SUBORDINATE LEGISLATION COMMITTEE

Tuesday 27 October 2009

Session 3

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SUBORDINATE LEGISLATION COMMITTEE
27th 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:

Gregor Clark CB (Scottish Law Commission)
Brian Gill (Faculty of Advocates)
Iain Jamieson (Law Society of Scotland)
Patrick Layden QC TD (Scottish Law Commission)
Andrea Longson (Advocates Library)
Roderick Thomson QC (Faculty of Advocates)

CLERK TO THE COMMITTEE

Douglas Wands

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 27 October 2009

[THE CONVENER *opened the meeting at 14:19*]

Decision on Taking Business in Private

The Convener (Jamie Stone): I welcome everyone to the 27th meeting this year of the Subordinate Legislation Committee. We have received apologies from Tom McCabe. I remind members to turn off mobiles and BlackBerrys.

Under item 8, we will consider evidence on the Interpretation and Legislative Reform (Scotland) Bill that we are about to hear from witnesses. Given the nature of the discussion, it would be appropriate for the item to be taken in private. Is that agreed?

Members *indicated agreement*.

Interpretation and Legislative Reform (Scotland) Bill: Stage 1

14:20

The Convener: The second item on our agenda is the Interpretation and Legislative Reform (Scotland) Bill. This is our first evidence session on the bill. Next week, we will hear from the Minister for Parliamentary Business. Today, we have three panels of witnesses. We will hear first from the Faculty of Advocates, then from the Scottish Law Commission and finally from Mr Iain Jamieson, representing the Law Society of Scotland. It is my pleasure to welcome our first set of witnesses: Andrea Longson, senior librarian at the advocates library; Roderick Thomson QC; and Brian Gill, advocate. It is nice to have you before us. We have prepared a series of questions. I invite committee colleagues to take you through their chosen questions.

Jackson Carlaw (West of Scotland) (Con): Good afternoon. The scope of part 1 of the bill is pretty complex and has made thrilling reading for all of us. There is an underlying concern or problem. As the Scottish Parliament does not have legislative competence in all areas, there is potential for confusion to arise if different legislatures do not operate by the same rules. Will the provisions of part 1 be able to achieve consistency of interpretation across the Scottish statute book?

Roderick Thomson QC (Faculty of Advocates): Our reservations are expressed in our second submission, which is a much summarised version of what we said earlier. However, we are relatively content with the broad thrust of the bill.

Jackson Carlaw: In your opinion, how will part 1 apply to provisions of acts of the Scottish Parliament or Scottish instruments that amend Westminster acts or statutory instruments?

Roderick Thomson: That is a rather broad question. We have highlighted issues that we think are worthy of comment. Subject to their being addressed, we are content that there will be sufficient clarity.

Brian Gill (Faculty of Advocates): The difficulty is that there is a risk of different interpretative regimes applying to different parts of the statute book. Unfortunately, that is just in the nature of the devolution that we have—there is no way around that. Whether that will be a problem will be a matter for draftsmen. Mr Clark, who will give evidence later, can speak to the issue better than we can. Generally, parliamentary counsel know what they are doing and will have different

interpretative provisions in mind when they draft legislation. In practice, there should not be a problem.

Jackson Carlaw: Do you have a view on the retrospective application of part 1 to acts of the Scottish Parliament or Scottish instruments that amend old acts of the Scottish Parliament or old Scottish instruments or Scottish statutory instruments that are not covered by the definition of "Scottish instrument"?

Roderick Thomson: Previously, we expressed the view that the bill should not apply retrospectively. In one response, it was suggested that it is unnecessary to have three interpretation codes. However, we see that as necessary, given that the bill is likely to be passed. Having three codes is not a difficulty, because the draftsmen will have that in mind when they draft legislation.

Jackson Carlaw: So you are confident that the draftsmen will ensure that aspects are made clear.

Roderick Thomson: Yes.

Ian McKee (Lothians) (SNP): We read with interest the faculty's submission, which disagrees with the bill's approach to the application of acts and instruments to the Crown. Will you outline the faculty's preferred approach?

Roderick Thomson: We prefer the current rule to remain, which is express inclusion or necessary implication. We have previously set out our reasons for that. It is submitted that the existing rule is sensible. It is useful and works in practice. A body of settled case law exists. There is no reason to diverge from that Westminster approach. Having a different rule from Westminster could create complication.

The necessary implication rule has potential benefits in applying or construing domestic legislation in relation to European Union law or European convention on human rights law when that law might require an act to bind the Crown and it is not specifically stated to be bound. The necessary implication rule allows a construction that is consistent with those laws.

Furthermore, the Crown is not a subject and is not in the same position as a citizen or a member of the public is. There is no compelling reason why we should try to pretend that the Crown is in the same position as a member of the public is.

Ian McKee: I do not have the benefit of legal experience, but does the suggested approach not just revert to the pre-1707 situation, so it provides continuity with Scots law before 1707?

Roderick Thomson: Much more continuity would be achieved by keeping the rule as it is. In 20 years of practice, the occasions on which I have had to look at a pre-1707 Scots act have been few and far between.

Ian McKee: I suppose that the Crown's relationship to Scotland is slightly different from that in England.

Roderick Thomson: We do not think that that should weigh heavily in considerations, but that is, of course, a matter for members.

Ian McKee: Indeed.

I will test a little further the implications of the proposed change, if we assume that it will take effect. If a new Scottish Parliament act created law on building controls and amended an old Scottish Parliament act about building controls, and the new act was silent about Crown application, I understand that the new act would bind the Crown. The question is whether the new provisions that were added to the old act would bind the Crown. The existing rule is that the Crown is not bound unless that is stated specifically or by necessary implication. In the circumstances that I described, would necessary implication apply?

Roderick Thomson: That went by rather quickly.

Ian McKee: I am sorry. Would you like me to ask the question more slowly?

Roderick Thomson: We did not get what you said.

Ian McKee: Under the changes that are proposed in the bill, if a new Scottish Parliament act created law on building controls, for example, and amended an old Scottish Parliament act about building controls, and the new act was silent about Crown application, I understand that the new act would bind the Crown, because the Crown is to be bound by acts of the Scottish Parliament. The question is whether the new provisions that were added to the old act would bind the Crown. The existing rule is that the Crown is not bound unless that is done specifically or by necessary implication. In the circumstances that I described, would necessary implication apply? Is that clearer? That will be in the *Official Report*. Perhaps you can write to us.

14:30

The Convener: The question will indeed be in the *Official Report*. You may want to consider it and give us a reasoned response.

Roderick Thomson: I am afraid that I would be uncomfortable answering that question here and now, but we would be happy to give an answer in writing.

The Convener: All right. We will have a gentleman's agreement on that. It was a tricky question. Let us move on.

Ian McKee: Sections 12 and 14 deal with references to the European Union and other legislative provisions. The explanatory notes say that references to EU instruments are not intended to be ambulatory. That is in contrast to section 14, which provides that references to United Kingdom legislation are to be ambulatory—future changes will wash through and be adopted by existing references. Do you have a view about the difference of approach that has been adopted to EU law and UK law?

Roderick Thomson: We did not consider that matter in huge detail. We were relatively comfortable with the draft as it stood originally and as it is.

Ian McKee: I suppose that the problem is that if references are not ambulatory and there are future changes in EU law, there will be difficulties with what is being dealt with. That seems to be the nub of the matter to me as a lay person. Do you agree that it is?

Roderick Thomson: Yes.

Ian McKee: So there would be problems.

Roderick Thomson: I do not wish to say more than what we have already said about that matter, because we did not make a detailed response on it.

Ian McKee: Okay.

Finally, do you have any concerns that changes by another legislature—Westminster—to legislation that is referred to in Scottish acts will automatically be adopted through that reference being ambulatory without reference to the Scottish Parliament and its views on those changes, or would you like to play a straight bat to that as well?

Roderick Thomson: Yes, if you do not mind.

The Convener: Okay. Let us move on.

I have several questions on the definitions of words and expressions. In its written submission, the faculty expressed the view that the Scottish ministers should not have the power to amend definitions in schedule 1 by order. What are the reasons for your position?

Roderick Thomson: Our primary concern is about ministers having the power to change definitions. The concern is not so much about adding definitions; it is about changing definitions that have been in place for a certain amount of time—perhaps for a long time—and in light of which acts have been drafted. We are concerned about ministers changing those definitions. Because of the ramifications for legislation that was in force, it would be preferable to deal with the matter by primary legislation so that there would be greater scrutiny.

The Convener: What could the effect be of amending definitions or adding new ones? Could the effect be retrospective? Would it not be complicated to identify the provisions to which the new definition applied? Could there not be a mess?

Brian Gill: There could be. Of course, the issue could be dealt with by transitional provision at the time, but our difficulty is simply that a level of unnecessary complexity would be created. Requiring primary legislation to make a change would ensure that the full scrutiny that would be necessary to think through such problems would occur.

The Convener: For the sake of tidiness, have any definitions in the Interpretation Act 1978 or the interpretation order—the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999—been omitted from schedule 1 that ought to be included?

Roderick Thomson: We did not consider that we wanted to propose any.

The Convener: Has Brian Gill thought of one?

Brian Gill: In his written evidence, Mr Jamieson makes the point that the interpretation order imports from the Scotland Act 1998 a number of important definitions, such as the definition of "the Scottish ministers". There is no particularly good reason for those not to be included in schedule 1, but they are not there. According to the policy memorandum, schedule 1 proceeds from the idea of a frequency of use test, but it is not clear what that means. In my opinion, it is not necessarily the correct test. The correct test is to identify the key terms that we want to be sure are defined for all purposes for acts of the Scottish Parliament. From that perspective, consideration could be given to the omission of the 1998 act definitions from the bill.

The Convener: That is an interesting thought. We will probably return to the matter.

Ian McKee: When it writes to us, the faculty could provide a list of the definitions that would benefit from being included in schedule 1.

The Convener: Yes, applying a sort of building blocks test rather than a frequency of use test.

Helen Eadie (Dunfermline East) (Lab): My question relates to section 26, on "Service of documents". It is recognised that, with the increased use of electronic communication, provision should be made for electronic service of

documents. However, there are a number of potential problems with proof of delivery or receipt. Do you consider that there are potential problems with the bill's provisions on electronic service of documents? How might those problems be resolved or overcome?

Roderick Thomson: In principle, it is a good idea to provide for that, if the problems can be overcome. Some of the other respondents mentioned various problems, primarily in relation to service of notice. We believe that the problems that have been identified are real, but our submission focused on the separate issue of consent. We are concerned that there would be immediate problems, as section 26 provides that the device will come into operation only if the parties consent. From bitter experience—in my case, as a solicitor—we foresee all sorts of problems in proving consent. People could claim that they had not consented when they had, or vice versa.

There is now a proposal for an amendment stipulating that consent should be written, as we suggested. I do not know whether the proposal is a response to our submission, but it matches what we said, so our concern in that regard has been assuaged. We discussed whether written consent ought to include electronic transmission. We said that we thought that it should, but that carries with it some of the problems that other respondents have mentioned.

In summary, we welcome the provisions, but think that there are problems with the technical aspects. We are not competent to give evidence on those. I can discuss the issues to the best of my ability, but I will not add to the sum of knowledge in the area.

Helen Eadie: We want to find out how the problems might be resolved. If you are unable to answer our questions today, you could write to us on the matter.

Roderick Thomson: On the technical aspects, we could not add anything in writing to what we are saying today. The issue for us is to have a means of service that is reliable and testable and can be used against a denial that there was consent or that service was made in the agreed way, so that somebody cannot say, "I didn't consent," or, "I didn't get the e-mail."

You will appreciate that there is a general postal rule that is an exception to the usual rule about transmission of consent. There are significant issues, but I do not think that we would be able to advance them by giving you anything further in writing.

Helen Eadie: That is helpful and I accept what you say. A number of us permit other people to open our e-mails, which could throw up a problem. If it was not reported to someone that a document had been served—messages are not always transferred reliably although one likes to think that they are—that sort of problem might arise.

I move on to part 3 of the bill, "Publication of Acts and Instruments". In your submission you highlighted concerns about the provisions in sections 41 and 44, which would require the Queen's printer for Scotland only to publish and not to print instruments. We have received correspondence from the Queen's printer for Scotland that suggests that your concerns are unfounded. How do you respond to that suggestion?

Roderick Thomson: I am afraid that we do not think that that response illustrates that our concerns are unfounded and I will explain why. I do not know whether you want me to tell you a bit more about our basic concern before I address whether it is unfounded; it might be helpful.

As members know, the advocates library is the national law library and it works with the National Library of Scotland to ensure that the published heritage is preserved. I offer an illustration of the problem, or at least one aspect of it, which I am told has improved. I gather that historically, there was some problem with the Scottish Parliament's archiving of publications. I am told that in relation to the parliamentary website, for a time at least, documents appeared and would then disappear, apparently without trace. As I say, I am told that that has very much improved in recent years, but it is illustrative of the problem that one has when considering the preservation of electronic record.

The web archive is another element that overlaps with the Parliament website problem that I just described. As I understand it, archiving involves taking a snapshot of a website every now and then to preserve the record. I am told that the National Library of Scotland does that in relation to the Scottish Parliament website every few months. Potentially, that is a hit-and-miss affair that depends on resources. Those are just introductory comments; the nub of the matter is that there is no nationally or even internationally accepted way of preserving non-print media. That is not just in relation to web archiving, but to the hardware that is used to preserve it, the conditions in which the hardware is kept or the software that is used to store or access it and procedures for changing hardware or software. None of those things is subject to international or national agreement. On the other hand, there are well-established standards for the preservation of print media, which all the national archive bodies follow—standards that relate to the quality of print, paper, storage and the like.

14:45

The long-term preservation of electronic material is uncertain: nobody knows how long material will be accessible on discs. Preservation is simply an unknown factor. People can guess how long a disc will retain its data, but it is only guesswork. Only experience will tell. In our submission, we say that prints should be made and supplied to at least two libraries. We say that for obvious reasons of preservation and security.

The idea behind the proposed change seems to relate to the number of hard copies that may or may not be necessary. Our view is that that is not a proper basis for proposing such a change. The size of a print run is—ultimately—an issue for the Queen's printer, which can decide to make a print run of six, 60 or 6,000. I understand that the Queen's printer is saying that it makes print runs of SSIs and that it will continue to do so. We wonder whether there is a good reason for the proposal. I will return to that.

Some respondents are supportive of the idea that it is not necessary to publish SSIs other than electronically. The reasons for saying that have nothing to do with preservation of media, but with dissemination of information. As far as we are concerned, the latter is a completely separate issue. A further view was expressed that provisions to deal with various archiving issues should be included in the bill. I think that it was Professor Reid who expressed that view. In our submission, we say that the bill does not take account of preservation issues. It seems unlikely that that will happen in the context of the current bill. As I hope I suggested earlier, the issues are complicated.

In its submission, the Queen's printer says:

"the average number of copies sold per ASP is now only 65 copies whilst the average number of copies sold per SSI … is now 29 copies with just six instruments selling in excess of 100 copies".

The subtext is clear: "It's not worth printing." We would like an obligation to publish to be included in the bill.

In paragraph 2.7 of its submission, the Queen's printer says:

"Print copies of Scottish legislation will be made available for sale as they are at present, but … they should no longer be the primary means for making legislation available. Print copies will continue to be available and users will be able to place standing orders to receive all ASPs and/or SSIs".

We wonder whether that amounts to any effective difference from the current situation. If what the Queen's printer for Scotland says about what it does and what it intends to do is correct, it will do exactly the same in practical terms after the bill has been passed as it did beforehand. It is being requested that the obligation changes from "printing" to "publishing", which might involve a change to the job title, if nothing else.

In paragraph 2.8 of its submission, the Queen's printer for Scotland indicates that two copies are printed and that copies are supplied to legal deposit libraries under the Legal Deposit Libraries Act 2003. It suggests that that point addresses our concern, but it does not. I am afraid that I do not have copies of the 2003 act for members, but I will refer to it briefly.

Section 1(1) of the act states that it applies to

"A person who publishes … a work to which this Act applies".

Section 1(3) states:

"In the case of a work published in print, this Act applies to—

(a) a book",

among other things,

"but that is subject to any prescribed exception."

That prescribed exception is made by the secretary of state.

Section 1(4) states:

"In the case of a work published in a medium other than print, this Act applies to a work of a prescribed description."

In other words, if a work is not in print, the act does not apply unless the secretary of state says that it does, by way of regulation. Furthermore, section 1(6) states that, subject to specific exception, the obligation to deposit

"is to deliver a copy of the work in the medium in which it is published."

There are two problems. First, as far as we are aware, the secretary of state has not prescribed anything in relation to non-print media. I am told by Ms Longson, who may wish to tell us more about the matter, that such provisions have been in the pipeline for a long time and that, as far as we are aware, there is no sign of their being introduced. It is thought that the reason for that is the complications that arise in relation to them. If the bill is passed, publishing will be by non-print media and, as matters stand, the 2003 act will not require the Queen's printer for Scotland to send anything to us, because that is not prescribed.

Secondly, under section 1(3) of the 2003 act, it is for the secretary of state to make specific exceptions, which has not been done. Even if we get around that problem, for reasons that I mentioned with reference to section 1(6), the copy that was provided by the Queen's printer for Scotland under the 2003 act would be an electronic copy, which is precisely what we do not want. The problem could be got around by the secretary of state prescribing that a paper copy be provided, but one must wonder what the point of

that would be. All that one needs to do is to keep the status quo—if SSIs were treated in the same way as ASPs under the bill, the secretary of state, with all the other things that he has to worry about, would not have to worry about that. We do not consider that the matter is answered by the 2003 act.

In addition, section 41 of the bill states:

"the Queen's Printer must publish copies of the instrument in accordance with regulations under section 42."

Section 42 allows the Scottish ministers to make provision by regulations for the publication of instruments. It would be possible for the ministers to prescribe that the publishing would be electronic. That seems to be the underlying thrust of the proposals. If that were done, it would mean that the advocates library would end up getting electronic copies. We would not get hard copies by reason of the 2003 act, contrary to what the Queen's printer seems to have suggested. The provisions in the bill and in the 2003 act operate to prevent hard copies being provided to the deposit libraries, and that is highly undesirable for the reasons that I have mentioned.

I return to the issue of principle—if there is one—which I touched on earlier. It seems that we are being told that the Queen's printer's view is that an average of 29 copies of SSIs and an average of 65 copies of ASPs are sold, and that the Queen's printer is happy to carry on printing ASPs but not SSIs. One has to question what the significance or importance of a difference of 36 copies is. I suggest that there is no significance or importance in that difference and that SSIs should be treated in the same way that ASPs are.

Andrea Longson (Advocates Library): It may help if I say that I support what Roderick Thomson has said. From a librarian's point of view, what he has said is exactly right.

Helen Eadie: It would be good to hear your experience; the more we can hear the better. The Queen's counsel made a powerful presentation, but if you want to add something to enrich it, that would be helpful.

Andrea Longson: I would not like members to think that information professionals are against the electronic supply of information. That is absolutely the way ahead for making information available. We are not stuck in the past; we use that method all the time. However, this morning, I checked the website of the British Library, which runs the national preservation office. It recently carried out a study of 16 major international libraries, and it says on its website:

"In summary, digital is not generally viewed as a suitable long-term preservation archival surrogate for print."

If we had only digital versions of documents, something would have to be done with them. It is not impossible to keep digital versions, but hard copies are much more tried and tested. We have books that are more than 500 years old in the advocates library; there is no equivalent on the digital side and there is no standard that is accepted to the same extent. Microfilm is also an accepted standard, but perhaps that does not apply in these circumstances. I have consulted the librarian in the National Library of Scotland's official publications department and the chair of the Scottish working group on official publications and discussed the matter with them. They concur with our view and are happy for me to say that.

Bob Doris (Glasgow) (SNP): I hate to be slightly flippant because I take seriously what you say about preserving original copies. Those copies are reliable and can be scrutinised and archived. However, if a portable document format—PDF—file is sent to you, is it outwith the realms of possibility that the Faculty of Advocates could print off a copy of it? That is hardly lightning stuff if you are concerned about getting copies sent to you.

Andrea Longson: Yes, but how would we know how authoritative that copy was, unless it had been produced directly by the Queen's printer?

15:00

Bob Doris: If the Queen's printer for Scotland were to send you a security-proofed, authenticated PDF file that could have come only from it, you could archive that electronically and print off a copy.

Andrea Longson: That is perfectly feasible, but why should SSIs be treated differently from all other legislation? Under the bill as drafted, there is no compulsion on the Queen's printer for Scotland to print SSIs, because no regulation has been made under the Legal Deposit Libraries Act 2003. That means that SSIs are being treated differently. Why should our Scottish legislation be treated differently from other types of legislation?

Bob Doris: These things change all the time. The committee and other committees of the Parliament will have to scrutinise the matter.

The Convener: Time is marching on. Do members have any further questions?

Helen Eadie: I am grateful to the witnesses for the answers that they have given, which I find powerful. They have made a compelling case.

The Convener: As MSPs, we know that we must treat some electronic information with extreme caution, especially if it comes from Nigeria. In his 10 and a bit years as an MSP, my colleague John Farquhar Munro has never switched on a computer. He relies on his staff.

Ian McKee: Is there any difference between publishing something electronically but having to provide a hard copy to a national library, and having to publish something in hard copy? Does the requirement to publish something in hard copy give other people the right to demand that hard copies be available to be purchased, as opposed to just libraries getting hard copies and other people having the right to get electronic copies?

Roderick Thomson: The difference relates to the obligations that are associated with having something published in print rather than by other means. There would be no difference in respect of who was entitled to the document.

The Convener: Thank you for your thoughtful, considered evidence, to which we will give proper weight. Enjoy the rest of the day. Jackson Carlaw must leave us now. After a short break, we will hear from the second panel.

15:02

Meeting suspended.

15:03

On resuming—

The Convener: I extend a warm welcome to our second set of witnesses, representing the Scottish Law Commission. We have with us Patrick Layden QC, commissioner, and Gregor Clark CB, parliamentary counsel. We look forward to your contribution.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): Welcome to the committee; thank you for coming. You will find that some of our questions are the same as those that have already been asked, but some were not put to the previous panel. I will start with questions that were asked at the beginning of the previous evidence session. Reference was made to different interpretative regimes applying to different parts of the statute book. Do you think that that is a problem, or are you satisfied with the approach that has been adopted? You have covered the matter to some extent in your written evidence.

Patrick Layden QC TD (Scottish Law Commission): From the user's point of view, there could be a problem. If I do not look to my right, I can harden my heart to the draftsman's problems. Draftsmen work with legislation all the time; if someone tells them that this or that regime applies, they can adjust to that. However, the user—the solicitor—picks up the act to find out what he is obliged to do. From his point of view, the interpretation legislation should be of assistance. It should be a reliable point of contact, so to speak.

If we start to have a separate regime, the risk for the user is that he does not realise that he is looking at a pre-2009 or post-2009 Scottish act or a pre-2009 Scottish act that has been amended and can become confused as a result. The Law Commission's general view is that we should not change a definition that has been in use for a number of years unless there is a very good reason for changing it.

Malcolm Chisholm: So, you think that there will be a lack of consistency.

Patrick Layden: There will certainly be a lack of consistency. I turn to section 20. At the moment, any lawyer who looks at a statute from 1707 onwards knows that the Crown is not bound, unless the legislation says so specifically or there is a necessary implication. The bill will change that. In point of fact, it will make it even more difficult. It seems to say that both a Scottish act and a Scottish instrument will bind the Crown. If one thinks about that for a minute, one will see that, even if the Scottish act says that it does not bind the Crown, an instrument that comes under the act has a free-standing life under section 20. One would have to ask whether the instrument binds the Crown. The unfortunate draftsman who is putting together an SSI will have to make up his mind how or in what way the instrument will bind the Crown, never mind the provisions in the act under which he is drafting it.

Malcolm Chisholm: Is your objection to the provision solely on the ground of consistency, or do you have other fundamental objections to the change in respect of the Crown?

Patrick Layden: The Crown—and it might be easier to talk of the Crown as the Executive with the tripartite division of power—is in a different position from the average citizen. It has powers and responsibilities that the average citizen does not have. It also has general duties that the average citizen does not have. It is therefore not surprising if legislation, a great deal of which is made for relations between citizens, does not bind the Crown; it would not be appropriate for it to do that. That said, it is appropriate in some cases and one therefore provides for that.

In a technical sense, it does not really matter which way the default rule goes. In this country, we happen to have had since 1990 a default rule that says that the Crown is not bound. Unless there is a good reason for changing that, let us not change it.

Malcolm Chisholm: Dr McKee's example in this regard was on old acts of the Scottish Parliament. In general terms, what is your professional view on the matter? I understand that, if an amendment is made to a Westminster act, an old Scottish statutory instrument or old act of the Scottish

Parliament, the new interpretation rules will not apply. Is that correct or is there some debate about that? Do you see any problem or lack of clarity? What is your understanding of the provision?

Patrick Layden: It is the case that an act will be construed according to the time at which the act was passed. If we amend an act of 1965—which is just before the last interpretation act—the interpretation regime that applied in 1965 is the valid regime. If a post-bill act amends a pre-bill act, the interpretation provisions that apply to the pre-bill act are the governing provisions.

In a sense, that is a good reason for thinking about consistency. It is frequently the case that modern legislation heavily amends previous legislation. The draftsman has to think, "For these bits that are new law, my regime is the new regime, but I have to remember that, if I am amending legislation from before the interpretation act, a different interpretative regime applies." That is difficult for him and for the user.

Malcolm Chisholm: Is a different approach suggested in section 55? Is that a way round the problem? Is the problem unavoidable or is it possible to deal with the inconsistency?

Patrick Layden: What problem? There is no problem if you keep the same regime.

Malcolm Chisholm: Yes, but I am talking about amending an old piece of legislation.

Patrick Layden: It is a problem if the old piece of legislation is subject to a different regime. At the moment, we have the Interpretation Act 1978—and there has been quite a lot of legislation since then—and the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999, which more or less reproduced the 1978 act. Therefore, we have a consistent interpretative regime throughout the United Kingdom statute book and the first 10 years of the Scottish statute book. Problems arise only if you start changing the regime now. If you do that, you create the possibility of confusion and conflict.

Malcolm Chisholm: Are you basically saying that you would rather that no changes were made or do you welcome some of the proposed changes?

Patrick Layden: It is entirely appropriate that we should have a bill that sets out the interpretative regime for acts of the Scottish Parliament and that we should not rely on a transitional order. That is a good thing. I would very much prefer it if the bill kept the definitions and the interpretative regime that we have had up till now unless there are good reasons for changing it. We mentioned in our written submission one good change: the provision that clarifies that, if an amending act is repealed, the amendments that it made are not affected. However, that is a technical point.

Malcolm Chisholm: Is that the sole positive change? Is it an example or is that it, as far as you are concerned?

Patrick Layden: That is it, as far as I am concerned.

Gregor Clark CB (Scottish Law Commission): We could go a little bit further. It would certainly be worth taking the opportunity to express things more clearly, as long as one was certain that one was saying the same thing.

Ian McKee: The rules in part 1—I think that it is section 1(4)—will apply to non-statutory instruments such as warrants and byelaws. Do you believe that they should? Should there be a restriction on the power to add to the definition to exclude adding instruments or documents that do not have legal effect?

Patrick Layden: It is really a question of how far down the food chain you want the interpretations to travel. Quite a lot of things are done under an act, because of an act or to implement an act. Subordinate legislation, rules and various things can be introduced under an act. The question is how far down that trail of post-legislative activity you want the interpretations in part 1 to go. I can see the arguments for doing it the way that the bill's draftsman has done it, but equally I can see an argument for limiting the interpretative regime to proper subordinate legislation. If limited in that way, you might be able to simplify some of the concepts in the bill. However, where you draw the line is a matter of legislative policy.

Ian McKee: So it is a matter for the Government rather than your opinion.

Patrick Layden: It is a matter for the Government and the Parliament, because the Parliament is accepting the regime as the way that it wants its statute to operate.

Ian McKee: In your written submission, you highlight potential difficulties with the general qualification in section 1(2) that part 1

"does not apply in so far as—

(a) the Act or instrument provides otherwise, or

(b) the context of the Act or instrument otherwise requires."

Will you explain your concerns?

Patrick Layden: Again, we are considering the matter from the user's point of view. Section 6 provides a power to revoke, amend and re-enact, which

"applies where an Act of the Scottish Parliament confers power … to make a Scottish instrument."

Section 6 must be read subject to section 1(2), which states:

"This Part does not apply in so far as—

(a) the Act or instrument provides otherwise, or

(b) the context of the Act or instrument otherwise requires."

If someone wants to find out whether section 6 applies to a particular provision in another piece of legislation, they will have to go back to section 1 and devote their mind to whether the context "otherwise requires" it. It might be easier for the user if that qualification appeared in each of the propositions in part 1, rather than being stuck in as a kind of chapeau at the beginning.

15:15

Ian McKee: It is a catch-all—

Patrick Layden: There is currently a catch-all provision, but one has to know that it exists and then go back and look at it. For someone who does not use the interpretation legislation frequently—let us face it, not many people do—it would be easier if all the qualifications appeared in the provision to which they applied.

Gregor Clark: The tendency is for people to pick up the interpretation legislation and look for a particular thing. They will not read the act as a whole, as a complete document, so there is a real chance that the provision will be misunderstood and thought to be wider than it actually is.

Ian McKee: I see. Practitioners will go straight to the bit that concerns them, and they might not get round to seeing the nasty bit that appears earlier in the act.

Gregor Clark: Yes.

Patrick Layden: Precisely so.

Ian McKee: Is there a possibility of legal argument over the meaning of "otherwise requires"?

Patrick Layden: You will never get away from that.

Ian McKee: I suppose that we would not have any lawyers if the meanings were all fairly well understood.

Gregor Clark: There is a curiosity, in that section 20(1) includes the qualification, which is completely unnecessary if we do have the catch-all.

Ian McKee: The qualification is included in that provision but not in others. I was going to ask how the bill could be improved, but I think that you have said that it could be improved by including the qualification every time it is required. Is that right?

Gregor Clark: Yes.

Helen Eadie: Sections 12 and 14 deal with references to EU and UK legislation. The explanatory notes say that in relation to EU instruments, references are not intended to be ambulatory. That is in contrast to section 14, which provides that references to UK legislation are ambulatory—that is, future changes will wash through and be adopted by existing references. Do you have a view about the differences in approach?

Patrick Layden: I do. It is a personal view, because the Scottish Law Commission has not considered the matter. I spent a lot of time working with UK and EU legislation, and the prevailing view in Government was that although we could expect users of legislation to keep up with UK changes—UK regulations, acts and so on—it was unreasonable to expect them to hit the spot on the sometimes rapidly moving target of alterations in EU directives.

My concern is that if section 12 were amended, we would be asking rather a lot of people who run businesses, and even lawyers, if we expected them to keep up to speed with every change in European law. So far, Governments have taken the view that we expect the citizen to keep up with our law, and our law must reflect EU law. However, if we simply allow for EU law references to be ambulatory, we will impose a high burden on a lot of people, many of whom are not lawyers. I always try to think of the users, and the user in this context will not necessarily be a lawyer; he might be a businessman who is trying to keep up with the most recent regulations on, for example, the provision of toilets in his shop or how high a shelf must be. If EU law changes, he is entitled to see that in British or Scottish regulations before the change becomes binding on him. That is the rationale, with which I agree.

Helen Eadie: Thank you. I think that you have answered the question that I was going to ask next—do you agree, convener?

The Convener: Yes, I agree.

I will ask the same questions about the definitions of words and expressions that I asked the previous panel. The Faculty of Advocates expressed the view that the Scottish ministers should not have the power under schedule 1 to amend definitions by order, but the Scottish Law Commission takes the opposite view. Can you elaborate on that?

Gregor Clark: It is useful to have the power to make small changes when dealing with words that cover a large area of meaning. Some references will be to statutes, and when a statute changes, updating references to it could perfectly well be dealt with in the amending legislation, which might

update, for example, the old police area legislation. However, there is a chance that something might be missed in the primary legislation because someone forgets to change the definitions of words. The power to amend definitions will simply give flexibility by providing a chance to catch dropped stitches. Without that, an act would have to be introduced to make the change, which would cause a great deal of inconvenience. The power is intended to benefit users.

The Convener: I also asked the previous panel about the retrospective possibilities of such a power and how complicated it will be to use. In addition, I asked whether anything has been missed out of the bill that ought to be included. Do you have any thoughts on those points?

Gregor Clark: I have no particular thoughts on what else should be included in the bill, but I have two thoughts on what should not be included within it.

First—this goes back to the business of not having separate regimes for the UK and Scotland—the bill currently provides that "'modify' includes … repeal". That seems to be counterintuitive. For example, section 25(2) provides that

"The Scottish Ministers may by order modify that schedule."

The ordinary reader would not think that that means that the Scottish ministers could repeal the schedule. That is certainly not what the word would mean in England and Wales. There is no particular reason to provide that "modify" includes repeal. If the draftsman wants to say "modify or repeal", he does not need that shortcut. It will not save a lot of words. If we want to provide that ministers may modify or repeal something, why not say that?

Secondly, I am certainly not an enthusiast for

"'by virtue of' includes 'by' and 'under'".

Those are all useful words, so the proposed definition would take away precision from the draftsman. "By" means that an act does something, such as providing a new amount. "Under" means that ministers use a power in an act to do something. "By virtue of" means that something is done in subordinate legislation that is made following on from the act. If we lose that flexibility and use "by virtue of" as a blunderbuss, we lose precision. Those definitions also carry through to the interpretation of the bill. However, in section 21, the draftsman has not used "by virtue of" but has seen the need to provide nuance by inserting "in or under" instead.

Bob Doris: I want to move on to part 2 of the bill, which deals with Scottish statutory instruments. Section 33, on "Combination of certain powers", will provide a legal basis for combining the exercise of negative and no-procedure powers in the same instrument. Do you envisage any problems with the combination of no procedure and negative procedure in that way?

Gregor Clark: I see no problem at all with that; I am surprised that it is not possible to have any combination of the three categories—affirmative, negative and no procedure—in the same instrument by using the highest level that is involved. For example, an instrument that is subject to the affirmative procedure should be able to include measures that are subject to the negative procedure. Very often, it is difficult to tell the whole story in one statutory instrument. It is absolute nonsense to have all the measures that are subject to negative procedure in one place and all those that are subject to affirmative procedure in another if that means that the reader does not get the total message.

Bob Doris: That response helpfully heads towards answering my next question, which is on whether the provision is not ambitious enough because it does not allow all three procedures to be mixed within one statutory instrument. However, I will ask the question anyway so that you can put on record what I think you were saying.

The minister has indicated in correspondence that the Government proposes to extend section 33 to allow powers that are subject to negative and affirmative procedure to be combined in the same instrument. Should that be permitted subject to the uniform application of the more rigorous—that is, the affirmative—procedure, so that if the measures that are subject to the affirmative procedure are passed, the whole instrument is passed?

Gregor Clark: Absolutely. There is an interesting little knock-on from that point. We were concerned about section 8(3), which contains a power to tag on to commencement orders transitional, transitory and saving provisions. We are not sure about the purpose of that, as commencement orders usually are subject to no procedure. Does that section suggest that transitional amendments should be made without procedure? That seems to be utter nonsense, because transitional amendments can have a serious impact on people's lives.

Bob Doris: Obviously, we will consider the evidence on that point. Would you like to add anything?

Gregor Clark: Section 8(3) is not needed at all if the bill contains an expanded section 33, allowing any combination of procedures. A combined instrument could be passed using the maximum procedural formality: the affirmative procedure, if

there were something in it needing that procedure. So if a transitional element seeks to modify statute, it should be dealt with under the affirmative procedure.

Bob Doris: The procedure should be composite and it should use the highest threshold of scrutiny.

Gregor Clark: Yes.

The Convener: Malcolm Chisholm wants to ask a question about an issue that is close to our hearts.

Malcolm Chisholm: I do not think that you mentioned part 4 of the bill in your written submission, but it would be interesting to get your views on consolidation, given your role.

As you know, the bill contains an order-making power that will be subject to affirmative procedure and will allow the Scottish ministers to make changes that

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

Various people have expressed concerns about that being a broad power. That might have been implied in the consultation paper, which said that the recommendations that the Scottish Law Commission can make are too limited because

"the Commission may be reluctant to make recommendations in relation to matters which involve significant policy changes or which are likely to provoke political controversy."

To me, that is an argument against giving that power to ministers. What are your thoughts on that comment in the consultation paper, and more generally on the power that is proposed in section 47?

Patrick Layden: We did in fact respond in writing on part 4, but we did it to the Standards, Procedures and Public Appointments Committee, which is what we were asked to do. It helpfully mentioned what we said in its report to you.

The Law Commission considers that it would be much better if it proposed pre-consolidation amendments, because it would do so objectively with a view only to what is necessary for the purposes of consolidation. That is reflected in the Standards, Procedures and Public Appointments Committee's submission to the Subordinate Legislation Committee.

I was the draftsman on the only consolidation bill to have gone through the Scottish Parliament. The Law Commission made 29 recommendations to the consolidation committee about amendments that the Law Commission thought were necessary for the consolidation. The consolidation committee was very good about that; it said, "We can see why this amendment is necessary, we are not sure about that one, and we don't think that one's necessary."

Saying that an amendment is necessary would be quite a high test; saying that something should be necessary or desirable would give a bit more flexibility, but it would still have to be exercised objectively to produce a consolidation, which is a particular kind of legislation that restates the law, therefore Parliament is prepared to wave it through with a less rigorous procedure than normal. As soon as consolidation gets away from a simple restatement of the law with minor adjustments to make it work in a modern context, or to sort out irregularities between different bits of the statute book, it is entirely proper for Parliament to want to consider and debate the policy. As I think Mr Jamieson said in his submission, it is much more difficult to do that on the basis of an order containing—as in my case—29 amendments than on the basis of a bill. It would be better if the Law Commission made such proposals.

15:30

Malcolm Chisholm: What safeguards would be appropriate to prevent the power from being used to make policy changes without full parliamentary scrutiny, or are you saying that we should just follow the Law Commission's advice and that will deal with the problem? Should that be written into legislation?

Patrick Layden: It could be. You could give the consolidation committee power to consolidate with such amendments as the Law Commission proposes, which are either necessary or would facilitate the consolidation. There would then be a process between the Law Commission and the committee, as there was in 2003, and the committee would work out its views. Speaking as the draftsman of the previous consolidation bill, I found that process to be perfectly acceptable. The committee was very careful in what it accepted as being necessary for the consolidation, because it was conscious that anything more than what was absolutely necessary ought to be debated in Parliament, and since that was not going to happen it took a more restrictive view. The nature of consolidation is that it is a restricted exercise to reproduce the law, so you should be very cautious about making amendments.

Ian McKee: In its response to the Scottish Government's consultation on the draft bill, the Scottish Law Commission expressed concern that there would be

"considerable practical and technical difficulties in describing any enactment of a common law position as 'consolidation', because of the perennial difficulty in securing agreement as to what the common law on any matter is."

Given those difficulties, is it appropriate that restatement of the common law should be included within the power in section 47?

Patrick Layden: No.

Ian McKee: Would you like to amplify that?

Patrick Layden: For the reasons that we set out in our written submission, you will never get two lawyers—let alone 10—to agree on what the common law is on any particular subject. Even if a little bit of the common law has been agreed because the House of Lords has just decided what it is, as soon as you try to restate it you find all sorts of other questions that the courts have not got round to answering yet, but which need answering if you are going to restate the law.

I have been leading for the commission on an exercise on double jeopardy. After we consulted we came to the view that we had to restate the law on double jeopardy, which is almost entirely common law. As soon as you start looking at the cases you can see what they say, but then you find that alongside those cases are other examples that the cases do not answer. A proper restatement has to deal with those examples, otherwise you get a limping statute that does not tell the whole story. It is extraordinarily difficult to say that we will restate the common law, because not only is it pretty difficult to agree on, it is difficult to pin down. The common law is not comprehensive in the way that statute is, because it depends on cases coming up in court, and you do not get a case on every aspect of a piece of law, so I do not think that you can restate the common law. You can codify it, but codification is a different animal, as it involves lots of policy questions. It is not difficult to write out a codification, but it is very difficult to do that by means of a parliamentary order as opposed to a draft bill that you consult upon.

Ian McKee: Would it be more appropriate for the Government to introduce a substantive bill on the policy issue in question?

Patrick Layden: Yes. That would give everyone a chance to debate the issue. Codifying the law is one thing that the Scottish Law Commission is supposed to do.

Ian McKee: I might be able to guess your answer to my final question. What steps would the Scottish Law Commission like to be taken to increase the number of consolidation bills that are introduced to the Parliament to give effect to commission reports?

Patrick Layden: It is one of the Scottish Law Commission's duties to propose consolidations. There is no doubt that a great deal of the law on our statute book needs to be consolidated, but consolidation depends on Scottish Law Commission and Scottish Government resources—particularly drafting resources—and also on the Parliament's capacity to process consolidation bills. It is all very well for us to produce bills, but a parliamentary committee has to deal with them. The Parliament formed a committee in 2002 to consider the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill and it might want to form such committees again. Standing orders cover the forming of consolidation bill committees, but they have to be formed from somewhere; members have to sit on them.

Mr Jamieson suggests in his submission that the Parliament should impose on the Scottish Government a duty to agree programmes of consolidation with the Scottish Law Commission. That is very much a matter for you. We are willing, but we are conscious that the resources to do that are properly in the hands of the Scottish Government. It has the drafting resources, which are vital if consolidation is to be done properly.

Ian McKee: Is the Scottish Law Commission happy with the response that it gets from Government in reaction to its reports?

Patrick Layden: As the chairman of the commission said in his foreword to our most recent annual report, it is disappointing that, since devolution, the rate of implementation of Scottish Law Commission reports has fallen off. That is particularly disappointing given that a number of those reports were compiled in response to references from the Scottish Government. However, we welcome the establishment of a joint working group of officials of the Scottish Government and the Scottish Parliament, which is actively investigating ways of increasing the capacity to implement Scottish Law Commission reports and therefore the rate of implementation.

The Minister for Community Safety produced a detailed response to our most recent report, on succession, and that response has been published. A number of reports on criminal law—on sexual offences, Crown rights of appeal, insanity and diminished responsibility, and the age of criminal responsibility—have been or are being implemented. There is perhaps a discernible trend, in that stuff on criminal law tends to be implemented more quickly than other stuff. We hope that the double jeopardy report will be published soon, and the Government might consider ways in which to implement it. We are conscious that Bill Butler has lodged a draft bill proposal on damages for wrongful death, which is a Scottish Law Commission bill. We welcome that.

It is very much a matter for the Parliament to consider whether it wishes to introduce a statutory duty on ministers to respond to Scottish Law Commission reports within two months, and it is

for the Parliament to consider whether to provide for a committee or a member to introduce a bill if the Scottish Government does not do so. We would be in favour of that, but we are conscious of the resource implications for the Government.

We welcomed the ministerial response to the report on succession as a step in the right direction. How much further you want to go in that direction is very much a matter for you.

Gregor Clark: I will add what are essentially drafting points. The bill is quite a difficult read, and one thing that makes it so is the introduction of certain expressions. In part 1, we have the expression "Scottish instrument", then in part 2 we have "Scottish statutory instrument". Immediately, the reader is floundering and wondering what the difference is.

The definition of "Scottish statutory instrument" in part 2 is important and useful. It differs from the part 1 expression "Scottish instrument" because the part 2 expression is going to be a term of art not just for the purposes of the bill but in legislation in general, whereas "Scottish instrument" is introduced purely for the purposes of part 1. I do not see why we need the term at all and why we cannot just talk about "an instrument". Having introduced what the part applies to, why can we not just say "instrument" thereafter?

Similarly, I find it odd that "special procedure order" is not being introduced as a term of art. It is not a confusing term; it is a useful term that could be used throughout the statute book.

The Convener: Thank you. That was useful.

Gentlemen, on behalf of the committee, I thank you for your thoughtful and considered contributions.

15:40

Meeting suspended.

15:45

On resuming—

The Convener: I welcome Iain Jamieson, who is here on the Law Society of Scotland's behalf—it is nice to see you. The format for your evidence is the same as before and we look forward to hearing your answers. As before, Malcolm Chisholm will open the batting, if I may use that expression.

Malcolm Chisholm: All three panel sessions were to begin with the same question, but your submission is detailed so I am not sure whether I need to ask you about consistency, about whether having different interpretative regimes for different parts of the statute book is a problem and about your view of the factual situation.

Your submission says that the new interpretation procedures will not apply to amendments to Westminster legislation or to amendments to old Scottish instruments and acts. You have described the problems, so rather than go over all that it would be useful to know what you think the answer might be. You have described the problems in detail and have said

"This may cause some confusion",

but

"it does reflect the existing position."

How do you recommend we address the confusion and inconsistencies that you highlight?

Iain Jamieson (Law Society of Scotland): I am not very good at finding solutions, but I will try. I should say that I appear in a personal capacity and as a representative of the Law Society of Scotland. That is uncharacteristically bold of the Law Society, because I am sure that it would not like all my views to be attributed to it.

Ian McKee: You will explain which is which.

Iain Jamieson: I will speak to the society's submission—that makes the position clear.

My main concern is not so much about how the line is drawn as about ensuring that the line is clear. I said that part 1 says that it applies to ASPs. Does that mean that it applies also to textual amendments that ASPs make to Westminster legislation? From a practical point of view, the working assumption has been that it does not, but no provision says that. That becomes very important in relation to provisions such as section 20, which is on Crown application. The rules of interpretation that apply to different acts must be clear. Provided that that is clear, having consistency across the board does not particularly matter.

Of course, as Patrick Layden said, if different regimes apply to Westminster legislation and to ASPs, one problem is that the possibility of confusion always exists, unless the rules remain the same. That means that the Scottish Parliament is constrained in the provision that it can make, because it must always look over its shoulder at what Westminster does.

I take a different view—that the Scottish Parliament is free to make its own interpretative rules, provided that what they apply to is clear. My argument against provisions such as section 55, which purport to interpret Westminster legislation, is that that in itself makes it not clear what the provisions are in Westminster legislation to which it applies. There are difficulties enough in trying to identify whether particular provisions are devolved,

particularly if they have not been the subject of an interpretative provision that says that in certain Westminster acts, or certain Westminster provisions, enactment should mean what the act of the Scottish Parliament says that it means. The scope is not clear and that causes confusion all the way down. That is why, contrary to the implication of your question, I would say that it is necessary to have different regimes applying to Westminster legislation and to acts of the Scottish Parliament—the two should not be mixed up.

Malcolm Chisholm: Towards the end of that section of your submission, you say that

"if the existing approach is followed, this may constrain the extent to which the provisions of Part 1 can differ from those in the 1978 Act without causing confusion".

Are you suggesting that part 1 has departed too far from the 1978 act?

Iain Jamieson: No, not at all. My view has always been that it is preferable to be bold when it comes to matters such as this.

Malcolm Chisholm: So you just think that it will cause confusion.

Iain Jamieson: Yes. That echoes what Patrick Layden said, but of course he is in favour of keeping the thing the same; he is a status quo person and I am not.

Malcolm Chisholm: Your submission suggests that section 1(2)(b) should be deleted. That suggestion may have been made elsewhere, but I did not notice it in anybody else's submission. What is your thinking on that?

Iain Jamieson: Nobody else has made that suggestion. What concerns me about section 1(2)(b)—I think that I have said this—is that I do not think that it is necessary and I think that it is confusing. It is not necessary because part 1 will apply only to future Scottish legislation, so when the draftsman drafts something he should know whether part 1 applies and if he does not want part 1 to apply, he can apply these provisions. It is also confusing because, as Patrick Layden admitted, nobody knows what is meant by "otherwise requires." Cases go up to the House of Lords on the implications of acts; Lord Hailsham said that nine out of 10 such cases involve either the statutory interpretation of provisions that turn upon these words, or the meaning of words in statute. It is by no means clear what is meant by "otherwise requires". The provision was useful in the past when there was not a clear role and one could say, as Mr Clark said, that it was there to catch dropped stitches. However, there ought not to be dropped stitches—if the draftsmen of the acts and instruments are doing their job properly, the provisions ought to be expressly clear. The same applies to section 20.

The Convener: You welcomed the provisions in section 8, which spell out what is implied when there is a power to make a commencement order. It seems that laid only procedure will apply to those orders. That reflects the current position, but might circumstances arise—perhaps when ancillary powers that are attached to commencement should be subject to procedure—in which the Parliament would wish to specify the procedure for commencement? Could that be done by the insertion of provisions in parent acts?

Iain Jamieson: I am sorry—I take it that you are referring to section 12.

The Convener: I refer to section 8, which is on commencement powers.

Iain Jamieson: That is the section to which Mr Clark referred. Two separate issues are raised. One is that it is most unusual that the power to commence acts should be subject to negative or affirmative procedure, although that happens sometimes. The main idea of having a commencement order is that it should be done relatively expeditiously.

Section 8(3) appends substantive provisions to that power. That raises the question whether it is appropriate that that subsection should simply be treated in the same way as any other commencement order power, which is subject just to the order's being laid without any procedure.

Mr Clark said that section 8(3) should be removed and that if an act needs transitional or savings provisions, a separate provision should be made in the ASP. If the Government wanted to combine the two functions, the procedure that is attendant on the transitional provision should apply to the commencement order. That would give the Government the flexibility to commence the order and then make a transitional provision. If it wanted to merge the provisions, both would be subject to negative or affirmative procedure. That is preferable to what section 8(3) does. I thank Mr Clark for pointing that out.

The Convener: You have welcomed the changes that the bill proposes to the law on the application of acts and instruments to the Crown. Will you elaborate on why you take that view?

Iain Jamieson: I come from a philosophical tradition that regards the Crown as no different from any other subject. It should be subject to the same laws, whether they are on health and safety or anything else. That is my prejudice.

My concern is that the rule should be clear. The House of Lords recommended that the draftsmen should make the position clear one way or the other—every ASP should contain an express provision and should not rely on the fallback of the necessary implication argument. That is stage 1.

The question then is whether the default position is that no act binds the Crown unless it contains an express provision or that all acts bind the Crown unless they contain a disclaimer. I prefer the latter position. There are only certain cases in which there might be difficulties in applying ASPs automatically to the Crown, such as the creation of criminal offences—but it might not matter in those cases. Where it is intended that a criminal offence should bind the Crown, express provision as to how it does so—for example, who is liable to be prosecuted for a road traffic offence—is usually put into the act. That will remain the same; the bill will not alter that approach. I see no difficulty, as long as the rule is clear and we get rid of the necessary implication rule.

16:00

Helen Eadie: Sections 12 and 14 deal with references to EU and other legislative provisions. In relation to EU instruments, the explanatory notes say that references are not intended to be ambulatory. That approach is to be contrasted with that of section 14, which provides that references to UK legislation are ambulatory—that is, that future changes will wash through and be adopted by existing references. Do you have a view about the difference in approach?

Iain Jamieson: Yes, I do. My main concern is that when an ASP refers to a particular section of an act or to EU regulations it should be clear one way or the other whether the reference will be ambulatory. At present that is not clear. The provision in section 12 is taken from a UK act.

My personal preference is that the rules should be the same. It does not matter whether references will be ambulatory or not, but the approach should be the same in both cases. There is no difference between a reference in an ASP to EU regulations and a reference in an ASP to an ASP of 2003; both references should be treated in the same way.

I suspect that the reason for the difference is that the Westminster Parliament traditionally does not really like EU legislation. It is one thing to say, "When a Westminster act refers to EU regulations I want to know exactly to what it is referring; therefore I will not allow the reference to apply without my control if what is referred to is amended in future"—that is primarily the reason for section 12 providing for non-ambulatory references. However, when it comes to references to ASPs the same objection applies, as I think that I said in my submission. The difference in that situation is that the body that is making the change will normally be the Parliament itself, which will be able to tell whether it is appropriate that the reference should continue to apply. That is the only reason that I can attribute to the difference in approach.

The position should certainly be clear one way or the other. I suspect that in practice section 14 reflects how persons would ordinarily expect Scottish legislation to be interpreted: that is, as ambulatory.

Helen Eadie: That is helpful. I think that you might have answered the question that I was going to ask next.

Bob Doris: I want to look at schedule 1, "Definitions of words and expressions." We have heard concerns from the Faculty of Advocates about the proposal to give the Scottish ministers the power to amend definitions by order made by Scottish statutory instrument. The Scottish Law Commission took the opposite view. What are your views on that?

The Convener: Which side are you on?

Bob Doris: Or is there a third way?

Iain Jamieson: I think that I am on the side of the Scottish Law Commission on this one, with one or two qualifications.

First, I do not necessarily agree with Mr Clark's views about section 25(2). He said:

"The Scottish Ministers may by order modify that schedule."

He suggested that the word "modify" would not include repealing amendments in that section. I take the view that it would, otherwise what would be the point of it? It must be possible to change references in that schedule. For example, the definition of "constable" might become redundant and go, so the schedule must be able to be modified.

Secondly, I am surprised that there is no transitional savings provision in relation to this power in the bill. The power will apply only in the future, so if the definition of "constable" is changed in 2015, it will apply only to Scottish legislation that is made after that date. However, nothing in the bill enables that power. All that the bill talks about is the power to modify, so the concerns of the Faculty of Advocates and the Scottish Law Commission are well founded. There should be something else; the provision is too bare at present. The power to make transitional savings provisions, or something, should be added to buttress the power.

Bob Doris: That is interesting. In essence, you believe that the Government should have the power, with parliamentary approval, to chop and change the definition as it sees fit so that there is a living piece of legislation.

Iain Jamieson: Yes, provided that the order makes clear the legislation to which it applies. My main criterion is that the order must be clear.

Bob Doris: You have answered part of my next question. Clearly, you do not believe that the power should be retrospective.

Iain Jamieson: Absolutely not.

Bob Doris: Some people believe that identifying the provisions to which a new definition applies will be complicated. Do you agree?

Iain Jamieson: No—not if the power that is given to the Scottish ministers will enable them to identify the legislation to which it applies. I imagine that it will apply to ASPs or Scottish instruments that are passed after a certain date. The order must have provision to make that clear.

Bob Doris: Okay. You are saying that the fact that the procedure is complicated does not mean that we will not be able to use it. That is what lawyers are good at and why they are so expensive to hire, of course.

Your written submission points out that schedule 1 does not reproduce several existing definitions that are contained in the interpretation order. Examples include “Scottish Executive”, “Scottish Parliament”, and “First Minister”. How important is it for those terms to be included?

Iain Jamieson: The stock answer that I would expect to get is that those terms are self-explanatory nowadays and do not need to be defined. If that is the case, however, the drafters need to explain why they have included a definition of “Scottish ministers” while not defining terms such as “Lord Advocate”, “Scottish Parliament” and “Scottish Executive”. Those are just institutions, of course; I am more concerned with real issues, such as what is meant by “convention rights”, “devolved competence” and “reserved matters”. All those are significant terms of art, and they are part of our constitution. As long as the Scotland Act 1998 exists, the interpretation legislation should refer back to it. The Scotland Act 1998 is the mother ship from which all those things are derived.

Bob Doris: Indeed it is, and that answer is helpful. Perhaps in the not-too-distant future we can consider terms such as “Scottish Government” and “Scottish Prime Minister”—that would be quite a wonderful thing.

Iain Jamieson: That is getting too political for me.

The Convener: We move on from such remarks, and from references to expensive professions—I turn to Dr Ian McKee.

Ian McKee: I am retired Dr Ian McKee, alas.

Turning to section 28, Mr Jamieson, you said in your written submission that you are very content with the provisions in part 2, with the single exception of negative procedure. Can you explain your concerns to the committee?

Iain Jamieson: I am conscious that your time is short. My main concern is that I would like the negative procedure to be made more effective.

Ian McKee: Thank you. You suggest increasing the minimum number of 28 days before an instrument can come into force to something approaching 40 days. How would such a change strengthen the position of the Parliament in scrutinising negative instruments?

Iain Jamieson: I preface my remarks by saying that all the suggestions that I throw out in my submission are only suggestions, and there are different ways of doing it. I suggested that one way would be to make the period before which the instrument comes into force as near as possible to the period during which the Parliament can annul the instrument. That would avoid the main problem with the negative procedure, which is that by the time the instrument comes to a meeting of the Parliament, it may have been in force for some time. The Parliament may therefore be disinclined to do anything about it. You must have come across that defect before.

Ian McKee: Should there be an extension of the 40-day rule—perhaps to 50 days—to allow the Parliament sufficient time to consider a motion to annul?

Iain Jamieson: During my time as adviser to the previous Subordinate Legislation Committee, we explored all sorts of ways of maximising the time for the SLC and the subject committee to consider the instrument and for the Parliament to examine it, whether by extending the time limit or doing anything else. That was why we came up with the suggestion we did, which I accept was not considered to be practical and was therefore dropped.

I do not know the answer to your question. I would like the time to be extended, but there is a limit. The Government has to govern, and you have to scrutinise, and the question is how we can marry those two things together.

Ian McKee: In circumstances in which Parliament resolves that an instrument should be annulled, are additional powers required in order to give effect to the will of the Parliament—a form of ancillary powers—to undo any permanent effects of the instrument that has been annulled?

16:15

Iain Jamieson: The bill is quite good in that it prevents the instrument from coming into force if it

has not yet done so. It prevents further action from being taken. However, it does not undo the past. In certain cases, undoing the past might not be feasible. Nevertheless, the overall picture must be that we try to restore the position to what it was before the instrument that was subsequently annulled took effect. If that is not possible, the Government ought to come along and explain why. The Parliament cannot impose duties that are not practical.

Ian McKee: Sometimes, it is impossible to undo what has been done.

Iain Jamieson: I know.

Malcolm Chisholm: The transitional statutory instrument order contains a test of the necessity to bring an instrument into force before the expiry of the 21 days after laying. It appears from the terms of sections 28 and 31 of the bill that that test will no longer apply. Should it be removed?

Iain Jamieson: I beg your pardon. Could you repeat that?

Malcolm Chisholm: When an instrument is brought into force before the expiry of the 21-day period, should there be any restraint on that? Should it just happen—I think that is what is implied—with no test of when that is acceptable?

Iain Jamieson: I would have thought that it would be difficult to devise an appropriate test. We suggested tests of urgency and emergency, for example, although those are sometimes catered for in instruments themselves. The best sanction that we can offer, which is repeated in the bill, is to ask for explanation after the event: "Why did you not do it?"

I am slightly concerned that, under section 31(3), if the instrument is not invalidated because it did not comply with the laying requirement, there is no requirement then to lay the instrument. Section 31(3) comes into play only where an instrument is laid, but not in accordance with the laying requirements. There is nothing that requires the instrument to be laid no matter what, whether it is in breach of the 21-day rule or not. That should be the first step. Beyond that, if the instrument was not laid in accordance with the laying requirements, the Government can give an explanation to the Presiding Officer, and the Subordinate Legislation Committee can consider the reasons.

Malcolm Chisholm: Does the reference to the Presiding Officer in section 31(3) have the same effect as the reference in the transitional order?

Iain Jamieson: I beg your pardon.

Malcolm Chisholm: Are you saying that there is no substantive change between the transitional order and the bill in terms of—

Iain Jamieson: Section 31(3) says that the Government must explain to the Presiding Officer. The written explanation used to be examined by the Subordinate Legislation Committee, which used to be able to test the Government on it.

Malcolm Chisholm: So, it may be that that could be strengthened a bit.

Iain Jamieson: Yes.

Helen Eadie: The next question is on section 30, "Other instruments laid before the Parliament". The Law Society of Scotland has argued that where the enabling act does not provide for use of negative or affirmative procedure, the default approach for subordinate legislation should be for it to be subject to the highest level of scrutiny and therefore be subject to affirmative procedure. Would not that be an excessive default position?

Iain Jamieson: After discussion with me, the Law Society has changed its mind and is content with the existing position, on the basis that if the Parliament wants a higher standard of procedure to apply, section 34 gives it the powers to do so.

Bob Doris: I could be wrong, but after two hours and 20 minutes of scrutiny, I think that this is the third time I have asked my questions. First, section 33, "Combination of certain powers", would provide a legal basis for combining negative and no procedure powers in the same instrument. Do you envisage any problems with that combination of no procedure and negative powers?

Iain Jamieson: Not particularly. I have referred previously to the commencement order and the transitional order. If the Scottish Government wishes to put its head in a noose, so be it.

Bob Doris: Okay. I move on swiftly to the next question that I have asked previously. It is a slightly different example, but the principle is the same. The minister indicated in correspondence that the Government proposes to extend section 33 to allow powers that are subject to negative and affirmative procedures to be combined in the same instrument. Should that be permitted, subject to the uniform application of the more rigorous affirmative procedure?

Iain Jamieson: The noose just gets tighter.

Bob Doris: Could that noose be made by having provisions that would usually go through quickly, on the nod, included in a composite instrument that might fall?

Iain Jamieson: Yes. That is quite possible.

Malcolm Chisholm: You have provided some useful written evidence on part 4, and you have highlighted that you think that there are problems with the section 47(1) power for the Scottish ministers. What problems do you envisage with that power?

Iain Jamieson: The power is too wide and it is unnecessary. It gives Scottish ministers far too much power, and calls into question and makes an abuse of the consolidation procedure. I agree with the Scottish Law Commission's view that if any change at all is to be made—on which I am saying nothing—it should be that the definition of a consolidation bill in the standing orders remains the same: that it is a bill

"to give effect to recommendations of the Scottish Law Commission".

However, the statutory provision might say that the commission may make recommendations that lead to amendments that are necessary or desirable to facilitate consolidation, which would tie the matter down exactly as Mr Layden suggested. It would make it an objective assessment of what might be required or what might even be desirable, if any change were required. I think that what is necessary is sufficient. I know that there can be different views, and that there were different views taken about this sort of thing. Certainly, section 47 should go.

Malcolm Chisholm: Section 47 should go, and you do not think that there can be any safeguards, or is what you are suggesting a safeguard? Perhaps you need, for my understanding, to clarify what you said. Are you saying that something in the legislation should refer to the Scottish Law Commission? Are you suggesting that ministers should be able to follow only what the Scottish Law Commission suggests?

Iain Jamieson: No. Ministers do not come into Scottish Law Commission recommendations.

Malcolm Chisholm: No—but I am talking about implementation.

Iain Jamieson: Ministers do not implement legislation at all. That is done by the consolidation committee that considers the bill, along with the Law Commission's recommendations, which come under a limited category. The Scottish ministers do not make any order on that at all. They do not come into it.

The consolidation committee looks at the Scottish Law Commission's recommendations and asks whether they are necessary to facilitate the consolidation. As Patrick Layden said, sometimes the consolidation committee took a different view on what was necessary and ruled out certain amendments that the SLC recommended.

All I am suggesting is that, if anything needs to be changed at all, section 47 would empower the Scottish Law Commission to suggest amendments that would not be limited to amendments that would be necessary to facilitate consolidation, but would include amendments that might simply be desirable to facilitate consolidation. However, in any event, to say

"desirable in connection with the consolidation",

as section 47 does, is just to open a can of worms.

Malcolm Chisholm: Would the things that you are suggesting in relation to the Scottish Law Commission need to go into legislation?

Iain Jamieson: No. The trouble is that the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill Committee obtained from the Scottish Law Commission a view about the recommendations that it would put forward, and the committee endorsed that view. That is not to say that the committee could not have changed its mind, but that would have to be argued before the next consolidation committee. If it was in statute that the Scottish Law Commission could make recommendations and the criteria for those recommendations were defined, that would make matters clear.

Malcolm Chisholm: Okay. You are saying that, as it stands, section 47 should go.

Iain Jamieson: Yes.

Malcolm Chisholm: You make some helpful suggestions about increasing the number of consolidation bills. Again, that is in your written submission, but it would be useful if you could highlight your main recommendations in that regard.

Iain Jamieson: Again, my suggestions are just suggestions; there are other ways in which that increase could be achieved. However, something must be done to increase the volume of consolidation of Scottish legislation. I suggested that the Scottish Law Commission cannot do anything at present without the prior approval of the Scottish ministers, and that that has been the kiss of death, because the Scottish ministers have not done anything, or have not been prepared to do anything, to enable the Scottish Law Commission to consolidate legislation. Almost every annual report of the Scottish Law Commission criticised the view that the then Scottish Government took—although I am not making any political points here.

It might not be for this particular bill, but I suggested that consideration might be given to moving the duty to consolidate legislation from the Scottish ministers to the Scottish Law Commission, so that it would be up to the Scottish Law Commission to prepare the programme, in consultation and co-operation with the Scottish ministers. The Scottish ministers should then be obliged to provide the necessary resources.

The overall objective—the carrot, as it were—would be that there would be rolling consolidation

of Scottish legislation every 10 or 15 years. Take any Scottish legislation—the national health service legislation, for example, as Malcolm Chisholm will know—and you will find that you cannot read it. Something has to be done.

16:30

The Convener: I thank you, Mr Jamieson, on behalf of the committee.

Iain Jamieson: Thank you. I will just make one qualification. I think I said that I took a more radical view than Patrick Layden, who was more in favour of the status quo. It is not that I criticise the status quo—I am a lawyer, and we are by definition conservative in our legal thinking—but Patrick Layden and I take different approaches to these matters. It was not an insult to him.

The Convener: Perhaps you see a certain middle way in these matters. I thank you for your contribution—having known you in my previous incarnation on the predecessor Subordinate Legislation Committee, it was nothing less than I expected.

16:31

Meeting suspended.

16:31

On resuming—

Home Owner and Debtor Protection (Scotland) Bill: Stage 1

The Convener: We move speedily on to agenda item 3. Members may recall that we considered the powers in the bill at our last meeting before the October recess and raised some questions. We have seen the responses from the Government.

On section 4, "Pre-action requirements", a number of recommendations are made in the summary of recommendations paper, which members have before them. Are members content to agree to the recommendations and to report to the lead committee accordingly?

Members *indicated agreement*.

The Convener: On section 9, "Certificate for sequestration", as the Scottish Government has indicated in its response that it is intended that the scope of the power in section 5B(5)(e) as inserted by section 9 will relate only to formalities of process and advice and information requirements, and not to additional substantive conditions, do members agree that we consider that that power could be drawn more narrowly to reflect that limited scope?

Members *indicated agreement*.

The Convener: On section 15, "Ancillary provision", do we agree to recommend that the power in section 15(1)(a), to make supplemental et cetera ancillary provisions that modify acts, should be subject to affirmative resolution procedure, whether or not such modifications are in the form of textual amendment of an act?

Members *indicated agreement*.

Tobacco and Primary Medical Services (Scotland) Bill: After Stage 1

16:33

The Convener: Members will have seen the response from the Government to the recommendations from our stage 1 report. We should all be pleased to note that the Government has agreed to take on board all our recommendations and that it will lodge the necessary amendments during stage 2. Are members content to welcome that response and to note the paper by the clerk? We should give ourselves a pat on our collective back.

Members *indicated agreement*.

Draft Instrument subject to Approval

Water Environment (Groundwater and Priority Substances) (Scotland) Regulations 2009 (Draft)

16:33

The Convener: We have but one draft affirmative instrument, with a number of points arising. Are members content to publish in our report the points that are raised in the summary of recommendations? That will save me from reading them out, as my voice is a wee bit poor today.

Members *indicated agreement*.

Instruments subject to Annulment

Rural Development Contracts (Rural Priorities) (Scotland) Amendment (No 3) Regulations 2009 (SSI 2009/335)

16:34

The Convener: While the preamble to the regulations indicates an intention that the reference in regulation 7(b) to council regulation 834/2007 is a reference to that community instrument as amended from time to time, no such ambulatory reference is made, in the absence of express provision to that effect. The committee welcomes the Government's commitment to correct this error. There is, in the preamble to the regulations, a drafting error in the reference to the title of council regulation 834/2007 but it is not considered that that error affects the validity or the operation of the instrument.

Members *indicated agreement*.

Sea Fishing (Enforcement of Community Quota and Third Country Fishing Measures and Restriction on Days at Sea) (Scotland) Amendment Order 2009 (SSI 2009/338)

The Convener: Is the committee content with the order, and with the reasons that the Scottish Government has provided for not complying with the 21-day rule?

Helen Eadie: I accept that the order corrects serious drafting errors, but it does not meet well with the eye to read that it was laid on 6 October, approved on 7 October and enacted on 10 October. I think that the public, if they did not understand the background to that, might be very puzzled. I hope that there is an explanation to that effect on a website somewhere, because I feel that the fact that those dates follow one another so swiftly does not sit well in the public eye. A narrative needs to be available somewhere so that the public can appreciate the reasons for that.

The Convener: I thank you for that, because you have put the matter on the record, which serves the interests of keeping information flowing to the public.

Pollution Prevention and Control (Scotland) Amendment Regulations 2009 (SSI 2009/336)

Welfare of Animals (Transport) (Scotland) Amendment Regulations 2009 (SSI 2009/339)

Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) (Scotland) Amendment Order 2009 (SSI 2009/340)

The committee agreed that no points arose on the instruments.

Instrument not laid before the Parliament

Climate Change (Scotland) Act 2009 (Commencement No 1) Order 2009 (SSI 2009/341)

16:36

The committee agreed that no points arose on the instrument.

The Convener: As we agreed at the beginning of the meeting, we now move into private session.

16:37

Meeting continued in private until 16:44.

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