needs to be made more effective. One way in which we could do that would be to change from 28 days to 40 days the period before any negative instrument would come into force. What is your view on that?

Bruce Crawford: As you know, we have agreed with the committee's suggestion to extend the period before an instrument can come into force from 21 days to 28 days. That was a good move by both the committee and the Government, and that is an appropriate amount of time by which to extend the period.

Both the Government and the Parliament have a duty to ensure that Scotland is governed efficiently. Extending the period to 40 days would significantly slow down the process of government in Scotland and the processes of Parliament. It is important to remember that we are talking about 40 laying days, which means that recess periods are not included. For example, an instrument that was laid on 29 May 2009 could not come into force until after 28 laying days—that is, until 27 June. If the required period was 40 laying days, it could not come into force until 11 September. That is an increase not of 12 days but of 76 days. It would not be in the interests of good governance or the people of Scotland to create such a delay in the law-making process.

We have moved to a 28-day period, and there would need to be clear evidence to show that the current position was creating a problem. To date, frankly, I have seen no such evidence.

Bob Doris: I suspect that my next question, on the annulment of negative instruments, will receive a similar answer. It has been suggested that the 40-day period should be increased to 50 days, otherwise difficulties would be created with parliamentary scheduling. What are your comments on that?

Bruce Crawford: We remain opposed to that proposal. The points of principle that I have already made remain. To move from 40 days to 50 days would slow down the law-making process in Scotland, which would not be good for our country, and we have no evidence to show that the current position causes problems. I am not sure that anyone has said that there are problems.

Again, I will give an example of the effect that the proposal would have. An increase of 10 days might seem modest, but because we are talking about parliamentary laying days, the actual increase might be far greater. A 40-day annulment period for an instrument laid on 8 May 2009 would end on 18 June. If we extended the period to 50 days, it would not end until 1 September: not 10, but 75 days later. The total period would be 116 days. Looking at those potential situations, I do not think that anyone could imagine that that would be a satisfactory way in which to deal with the matter.

We have tried hard, together with the committee, to manage the process of statutory instruments in a much more even way and avoid a situation where the committee gets all the instruments at once, in a lump. If we introduced the longer laying periods that have been proposed, there would be a real danger that the process would become much lumpier. We would have to introduce a lot more SSIs at once to get them through the gate before the long summer recess, which does not count for the purposes of laying instruments. We would have to use the relatively short window that would be available to us at the start of each parliamentary term.

The proposed periods would not be good for the process of government and they would not be good for the proper parliamentary consideration of the various instruments that the Government produces.

Bob Doris: I think that it is fair to say that the committee does not yet have a firm view on the matter and that we are testing the evidence, so it is important that you have put your view on the record this afternoon.

Remaining on the theme of timescales, under the provisions of the transitional statutory instruments order, in circumstances where the Parliament resolves that an instrument should be annulled, there is no timescale within which the Scottish ministers must revoke the instrument. Does the bill clarify the issue?

Fraser Gough (Scottish Government Legal Directorate): The proposal is that we will leave it open-ended, as it is at present. In the event of an annulment, the consequences depend on the nature of the instrument that is annulled. It might not be desirable to require the Government to revoke an instrument suddenly or within a prescribed, statutory timeframe, because it might be necessary to put in place transitional arrangements or savings provisions for what had gone before.

Bob Doris: So there would not be a recommended timescale, but with the opt-out that, if we had to be more fleet of foot we could condense things. We will leave it open-ended.

Fraser Gough: Ultimately, the matter is best dealt with by the Parliament rather than by the courts. It is better for the Parliament to decide at a political, policy level when to exert pressure on the Government to revoke an instrument—and how much pressure to exert—than for the courts to decide whether a statutory test for the period of annulment has been met.

Bruce Crawford: An annulment is, in essence, a pause. It is an opportunity for the Parliament and the Government to try to resolve their differences. That pause is where the discussion about the political decisions must be had. If the Parliament decided to annul an instrument, it would be appropriate for the Government to be involved in a discussion with whichever might be the relevant committee to try to come to a resolution on the matter. That is how to do it. Government should be answerable to the Parliament in that regard. That is the purpose of annulment in any case.

14:45

Bob Doris: Are additional powers—a form of ancillary powers—required to give effect to the will of the Parliament to undo any permanent effects of an instrument that has been annulled?

Bruce Crawford: There is a real issue with that suggestion that must be addressed. I understand the initial attraction of such additional powers, but I do not consider them to be appropriate. In some circumstances, it might be relatively easy for the Government to restore the previous position using the power already given to it by the Parliament but, in others, it could be significantly more difficult. For instance, if a body corporate had already been dissolved, it may be difficult or even impossible to restore the previous position.

A requirement to restore the previous position might also be problematic if the Parliament were dissatisfied with part of an instrument but positively supported the rest of it. In that case, it would be in nobody's interest—neither the Government's nor the Parliament's—to require the Government to restore a position that all sides were agreed should be changed. In those circumstances, it would be appropriate that we have the pause that I described to allow a parliamentary committee and the Government to come to a conclusion through a discussion about what might be appropriate. Otherwise, some good things that were in the instrument might be thrown out, which would not be the right way to proceed.

Malcolm Chisholm: Article 10 of the transitional SI order contains a test of necessity for bringing into force a negative instrument before the expiry of the current period of 21 days after laying. It appears from sections 28 and 31 of the bill that the test will disappear. In other words, there is no reference to "where it is necessary" to breach the 21-day rule. Was it a deliberate decision to remove the test? Should it be reintroduced to allow the Parliament and its committees to test whether a decision of the Scottish Government was appropriate?

Fraser Gough: The necessity test—or, at least, the word "necessary"—has been removed, but it is important to say that section 31 retains the requirement on the Government to write to the Presiding Officer to explain any breach of what will become the 28-day rule. To some extent, this comes back to Mr Doris's point about the effects of an annulment. Retaining the word "necessary" would, to some degree, create an implication that there was some legal moment to the concept of the necessity, which could be subject to the jurisdiction of the courts to assess. However, the Government's view is that it would be entirely appropriate for the Parliament to assess whether any breach of the 28-day rule were necessary and that it would be undesirable for that matter to be dealt with by the courts. The considerable delays in ascertaining whether an instrument was truly legally valid that might result from having the

matter dealt with in the Court of Session and then appealed all the way to the Supreme Court would be undesirable.

Malcolm Chisholm: Is the danger not that the Government's behaviour would change? At the moment, whenever the situation arises, the Government has to decide whether it is really necessary or simply convenient to breach the 21-day rule. Surely, under the bill, it would not have to apply that test when it made such a decision.

Bruce Crawford: It would have to apply the test because it would be up to the Parliament to annul the instrument if it was not happy. The ultimate power would be with the Parliament, so the Government would have to have regard to those issues.

Convener, if I remember rightly, I wrote to you about that in September, when I explicitly said that we were of the view that the 21-day rule was, in any case, directive as opposed to mandatory in effect.

Malcolm Chisholm: You can understand the concern. There might be an assumption that the Government would become more casual about invoking the procedure because there was not really any reason why it should not invoke it. It would simply have to write to the Presiding Officer.

Bruce Crawford: Yes, but if we did that regularly—we certainly do not do it unless there is a good cause—the committees would rightly say, "Come on. What's going on here?" We would put ourselves in jeopardy of the committee being prepared to recommend the annulment of a particular instrument in those circumstances. I do not think that anything will change because the committee will have the ultimate say through its policy decision-making process.

Malcolm Chisholm: That is true, but it may not be against the substance of an instrument; the issue might be the timing. Obviously, we will reflect on what you and your officials have said.

Bruce Crawford: We could write to you to flesh out what has been said, if that would help. We could try to define more tightly what we mean.

The Convener: That would be helpful.

You mentioned a letter that was written in September. We have been checking for that. We have a letter that was written in October. The matter could be covered when you write to us.

Bruce Crawford: If you want us to follow up that matter in correspondence in light of what Malcolm Chisholm has said and try to make things a bit more explicit and give guarantees on the role of committees, I am happy to do that.

The Convener: That would be super; it would be helpful from both sides' points of view. That is now on the record.

Tom McCabe (Hamilton South) (Lab): When you wrote to us previously, you indicated that the Government intends to extend section 33 to allow powers that are subject to the negative and affirmative procedures to be combined in the same instrument. Will you confirm for the committee that any instrument that combines powers in that way will be subject to the affirmative procedure?

Bruce Crawford: Yes. If powers are subject to the affirmative and negative procedures, including possibly even to no procedure aside from laying, the affirmative procedure would be the primary process, and the powers would be subject to the affirmative procedure. If the powers are subject to the negative procedure and to no procedure aside from laying, the negative procedure would apply. If they are subject to the affirmative procedure and to no procedure aside from laying, the affirmative procedure would apply. That is the standard that we will set with instruments.

The Convener: As a great royalist, Dr Ian McKee would like to ask you about the Queen's printer for Scotland.

Ian McKee: I am worried about the Queen's printer for Scotland. The Faculty of Advocates has expressed serious concern about the proposal in the bill that would require the Queen's printer only to publish and not to print Scottish statutory instruments. Perhaps that would fall foul of the trades description legislation and require a change in the Queen's printer for Scotland's name. The faculty was concerned that the ability to preserve Scotland's published heritage could be endangered if records are published and dealt with only electronically. How do you respond to those concerns?

Bruce Crawford: Can you do me a favour and remind me of the section that you are referring to so that I can find my notes?

Ian McKee: Section 41. I am sorry; I should have said that.

Bruce Crawford: That is all right.

We see the way forward as requiring that the Queen's printer for Scotland publish SSIs and leaving it to the Scottish ministers to specify in regulations the manner in which they are to be published. That would allow the publication requirements to be more readily adapted—for instance, to take account of technological developments or changes in societal trends—while the importance of the law's accessibility would be recognised. It is important that such regulations would be subject to the affirmative procedure.

Sections 41 and 42 provide for the Queen's printer's responsibility in respect of the publication of Scottish statutory instruments. It is recognised that SSIs are increasingly accessed online and that demand for hard copies is limited. Therefore, the provisions dispense with the requirement for the Queen's printer to print all SSIs. However, we recognise that not everyone will have access to the internet, so a duty will be imposed on the Queen's printer, by regulations, to make print copies of instruments available on request.

The Government acknowledges that the provisions as drafted allow the publication requirement to be disapplied

"in relation to an instrument or class of instrument".

That is an area of genuine concern, as I can understand. In response to that concern, we will lodge an amendment at stage 2 that will make the requirement to publish all SSIs online inalienable. I hope that will help to deal with any issues that remain in that regard.

Ian McKee: Thank you for that response, but I am not certain whether it entirely resolves the concern of the Faculty of Advocates. The faculty was concerned that there is some doubt as to how long material published online can be preserved. There is not enough knowledge in that field. The faculty felt strongly that there should be provision for making a hard copy of any act or SSI to be preserved at a repository such as the National Library of Scotland, so that a hard copy of any legislation was always guaranteed to be in existence. What do you think about that?

Bruce Crawford: I understand that the office of the Queen's printer for Scotland—the OPQS—has confirmed that it will deliver copies of every act of the Scottish Parliament and every SSI to each of the six legal deposit libraries under the terms of the Legal Deposit Libraries Act 2003. The bill's provisions do nothing to disturb that obligation.

Ian McKee: The 2003 act says that the copies should be delivered in the medium in which they are produced, so if instruments are produced electronically, electronic transmission would do, under that act. Is that the case? Is there something in the act that says that a hard copy must be delivered?

Bruce Crawford: Forgive me—I do not have a copy of the 2003 act in front of me. I do not know whether anyone here is in a position to answer that. If not, we will write to you on that point.

Ian McKee: A written response would be helpful. It is important that, somewhere, there is a hard copy of every piece of legislation that goes through, until we are a lot more confident about the future of electronic formats.

Bruce Crawford: I am pretty confident about the future of electronic formats. The six legal deposit libraries will have copies. We will respond to you in writing on the points that you raise.

Ian McKee: Thank you. You helpfully provided the committee with a set of draft regulations to be made under section 42 of the bill. However, those draft regulations are silent in relation to the manner of publication of Scottish statutory instruments. I hope that the final regulations will include specific provision on that, although that will depend.

Bruce Crawford: I have considered that matter, not least in light of the evidence that the committee has heard already, and we have decided to lodge stage 2 amendments that will help to create an express duty requiring the Queen's printer to publish all SSIs online. I hope that that will address the matter.

Ian McKee: I turn now to section 47, "Pre-consolidation modifications of enactments". It provides the Scottish ministers with an order-making power, subject to the affirmative procedure, to make changes which

"in their opinion facilitate, or are otherwise desirable in connection with, the consolidation of the law on the subject."

That is potentially a very broad power, which goes well beyond existing powers to amend primary legislation by order. I appreciate that you have covered some of this ground in your opening remarks, but the Scottish Law Commission suggested that amendments of this type should be proposed by the commission, rather than by the Government. Iain Jamieson argued that the power could lead to an abuse of the consolidation procedure and that section 47 should be removed from the bill altogether. How do you respond to those strong reservations that witnesses have expressed?

Bruce Crawford: That is one of the areas where there is a significant issue, as is obvious from the evidence that you have received—which has been noted. Let me explain how we see things operating. The Law Commission currently has the power to make recommendations for minor amendments to legislation that is to be consolidated. The commission can recommend amendments for the stated purpose

"of enabling a satisfactory consolidation".

In some cases, the need for amendment is obvious. However, the change that is made may go beyond what the commission may recommend. For example, suppose that each of three acts that are being consolidated have provisions making particular conduct an offence, but with different penalties imposed. The reason for the difference might be historical, and it might be clear that the

provisions should be brought into line, but the Law Commission might feel that the question of what the new penalty should be is a matter of policy and, therefore, properly for the Scottish ministers to decide. It might be an easy decision for ministers, but the amendments to implement it might have to wait until there was a programme bill; you can imagine the difficulties that those particular circumstances could create. If we needed to wait until a programme bill could be found, the consolidation would be held up.

15:00

The power in section 47 would allow the Scottish ministers to make that amendment by order, but the Parliament would be able to closely control the amendments being made, as such an order would be subject to affirmative procedure, and would therefore go to the lead committee that specialises in that area.

Incidentally, the amendments would not take effect on a standalone basis but would come into force only when the consolidation bill in relation to which the order was being made came into force.

Because of those sorts of circumstances, it would not be satisfactory to leave the changes to the Law Commission, as it might not have the powers to make all the necessary changes.

The Convener: Section 47(5) of the bill says:

"'consolidation', in relation to the law on a particular subject, includes the restatement of the common law in relation to the subject."

Last week, our friends the Scottish Law Commission told us that, because of the difficulty in securing agreement as to what the common law on any matter is, restatement of the common law should not be included within the power in section 47. What is your response to that suggestion?

Bruce Crawford: As that relates to a matter of law, I will let Colin deal with it.

Colin Wilson: Rule 9.18A of the Parliament's standing orders lays out the procedure in relation to codification bills, which is pretty much identical to the procedure for consolidation bills. The drafting of the provision that you refer to was simply meant to reflect the procedure that the Parliament already has under its standing orders. It is fair to say that that procedure has not actually been put into practice so far, but it is there and it was felt that the drafting should allow for the possibility of that in the future.

A consolidation bill would normally just restate the legislation that is being consolidated. However, it is possible that there might be cases in which a particular provision of the legislation has been interpreted by the courts in a decision, and it might be felt to be desirable to reflect the effect of that judgment in the provisions as restated. The breadth of section 47 would enable that sort of thing to be done as part of a consolidation bill, which would mean that the new legislation would reflect the judgment of the court as well as the pure words of the legislation.

The Convener: Perhaps I misunderstand you. Does what you are saying not simply amount to a continuation of what has gone before? Would there not be some value in the Scottish Government considering a bill to address the issue that I am talking about, which is the inclusion of common law?

Colin Wilson: The point that the Law Commission was making is that codifying the common law is extremely difficult. Everyone would accept that. Legislation that has attempted to state the common law has often resulted in the recognition that there is not always pure agreement about what the common law is. However, the fact that the Parliament's procedures allow for a restatement of the common law meant that we thought that that ought to be reflected in the bill.

Bruce Crawford: Is it not right to say that, because common law is, by definition, not written down, it is incapable of being amended in text form? That would make for a difficulty.

The Convener: Indeed. Perhaps we had better move on swiftly while the convener still has a limited grip of the issue.

Malcolm Chisholm: Last week, concern was expressed about the fact that the Scottish Parliament has dealt with few consolidation bills. What steps is the Scottish Government taking to increase the rate of implementation of Scottish Law Commission reports, including on consolidations?

Bruce Crawford: First, it is true to say that the Parliament, the Government and the Law Commission share responsibility for keeping Scotland's statute book in good repair and as up to date as possible. We certainly want to work as closely as possible with the Scottish Law Commission on that. As far as I am aware, the commission has not prepared any consolidation bills that the Scottish Government has not introduced. In terms of the Scottish Law Commission's future work, I note that it has just finished a wide-ranging consultation on the priorities for its forthcoming eighth programme of work and will be making proposals shortly. Recent and forthcoming work in the Parliament includes consolidation of bankruptcy and crofting legislation, which came primarily from the SLC, so we have been going quite a long way towards accommodating it.

I would like, if it is appropriate to do so at this stage, to throw something on the table, convener. I have had a number of discussions with the Scottish Law Commission, as has the Cabinet Secretary for Justice, about how we are dealing with all the matters that the commission is bringing to us, and how we can do it more efficiently. There are roles for Parliament, the Government and the commission in that. I know that Ian McKee held a reception for the Scottish Law Commission not long ago, at which the question was raised whether we need a specific parliamentary committee that could deal with consolidation bills so that they do not get mixed up with programme bills and so that we could speed up the process when consolidation bills come before Parliament. It is worth considering whether that committee should be an ad hoc committee, or whether it should be the Subordinate Legislation Committee, We can deal with things like bankruptcy and crofting legislation, but we could speed up the process when a consolidation bill comes before the Parliament. Obviously the Government would have to act as gatekeeper in such circumstances, but it would be valuable to discuss how best Parliament might respond as well.

Malcolm Chisholm: Would one option be to require the Scottish ministers to introduce a bill within two or three months of the submission of a commission report containing a draft bill or, if they will not, to explain why not?

Bruce Crawford: I do not think that there should be any such requirement. In my previous answer, I explained that we are to introduce legislation to implement Scottish Law Commission reports, and that the commission is preparing consolidation on bankruptcy law, which will be introduced during the current legislative programme. The committee will also be aware that the forthcoming crofting bill was put out to consultation in May. Measures are included in that bill to facilitate the consolidation of crofting law.

Consolidation is going on all the time. It might not always be obvious that it is going on, but it can be done as part of programme bills. We announced that crofting law would be a target for consolidation during the next session of Parliament. If the committee is aware of concerns that consolidation is not happening—other than in areas in the Scottish Law Commission's eighth programme of work, which it is working on just now—and of which I am not aware, I am keen to know about them.

Malcolm Chisholm: There is no such requirement on Government at the moment, so I suppose that the suggestion is that there should be such a requirement. The time in which the Government would be required to act could be lengthened, but the point that one or two witnesses are making is about whether there should be an obligation on the Government to respond within a set time to a proposed consolidation bill from the Scottish Law Commission.

Bruce Crawford: Elspeth MacDonald has just whispered to me that she does not think that that is necessary, and I agree with her. The Government is responding to the Scottish Law Commission.

Unless the Subordinate Legislation Committee or another ad hoc committee was prepared to take a matter on as a consolidation issue, the danger is that programme bills might well be affected. Of course, as I said at the beginning, it is not just the job of the Government but that of the Law Commission and Parliament to ensure that the consolidation process proceeds. We must try to keep the statute book as modern and up to date as we can, which is what consolidation is all about. Unless somebody can point me to an area in the consolidation process in which Governments have been lacking, we do not have a problem.

Ian McKee: Some of the evidence that we got from the Scottish Law Commission was not specifically on consolidation, but drew attention to the fact that the Government often asks the Law Commission to consider something, then literally does not respond. I do not mean that it does not respond in that it does not take action: I mean that it does not respond at all. Do you think that it is reasonable that, if the Government asks the Law Commission to undertake some work, it should give some sort of response, even if it is not going to do anything about the matter?

Bruce Crawford: It is nothing to do with the bill, but I think that it is a matter of good process for the Government to do as Ian McKee suggests: it is not a bad tenet to start with. I am not aware that what you describe has happened under this Government; it may have happened under previous Governments, but I am not sure enough to point the finger.

Ian McKee: I just sneaked in the opportunity to make that point, minister.

Malcolm Chisholm: Iain Jamieson stated in his written submission that section 55 was not in the consultative draft and that it is contrary to the approach that has been adopted in part 1. He also said that no explanation or justification was given in the policy memorandum. As you will know, minister, the approach that has been taken in part 1 is that the bill should make provision only for interpretation of acts of the Scottish Parliament, and that Westminster legislation should be left to be interpreted by the Interpretation Act 1978. Mr Jamieson also highlights in his submission that section 55 does not expressly apply only to

Westminster legislation that does not relate to reserved matters. I suppose the question is why section 55 is there at all and why it has been drafted as it has been drafted. Is there not a lack of clarity about the whole matter?

Bruce Crawford: Section 55 will amend the definition of "enactment" in the 1978 act to include enactments in the form of acts of the Scottish Parliament and Scottish statutory instruments. The 1978 act defines the words and expressions for Westminster acts of Parliament and statutory instruments. It currently excludes acts of the Scottish Parliament and Scottish statutory instruments from definitions of "enactment". Fraser Gough can perhaps explain why we are where we are.

Fraser Gough: This rather neatly brings us back to two central themes that we have been talking about for the whole meeting. First, the rules of interpretation provide a base point, or starting presumption, that can then be rebutted or reverted as necessary in the context of the wider act.

The second issue, to which we have kept coming back, is the idea that the bill is reforming the current arrangements in the light of 10 years' experience of devolution. We have learned in those 10 years that the original call that was made when the Scotland Act 1998 was enacted, to exclude ASPs or SSIs from the definition of "enactment", can potentially cause problems in some cases with the interface between the post-devolution and pre-devolution Scottish statute book. What we are doing in section 55 is essentially refining the operation of the Interpretation Act 1978 to address potential difficulties, so that the definition of "enactment" in the 1978 act—which was for the purposes of the pre-devolution statute book—will henceforth include ASPs and SSIs. Everything in the supervening period will remain as it is, because draftsmen have known about the position and have drafted accordingly by expressly including ASPs and SSIs, where necessary. We will be changing the position because we think a more reasonable presumption to start from is that, when drafters use the word "enactment", they mean to include ASPs and SSIs. Unless the contrary intention applies, that is what we think the default rule should be.

On the questions that have been asked about the drafting and the fact that it is not explicitly stated that section 55 will not apply to reserved areas of law, in the first instance I should say that discussions with the UK Government are going on to seek an order that would extend the effect of the section so that it will apply to the reserved statute book. In any event, it is not uncommon drafting practice not to talk expressly about the limits of legislative competence when amending legislation. The Scotland Act 1998 contains express interpretive provisions that mean that legislation is read down in so far as it is possible to do so within legislative competence; the drafting of section 55 is entirely consistent with that routine drafting approach.

15:15

Malcolm Chisholm: Thank you for your comments, on which we need to reflect. We were worried about transparency and how the provision will work, and the answer that you gave suggests that such issues are still under discussion, which perhaps does not allay our concerns. Do you accept that the approach in section 55 is contrary to the approach that is adopted in part 1, which is why many people have been surprised by section 55's appearance?

Fraser Gough: The drawing of an analogy between part 1 and section 55 is misconceived. Part 1 is about the prospective interpretation of ASPs and SSIs. Part 7, by definition, is not part 1, and has an entirely separate objective, which is to address a perceived potential problem in the statute book. The issue is within the scope of the bill but is not necessarily germane to the purpose of part 1.

The Convener: Have you finished, Malcolm?

Malcolm Chisholm: For the time being.

The Convener: That concludes our questions, although I will not let you off quite yet, minister. In response to your offer, I am bound to say that there is work to be done on consolidation, certainly in relation to the health service and criminal justice. The Scottish Law Commission can do what it does only within its role, and I should say for the record that although we always assist, remind, prod and work constructively with the Scottish Government, there remains a job to be done on consolidation. I leave that thought with you, minister.

Bruce Crawford: I accept that thought. That is why I threw the offer on the table—I am not suggesting that we need to reach a conclusion today. The Government is serious about trying to modernise the statute book and keep it up to date as much as we can. It is important, particularly for the courts, that we do so. We are committed to that journey: I encourage the Parliament to be similarly committed. We might need to ask the Standards, Procedures and Public Appointments Committee to consider whether there is another mechanism that we can use for general consolidation in order to speed up processes. The issue is in the ether, although I am not suggesting that there is a hard idea on that. It is worth floating ideas, to try to achieve improvement.

The Convener: If there are no more questions, it remains for me only to thank you and your team for coming and for the thought and effort that have gone into your answers. Your comments have been helpful and we will deliberate on them in due course.

Bruce Crawford: As always, the offer stands for Government officials to have further discussions with the clerks after this and other evidence sessions, so that both sides have a clear understanding of what we are trying to achieve. Such discussions might be useful. I will write to you about the two matters that were mentioned.

The Convener: Thank you.

15:18

Meeting suspended.

15:19

On resuming—

Draft Instruments subject to Approval

Budget (Scotland) Act 2009 Amendment Order 2009 (Draft)

Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (Scotland) (No 3) Order 2009 (Draft)

The committee agreed that no points arose on the instruments.

Instruments subject to Annulment

Protection of Vulnerable Groups (Scotland) Act 2007 (Transitory Provisions in Consequence of the Safeguarding Vulnerable Groups Act 2006) (No 2) Order 2009 (SSI 2009/337)

15:20

The Convener: Can we agree to report that, in relation to the replies that have been provided by the Scottish Government in respect of questions 1 to 3, all of which were concerned essentially with the same issue and related to the nature of the "modifications" that the order makes to other primary legislation, we wish to bring the order to the attention of the lead committee and the Parliament on the basis that the form or meaning of articles 3 and 4, which provide for modification of the Police Act 1997 and the Protection of Children (Scotland) Act 2003, could have been made clearer and that, where the question whether an instrument makes a textual amendment is determinative of the parliamentary procedure that applies, we consider that the form of modification that is adopted should be absolutely clear?

Members *indicated agreement*.

The Convener: Can we also agree to report that, in relation to the reply that has been provided to question 4, we wish to bring the order to the attention of the lead committee and the Parliament on the basis that the intended effect of article 2, which provides for the order being of temporary effect, could have been made clearer, as there appears to be a fundamental inconsistency between the proposition that the entire order is temporary in its legal effect and article 6, which provides for the revocation of the instrument that is referred to therein and which is assumed to be intended to be permanent?

Members *indicated agreement*.

The Convener: Finally, can we agree to report that, in relation to the breach of the 21-day rule, we wish to report to the Parliament that we find satisfactory for our interests the explanation that is given by the Scottish Government in its letter to the Presiding Officer, dated 5 October 2009, for the failure to comply with article 10(2) of the Scotland Act (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SSI 1999/1096)?

Members *indicated agreement*.

Town and Country Planning (Miscellaneous Amendments) (Scotland) (No 2) Regulations 2009 (SSI 2009/343)

Planning etc (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Amendment (No 2) Order 2009 (SSI 2009/344)

Pensions Appeal Tribunals (Scotland) (Amendment) Rules 2009 (SSI 2009/353)

Mental Health Tribunal for Scotland (Appointment of Medical Members) Amendment Regulations 2009 (SSI 2009/359)

The committee agreed that no points arose on the instruments.

Instruments not laid before the Parliament

Act of Adjournal (Criminal Procedure Rules Amendment No 5) (Miscellaneous) 2009 (SSI 2009/345)

Act of Sederunt (Child Support Rules) (Amendment) 2009 (SSI 2009/365)

15:22

The committee agreed that no points arose on the instruments.

The Convener: We now go into private session, as agreed under agenda item 1.

15:23

Meeting continued in private until 15:26.

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