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Pàrlamaid na h-Alba

Official Report

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 16 March 2010

Session 3

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SUBORDINATE LEGISLATION COMMITTEE
9th Meeting 2010, 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)
Margaret Curran (Glasgow Baillieston) (Lab)
*Bob Doris (Glasgow) (SNP)
*Helen Eadie (Dunfermline East) (Lab)
*Rhoda Grant (Highlands and Islands) (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 ALSO ATTENDED:

Bruce Crawford (Minister for Parliamentary Business)

CLERK TO THE COMMITTEE

Douglas Wands

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 16 March 2010

[The Convener *opened the meeting at 14:15*]

Interpretation and Legislative Reform (Scotland) Bill: Stage 2

The Convener (Jamie Stone): I welcome everyone to the ninth meeting this year of the Subordinate Legislation Committee. We have received apologies from Margaret Curran. I remind everyone, including myself, to turn off all mobiles and BlackBerrys.

Agenda item 1 is consideration of the Interpretation and Legislative Reform (Scotland) Bill at stage 2. It is my pleasure to welcome the Minister for Parliamentary Business and his officials to our meeting. We will proceed swiftly, because we have a longish afternoon in front of us.

Section 1—Application of Part 1

The Convener: Group 1 is on the application of acts and instruments to the Crown. Amendment 2, in the name of Jackson Carlaw, is grouped with amendment 3.

Jackson Carlaw (West of Scotland) (Con): I do not think that my lodging of amendment 2 will have come as an enormous surprise to the minister, but I say at the outset that I have found the way in which he has explained matters as our discussions have progressed helpful and illuminating.

I understand the point that the proposed application of acts and instruments will not apply exclusively to the sovereign but will apply to the wider definition of "the Crown", but I am still mindful of the fact that the judges of the Court of Session, the Scottish Law Commission and the Faculty of Advocates expressed concerns and reservations about the proposal, albeit that there are others who take a separate view.

Ultimately, my concern is that, as a unionist, I believe that such matters are probably best addressed in the context of the wider United Kingdom. It is not that I object in principle to all of what is being attempted, and I understand the point that the minister has made about the application of regulations and laws from Europe, but I would prefer such matters to be dealt with in a broader setting in due course, so that the status of the Crown is changed not by Scotland on its own but in the context of the whole of the United Kingdom. Those are the reasons behind amendments 2 and 3.

I move amendment 2.

Ian McKee (Lothians) (SNP): I am very sensitive to the remarks that Jackson Carlaw makes, but I was impressed by the evidence that we took that said that the proposal in the bill is not even a hidden attack on the sovereign or those around her, and that because the Crown includes all sorts of Government bodies, if they were not to be bound by legislation, certain injustices could take place. I do not think that it requires much imagination to see that happening.

I believe that at present, it is quite common for the Crown to be brought under legislation in specific cases. The bill would prevent that from having to happen each time by making it clear that the Crown is to be bound by any act of the Scottish Parliament or any Scottish instrument. If necessary, if that were not the case, the legislation in question could be altered. Therefore, on balance, I support the Crown being covered in that way.

Rhoda Grant (Highlands and Islands) (Lab): It is hard to look into the future and see what legislation the Parliament will have to scrutinise, but it is my understanding that, if a bill were going through Parliament that would create a problem if it were applicable to the Crown, it could be amended to opt out from this provision. It may not be a catch-all, but it changes the status quo slightly, so I seek the minister's reassurance that my understanding is correct.

The Minister for Parliamentary Business (Bruce Crawford): Thank you, convener. I appreciate and respect the reason why Jackson Carlaw has lodged these amendments. By the time I have finished, I hope that I will have persuaded him that there is no intention to change the status of the Crown as far as legislation is concerned. Many of the bills that we have considered deal with the Crown in this way, but they do so on a case-by-case basis. This is not new, as I will explain. As Mr Carlaw recognises, "the Crown" is a wide-ranging term that spans everything from Her Majesty in her private capacity—in other words, as the owner of the Balmoral estate—to Government departments. Where an act of the Scottish Parliament affects Her Majesty's interests, it is always the case that the Scottish Government will write to the Crown asking for consent. To date, that has always been granted, and that will always be the practice in future. That point deals with Rhoda Grant's question. The principal effect of the Crown application provision will therefore be to ensure that Government bodies will be bound by the law and that they will no longer be exempted by

default from the normal application of legislation or be able to disregard the laws that apply to the rest of society. Section 20 simply brings drafting practice into line with modern reality. I hope that the committee will see that as a good thing.

Jackson Carlaw referred to the objection that has been raised, particularly by the judiciary, that changing the interpretation rule for future acts of the Scottish Parliament might prove confusing, which relates to the argument that the change should be made only at Westminster. It is argued that confusion might arise because existing acts of the Scottish Parliament and both existing and future Westminster legislation would apply a different rule—in other words, the Crown would continue to be bound only by explicit provisions or necessary implication. The argument has practical implications, the most obvious of which is that anyone who reads a future act of the Scottish Parliament would need to apply the correct interpretation rule. However, that is not a persuasive argument against change. The point of devolution is that the Scottish Parliament can develop laws that are appropriate to the needs of Scotland. Again picking up on Rhoda Grant's point, I point out that it is already the standard practice to apply legislation to the Crown, with special exemptions where necessary. Indeed, many pieces of legislation that the Scottish Parliament has passed have that as standard practice. We are simply trying to apply it across the board by way of the bill.

It will remain the case that the precise manner in which legislation is applied to the Crown can be adjusted in particular circumstances, where necessary. I believe that, as is proper in a modern democratic society, the basic starting point will be that the institutions of the state—most obviously the Government departments that we are talking about in the main—have to obey the law of the land unless there are good reasons for granting them an exemption. Again, that picks up on Rhoda Grant's point. I remind members—Jackson Carlaw alluded to this—that the Law Society of Scotland commented that the provision would be

"consistent with our obligations under the European convention on human rights".

As I have said previously, I believe that this provision is correct. I cannot therefore recommend the amendments to the committee. I hope that Jackson Carlaw is persuaded by those arguments and now sees clearly that the Government has the best interests of Her Majesty at heart. It is not our intention to bring forward any instrument that would, in any way, have an effect on that interest.

Jackson Carlaw: I thank the minister for his comments, which reflect the tone of his remarks when we have addressed the subject previously. However, although I understand the underpinning objective, I feel that the appropriate context in which to deal with the issue would be a change that affected the status of the Crown throughout the United Kingdom. I am not persuaded that the appropriate course is for us to press ahead in Scotland with a unilateral change now. Therefore, I will press amendment 2.

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Carlaw, Jackson (West of Scotland) (Con)

Against

Doris, Bob (Glasgow) (SNP)
Eadie, Helen (Dunfermline East) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
McKee, Ian (Lothians) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

The Convener: The result of the division is: For 1, Against 5, Abstentions 0.

Amendment 2 disagreed to.

The Convener: Group 2 is on the meaning of "Scottish Instrument". Amendment 4, in the name of the minister, is grouped with amendments 5 and 6.

Bruce Crawford: Amendment 4 aims to meet the concerns that the judiciary expressed in a submission responding to the committee's call for evidence on the bill. The submission raised concerns that confusion might arise about which interpretation code should be used in relation to an instrument that is made under some powers that are contained in acts of Parliament—that is, the UK Parliament—and some that are in acts of the Scottish Parliament. The Interpretation Act 1978 would apply to the interpretation of the instrument in so far as it was made under acts of Parliament and the bill would apply to the interpretation of it in so far as it was made under acts of the Scottish Parliament. It might not always be clear which interpretation rules would apply to a particular provision. Amendment 4 provides that such hybrid instruments should be subject to the provisions in part 1 of the bill, which should address the judiciary's concern. Amendment 6 is a technical amendment that is consequential on amendment 4.

In response to the concerns that were noted in paragraph 47 of the committee's stage 1 report, I gave an undertaking during the stage 1 debate and in my formal response to the report that the Government would introduce an amendment adding acts of sederunt and acts of adjournal to the list of Scottish instruments in section 1(4).

Amendment 5 will put it beyond doubt that acts of sederunt and acts of adjournal are Scottish instruments. I thank the committee for that advice.

I invite members to support amendments 4 to 6.

I move amendment 4.

Amendment 4 agreed to.

Amendments 5 and 6 moved—[Bruce Crawford]—and agreed to.

Section 1, as amended, agreed to.

Sections 2 and 3 agreed to.

Section 4—Exercise of powers before commencement of Act of the Scottish Parliament

The Convener: Group 3 is on the meaning of "pre-commencement period". Amendment 7, in the name of the minister, is the only amendment in the group.

Bruce Crawford: I will make a short comment on amendment 7, which also comes at the committee's behest. It addresses the concerns that the committee expressed in paragraphs 53 and 54 of its stage 1 report. The committee agreed that the use of pre-commencement powers is at times appropriate. However, it was concerned about a lack of certainty on the point in time from which pre-commencement powers could be exercised. Amendment 7 meets the committee's concerns by specifying that the pre-commencement powers can be used only from the day after the day on which the bill receives royal assent. I ask members to support amendment 7.

I move amendment 7.

Amendment 7 agreed to.

Section 4, as amended, agreed to.

Sections 5 to 7 agreed to.

Section 8—Additional powers on commencement by order

14:30

The Convener: Group 4 is on ancillary powers. Amendment 8, in the name of the minister, is grouped with amendments 9, 39 and 40.

Bruce Crawford: Amendment 8 is consequential on amendment 9. It will make a minor drafting change to section 8(1), which becomes necessary if amendment 9 is agreed to.

Amendment 9 will remove section 8(3). It addresses the concerns that the committee expressed in paragraphs 61 and 62 of its stage 1 report, in which it said:

"The Committee considers that it would not be appropriate to create, as a default position, the power for Scottish Ministers to make transitional, transitory and saving provisions in commencement orders which are not subject to Parliamentary scrutiny."

Amendment 39 provides that, as a default,

"The power to make an order ... includes power to make such transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient"

in connection with that order. That responds to the committee's suggestion in its stage 1 report that the Government take those powers in relation to specific order-making powers in section 1(7) and section 25(1). The provision would also apply to the other order-making powers, in section 34(2), section 42(1) and section 57(3). The Government thinks that that is appropriate in the context of this complex and technical bill.

Amendment 40 will provide the Scottish ministers with ancillary powers to

"make such supplementary, incidental or consequential provision as they consider appropriate for the purpose of, in consequence of, or for giving full effect to, any provision of this Act."

Those orders would, of course, be subject to the affirmative procedure.

Amendment 40 will also enable the Scottish ministers to

"make such provision as they consider necessary or expedient for transitional, transitory or saving purposes in connection with the coming into force of any provision of this Act."

Those orders would be subject to the negative procedure.

The new section that amendment 40 introduces is intended to ensure that ancillary provisions can be brought forward to ensure that the bill as passed by the Parliament can operate as intended. It is particularly important to ensure clarity for general rules of interpretation in the bill.

I invite members to support amendments 8, 9, 39 and 40.

I move amendment 8.

Amendment 8 agreed to.

Amendment 9 moved—[Bruce Crawford]—and agreed to.

Section 8, as amended, agreed to.

Sections 9 to 11 agreed to.

Section 12—References to EU instruments

The Convener: Group 5 is on references to European Union instruments and other legislative provisions. Amendment 10, in the name of the minister, is grouped with amendments 11 and 12.

Bruce Crawford: Again, I will make my comments brief, because I think that the committee agrees with us on the proposals.

Amendment 10 is intended to make it clear that references in Holyrood legislation to an EU instrument are to the EU instrument as amended, extended or applied up to the day before the legislation receives royal assent or the Scottish statutory instrument is made. In its stage 1 report, the committee sought clarification on the effect of section 12. Amendment 10 is intended to meet the committee's concerns in that respect.

Amendment 11 is consequential on amendment 10 being agreed to. It makes it plain that a reference in Holyrood legislation to an EU instrument as amended, extended or applied includes those changes that have been made but are not in force when the legislation receives royal assent or the Scottish statutory instrument is made.

Amendment 12 is a minor technical amendment to section 14 that is intended to clarify further that references to enactments include references to enactments that are not in force.

Section 14 deals with the interpretation of references in Holyrood legislation to legislation other than EU legislation. Those references would be to the legislation as amended, extended or applied from time to time, including future changes. Amendment 12 explains that the reference is intended to include changes that have been made but are not yet in force.

I invite members to support amendments 10 to 12.

I move amendment 10.

Amendment 10 agreed to.

Amendment 11 moved—[Bruce Crawford]—and agreed to.

Section 12, as amended, agreed to.

Section 13 agreed to.

Section 14—References to other legislative provisions

Amendment 12 moved—[Bruce Crawford]—and agreed to.

Section 14, as amended, agreed to.

Sections 15 to 19 agreed to.

Section 20—Application of Acts and instruments to the Crown

Amendment 3 not moved.

The Convener: I think that I do not need to put the question on section 20.

Sorry, I am told that the question should be put. The question is, that section 20 be agreed to.

Section 20 agreed to.

The Convener: Remember that this is the first time that I have been involved in stage 2 of a bill, so I am allowed a slip.

Bruce Crawford: This is the first time for us both, convener.

The Convener: Indeed, minister.

Sections 21 to 24 agreed to.

Section 25—Definitions

The Convener: Group 6 is on definitions. Amendment 41, in the name of Helen Eadie, is grouped with amendments 13, 42, 43, 14, 44 and 45.

Helen Eadie (Dunfermline East) (Lab): The purpose and effect of amendment 41 will be to ensure that, unless expressly provided otherwise, expressions that are defined in the Scotland Act 1998 will retain the same meaning when used in an act of the Scottish Parliament or a Scottish statutory instrument. Amendment 41 will replicate the existing provision under article 6(3) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379), in accordance with the Subordinate Legislation Committee's view in paragraph 120 of our stage 1 report.

Currently, schedule 1 refers to only four expressions—"Scotland", "the Scottish Administration", "the Scottish Ministers" and "Scottish public authority"—that are defined by reference to their definition in the Scotland Act 1998. The policy memorandum does not explain why schedule 1 does not reproduce the provision under article 6(3) of the transitional interpretation order or why it omits the definitions of other expressions defined in the Scotland Act 1998, such as "the Scottish Executive", "the Scottish Parliament", "legislative competence", "devolved competence", "reserved matter", "Convention rights", "First Minister", "Lord Advocate", "international obligations", "Scots criminal law" and "Scots private law". Paragraph 25 of the policy memorandum simply states:

> "Schedule 1 ... provides a list of words and expressions commonly used in legislation".

That might imply that those other expressions are not used commonly enough to satisfy the frequency of use test, but that is difficult to believe. There is hardly an act of the Scottish Parliament that does not mention "the Scottish Parliament". Part 2 of the bill makes references to "devolved competence", "First Minister" and "Lord

Advocate"—see section 27(4) as well as paragraphs 1(1) and 2(1) of schedule 2 and the other amendments suggested below.

In any event, the so-called frequency of use test might not be appropriate for deciding whether expressions that are used in the 1998 act should be included in schedule 1 to the bill. It is much better to be certain that, when an act of the Scottish Parliament uses expressions that are used in the 1998 act—such as "the Scottish Parliament", "reserved matters" or "legislative competence"—the same meaning is intended as is intended in the 1998 act. Otherwise, at best, acts of the Scottish Parliament will need to contain express definitions. At worst—this is what will tend to happen in practice—there will be no definition, so an argument will need to be made that it is implied that the expression has the same meaning as in the 1998 act. However, that argument will be difficult to make if there is a deliberate decision not to reproduce the effect of article 6(3) of the transitional interpretation order.

The bill illustrates my point. Section 27(4) and paragraph 1(2) of schedule 2 define what is meant by

"a function's being exercisable within devolved competence",

but references to "the Scottish Parliament", "the Parliament", "First Minister" and "Lord Advocate" are not defined.

The decision not to reproduce article 6(3) is all the more extraordinary when we consider that schedule 1 provides that

"'the EU', 'the Treaties', 'the EU Treaties', 'EU instrument' and other expressions defined by section 1 of and Schedule 1 to the European Communities Act 1972 (c.68) have the meanings given by that Act".

The expressions that are defined in the 1972 act—particularly those that are not specified—are used even less than the expressions that are defined in the Scotland Act 1998.

I move amendment 41.

Bruce Crawford: I appreciate the tone in which Helen Eadie spoke to the amendments in her name, but I hope that I can persuade her that the direction of travel on which we are intent is the appropriate one.

In its stage 1 report, the committee expressed concern that schedule 1 does not include all the terms that are defined in section 127 of the 1998 act. The amendments in Helen Eadie's name would make that happen.

The purpose of schedule 1 is to avoid having to define individual acts, instruments and expressions that are commonly used. The definitions and expressions in schedule 1 were chosen because they meet the frequency of use test.

Some of the expressions in section 127 of the 1998 act are specific to that act. For example, "open power" is a shorthand expression that has meaning only in the context of the 1998 act. Therefore it would be wrong and pointless to include it in schedule 1 to the bill.

I will not go through the list that Helen Eadie provided, but she said that there was a need to define "the Scottish Parliament". A definition was given in the 1998 act because the Scottish Parliament did not yet exist, but acts of the Scottish Parliament have never defined the term, because its meaning is clear. That is why we do not need a definition of the term in schedule 1.

Other expressions in section 127(1) might be more generic. Some have simply not been used in Scottish legislation for more than 10 years. For example, "international obligations" has not been and was never intended to be used in Scottish legislation, because we take account of specific international obligations, for example under the Aarhus convention in the context of the Climate Change (Scotland) Act 2009.

It is therefore unnecessary, and in some cases it would be inappropriate, to import all the definitions from the Scotland Act 1998. We have taken the opportunity to fillet out definitions that are not needed. Amendment 13, for example, will remove a definition that, on reflection, we think is not helpful as a general rule for the interpretation of Scottish legislation.

If Helen Eadie or other members think that specific words and expressions that are in section 127 of the 1998 act should be included in the bill, my officials will be glad to consider their arguments. However, the Government has given careful consideration to the definitions in the 1998 act and sees no reason to import them willy-nilly. Of course, in future, if changes to the definitions in schedule 1 are required, we can make such changes through an order under section 25(2).

Even if we accepted that all the definitions in the 1998 act should be included in schedule 1, we would not support a simple cross-reference to the 1998 act. A reader of future legislation who wanted to find out what a particular word or expression meant would have to refer not only to the schedule to the bill as enacted but to the 1998 act. Such an approach would not be consistent with the intention to make the law clear and accessible.

Amendment 13 is a minor technical amendment that removes from schedule 1 the definition of "by virtue of". Use of the phrase "by virtue of" to mean "by" and "under" is a form of shorthand that came into the transitional interpretation order because it

was used in the 1998 act. The expression does not look like it bears a special meaning and attracted some critical comment during stage 1. On reflection, I would like to revert to the position before the transitional order and to remove the expression from schedule 1.

14:45

Amendment 14 is a minor technical amendment that is intended to amend the definition of the term "registered medical practitioner" in the bill to take into account a new licensing regime that came into force on 16 November 2009. In future, such changes will be made by order under section 25(2), as I have described.

We want to remove certain definitions—especially the use of the term "by virtue of" to mean "by" and "under"—from the schedule because they originated in the 1998 act. There is no requirement for "international obligations" or "the Scottish Parliament" to be defined in the schedule. I hope that I have persuaded the committee that we need to tidy up our legislative book before we proceed with the bill, to ensure that it is as fit for purpose as it can be. It would not be right for us to have to cross-refer between the bill and the 1998 act to find out what is meant in schedule 1.

Helen Eadie: It is a great pity that in Scotland and elsewhere we have to spend time in court arguing about definitions, when most people want to get on to the substance of legislation. The benefit of defining terms in the way in which I have suggested in the amendments is that such an approach does away with the difficulties that people will otherwise face in court. That is one of the main motivations for the proposals that are set out in my amendments. I know what it is like to have to stand up in court; I am sure that my good and learned friend Jackson Carlaw has had to do that on many occasions. It is a great pity when the substance of the issue is missed because people have to argue about definitions. For that reason, I will press amendment 41.

The Convener: The question is, that amendment 41 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Eadie, Helen (Dunfermline East) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)

Against

Carlaw, Jackson (West of Scotland) (Con)
Doris, Bob (Glasgow) (SNP)
McKee, Ian (Lothians) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 41 disagreed to.

Section 25 agreed to.

Schedule 1—Definitions of words and expressions

Amendment 13 moved—[Bruce Crawford]—and agreed to.

Amendments 42 and 43 not moved.

Amendment 14 moved—[Bruce Crawford]—and agreed to.

Amendments 44 and 45 not moved.

Schedule 1, as amended, agreed to.

Section 26—Service of documents

The Convener: Group 7 is on the service of documents. Amendment 46, in the name of Helen Eadie, is grouped with amendments 15, 47, 48, 16, 17, 49, 18, 19 and 50. I point out that if amendment 48 is agreed to, I cannot call amendment 16 because of pre-emption; if amendment 49 is agreed to, I cannot call amendment 18 for the same reason; and if amendment 19 is agreed to, I cannot call amendment 50 for the same reason.

Helen Eadie: The purpose and effect of amendments 47 to 50 is to make provision for the service of documents by electronic communication, but only if it is in accordance with regulations that the Scottish ministers would make. The reason for the amendments is that it is thought that the existing provisions in section 26 do not make adequate provision for service by electronic communication.

Section 26(3) provides for electronic communication if the person upon whom the document is to be served has agreed and has provided an electronic address. However, it does not state how such addresses can be provided. Similarly, section 26(6) presumes a document served electronically

"to have been received 24 hours after it is sent".

However, it states nothing about how the sending or receipt of documents could be proven. It is not thought that it would be possible to provide for such matters at present because they could be quite complicated. For example, there might be problems with deeming an electronic communication to have been received when the recipient's internet access may have been interfered with under the provisions of the Digital Economy Bill.

Accordingly, amendment 48 proposes to confer upon the Scottish ministers the power to make regulations with regard to such matters. The regulations would be subject to affirmative resolution. As a consequence, the existing provisions in sections 26(3) and (6) and consequential provisions would be deleted.

I move amendment 46.

Bruce Crawford: I was somewhat surprised by the amendments that Helen Eadie lodged in relation to the provisions in section 26 regarding the use of electronic means for the service of documents. I have lodged my own amendments, which I will come to in due course.

The proposals that Helen Eadie has made would give ministers powers to make provisions in respect of the technologies surrounding the use of electronic communications as a means of serving documents. Those issues are highly technical. In its response to our consultation on the bill, the Law Society of Scotland said:

"On balance, the Working Party is of the view that there is too much room for technological problems, faults and issues surrounding proving that the service has been effected for the Bill to deal with servicing by electronic means. Adequate safeguards, guidelines and mechanisms to ensure that a document served electronically was actually received would need to be established. It may be worthwhile to establish such a mechanism, but this would require considerable work by technological specialists and the Bill is not the appropriate place for this."

In light of such concerns, the Government's provisions on the service of documents seek to allow electronic modes of communication to be used only when the parties concerned are agreed that they should be used and subject to such rules as the parties may agree between them. Any attempt by the Government to be prescriptive about such matters may well create more problems than it solves. On that basis, we cannot envisage circumstances in which it would be helpful for the Government to use the powers that Helen Eadie's amendment 48 envisages.

As the committee will be aware, the Government has lodged its own amendments to section 26. Amendment 16 aims to provide that electronic communications may be available as a valid means for the service of documents only if the parties have previously agreed to that in writing. During our consultation, the Law Society for Scotland raised concerns in relation to the provision that allows the service of documents using electronic means. It believed that there should be prior written agreement of all parties before that method of delivery could be used. I lodged amendment 16 to address the concerns that the Law Society expressed.

Amendment 15 is a minor technical amendment.

Amendment 17 will decrease the time period in the bill for the presumed delivery of documents when they are delivered using either a registered post service or a recorded delivery postal service from three days to 48 hours. That will make the provisions consistent with similar provisions in section 1147 of the Companies Act 2006.

Amendment 18 aims to increase the time period for the presumed delivery of documents when they are delivered using electronic means from 24 hours to 48 hours, which will ensure consistency with the rule in the 2006 act.

Amendment 19 will remove two definitions from the provisions of the bill. Section 26(7) as drafted defines the terms "electronic address" and "electronic communications" for the purposes of that section. However, amendment 16 will provide for the parties to decide between themselves what form any electronic communication for the service of documents should take. If that amendment is agreed to, the definitions in section 26(7) will become redundant.

I hope that my explanation that the Law Society of Scotland argued through its working group for the very amendments that we have lodged will allow Helen Eadie not to press her amendments and will allow members to support amendments 15 to 19.

The Convener: Do members have any comments?

Bob Doris (Glasgow) (SNP): Helen Eadie's amendments are clearly well intentioned and, at first glance, it seemed to me that it would be common sense to have a set of evidence-based arrangements by which electronic data are passed and documents are received. However, having listened to the debate this afternoon, I get the idea that the Parliament could come up with some very inflexible rules and regulations, which could appear clumsy and crude, depending on which stakeholder organisation the data are being transmitted to. Such an approach might move us towards a one-size-fits-all policy that would act as a straitjacket for the Parliament and the Government in conducting their business.

I favour a move towards individual written agreements on data transfer and the receiving and obtaining of documents: a suck-it-and-see attitude. We could see how such agreements work and perhaps develop best practice guidelines. That could be done at a UK level—as Jackson Carlaw noted, the issue involves not only Scotland; there is a wider UK and European perspective.

Given that we are not clear on the issue and that any Parliament could come up with very specific recommendations on how data are transferred and documents are received, I believe that individual written agreements should initially

be the way forward. I am open-minded about the idea of the Parliament revisiting the matter in future, perhaps in conjunction with the UK Parliament or in a wider context.

Helen Eadie: First, I should take no credit for any of the amendments that I have lodged. They all came from the Law Society of Scotland, which has simply used me as a vehicle to get the proposals on the table, so I give the credit to that organisation. I am slightly puzzled by the minister's comments, which seemed to suggest that my amendments go against the wishes of the Law Society, when in fact they are born of the Law Society.

Secondly, on the point about rules acting as a straitjacket, the intention of the amendments is quite the opposite: they are about giving ministers powers to amend regulations as the new digital economy develops. That is a key point. If people have BBC iPlayer, I caution them to tune into the "Panorama" programme that was on television last night, as it showed how the new digital economy works globally and how it can be impossible to identify an individual because of the chain that is set up through internet service providers.

I understand digital process—the amendments would give the ministers powers and flexibility. If the minister does not accept the amendments, it will put him in a straitjacket. For that very reason, I will press amendment 46: we need to ensure that there are no straitjackets, as the digital economy is changing so swiftly.

The Convener: The question is, that amendment 46 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Eadie, Helen (Dunfermline East) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)

Against

Carlaw, Jackson (West of Scotland) (Con)
Doris, Bob (Glasgow) (SNP)
McKee, Ian (Lothians) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 46 disagreed to.

Amendment 15 moved—[Bruce Crawford]—and agreed to.

Amendment 47 moved—[Helen Eadie].

15:00

The Convener: The question is, that amendment 47 be agreed to. Are we agreed?

Members No.

The Convener: There will be a division.

For

Eadie, Helen (Dunfermline East) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)

Against

Carlaw, Jackson (West of Scotland) (Con)
Doris, Bob (Glasgow) (SNP)
McKee, Ian (Lothians) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 47 disagreed to.

The Convener: As I pointed out earlier, if amendment 48 is agreed to, I cannot call amendment 16.

Amendment 48 moved—[Helen Eadie].

The Convener: The question is, that amendment 48 be agreed to. Are we agreed?

Members No.

The Convener: There will be a division.

For

Eadie, Helen (Dunfermline East) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)

Against

Carlaw, Jackson (West of Scotland) (Con)
Doris, Bob (Glasgow) (SNP)
McKee, Ian (Lothians) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 48 disagreed to.

Amendments 16 and 17 moved—[Bruce Crawford]—and agreed to.

Amendment 49 moved—[Helen Eadie].

The Convener: The question is, that amendment 49 be agreed to. Are we agreed?

Members No.

The Convener: There will be a division.

For

Eadie, Helen (Dunfermline East) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)

Against

Carlaw, Jackson (West of Scotland) (Con)
Doris, Bob (Glasgow) (SNP)
McKee, Ian (Lothians) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 49 disagreed to.

Amendments 18 and 19 moved—[Bruce Crawford]—and agreed to.

Section 26, as amended, agreed to.

Section 27 agreed to.

Schedule 2 agreed to.

Section 28—Instruments subject to the negative procedure

The Convener: Amendment 51, in the name of Helen Eadie, is grouped with amendment 53.

Helen Eadie: The minister cannot say that I have not been like a dog with a bone at this issue.

The purpose of amendments 51 and 53 is to provide for the general rule that a negative instrument requires to be laid before the Parliament for at least 40 days before the instrument comes into force. Any period of time when the Parliament is in recess for 16 days or less does not interrupt the 40-day period running. However, longer periods of recess do not count for the purposes of the 40-day period, with the period stopping at the start of recess and resuming again once recess ends.

Whether the negative procedure offers the right level of parliamentary scrutiny is a question that has been considered in both of the regulatory inquiries into the legislative process that the Parliament has conducted since devolution. The session 2 inquiry recommended significant reform of the process, which the then Scottish Executive and the present Administration both rejected. The subsequent inquiry that this committee conducted revisited the issue, but was unable to resolve the matter completely.

The focus is on the standard period of time for which a negative instrument should be laid before it comes into force. The purpose of the provision is to permit a period of time for parliamentary scrutiny before the instrument comes into force. It is generally accepted that members with concerns about an instrument are more likely to feel able to pursue those concerns through annulment if the instrument is not in force. As a result, negative procedure will be seen to provide a more effective form of scrutiny. All members of the committee recognised that in our stage 1 report.

Such considerations must be balanced against the need for subordinate legislation procedure to provide an effective and efficient mechanism for delivery of Government business. In recognition of that, the Government has proposed that the present 21-day period be extended to 28 days, which is the period for which section 28(2) provides. At stage 1, not all members of the committee were satisfied that the provision represented the best balance between the twin objectives of efficient government and adequate scrutiny. Amendments 51 and 53 combined are intended to explore further whether the proposed 28-day rule strikes the right balance. No change is proposed to the period of 40 days within which the Parliament can annul a negative instrument or to how recess periods are to count for that purpose; those provisions remain unaffected by the amendments.

Helpfully, the Government has provided further information to the committee on the effect that a simple extension of the 28-day period to 40 days would have on Government business. At present, the transitional order permits recess periods that are longer than four days to stop the 21-day period running, so the clock stops during the February, Easter, October and Christmas recesses, as well as during the longer summer recess. The combination of that rule and the fact that often the periods between recesses come close to the 40-day period mean that there would be a significant effect on the programming of Government business, were amendment 51 to be agreed to on its own. It might be said that the Government should simply have to factor that into its planning and that the permitted exceptions to the 28-day rule would cater for situations where it proved necessary to disregard the general rule. However, in seeking to address the Government's concerns, I have been prepared to consider an alternative approach.

Amendment 53 proposes that, for the purposes of the general rule, negative instruments should be laid for 40 days before they come into force but that periods during which the Parliament is in recess for more than 16 days would not count. That means that the 40-day period before coming into force would not stop running during the shorter recesses in February, at Easter, in October and, depending on the length of the holiday, at Christmas. As I have explained, the current rules on the 40-day annulment period will be unchanged. The long summer recess will cause the 40-day period to stop running, but it is not unreasonable to expect different rules to apply to that period. Again, the exceptions to the rule for which section 31 provides will allow the Government to depart from the rule where necessary, subject only to being required to give reasons to the Parliament.

I will give members a practical example of how the proposed rule would operate. If an instrument were laid today under the rule that the Government proposes in the bill, it could not come into force until 27 April. If amendments 51 and 53 are agreed to, the same instrument could come into force on 25 April, so there is a slight balance in favour of the Government. The same would be true of the October recess and a two-week Christmas recess. If the laying period spanned the February recess, the difference would lie in the Parliament's favour, with an additional six days for scrutiny. An additional 12 days' scrutiny would be provided for instruments that spanned the summer recess. Overall, the amendments would enhance parliamentary scrutiny, without the catastrophic effect on the programming of Government business that the Government fears.

The Government has previously agreed that its target should be always to allow the full 40-day annulment period to run before measures are brought into force. However, working in the real world, we have to accept that targets cannot always be met. Amendments 51 and 53 seek to recognise the spirit of the target and acknowledge the reality of the impact that recesses can have on Government business while respecting the importance of parliamentary scrutiny.

I move amendment 51.

Ian McKee: Helen Eadie is perfectly correct that the suggestion to increase from 28 days to 40 days the minimum period before instruments laid in the Parliament that are subject to the negative procedure come into force has caused concern to the current Administration and the previous Labour Administration. The convener, Jackson Carlaw and Helen Eadie will recall that, in its 12th report in 2008 on its inquiry into the regulatory framework in Scotland, the Subordinate Legislation Committee came to the unanimous conclusion that

"to require even the most routine instruments to be laid for 40 days is probably unworkable. However, we welcome the previous Executive's suggestion—which the current Minister supports—that the coming into force date for negative instruments should be extended from 21 days to 28 days after laying. This would allow committees more time for scrutiny of negative instruments before they come into force ... We consulted a sample of committee conveners on this proposal. It was very much welcomed."

We recommended that

"the period after which instruments subject to the negative procedure can come into force should be extended from 21 days to 28 days."

The Subordinate Legislation Committee reached that conclusion in this session after an exhaustive inquiry in which evidence was taken from witnesses.

I appreciate that, having heard the arguments that the minister and others have put forward about the difficulties that would be caused in certain circumstances by extending the minimum period from 28 days to 40 days, Helen Eadie has come with up a mechanism that attempts to manage the process, but that mechanism is extraordinarily complicated and would cause a great deal of confusion inside and outside the Parliament. The recommendation that we made in 2008 was simple; everyone could understand it. Indeed, allowing 16 days during the summer recess to count towards the 40 days would mean that we would end up with 28 days of debate and discussion anyway. That takes us back to the 28-day situation.

I appreciate the good intention behind the amendments and know how hard Helen Eadie has worked on the matter, but they will not solve the problem. The simpler solution, which the minister has proposed, should be accepted.

Bruce Crawford: Rather than use Helen Eadie's description of her being like a dog with a bone, I would say that there is no doubt that she has been consistent on this issue throughout the process and that she has prosecuted the arguments as well as she can. However, I consider that the current Government and the previous Government have made a robust and reasonable case for setting the relevant period at 28 days. Ian McKee expounded the position well in describing what happened in the committee's previous considerations. The argument was founded on close consideration and analysis of the technicalities, the broader constitutional framework, the day-to-day practical implications for all stakeholders and, in particular, the impact on the Parliament. This is not just about the Government. Any move to a 40-day period would result in the constitutional irony of affirmative instruments progressing through the Parliament more quickly than negative instruments. That in itself should be viewed with concern by members.

The concept of subordinate legislation arose initially from a recognition of the need to allocate valuable parliamentary time to allow the Parliament proper control over how it focuses its scrutiny. The amendments would cut across that approach without giving the Parliament or the Government a proper opportunity for consideration of the consequences. Aside from the constitutional issues, the Government's formal response of 12th February to the stage 1 report offered a thorough, comprehensive and—I am happy to go as far as saying—conclusive analysis of the practical difficulties that would arise. A move from 28 to 40 days would produce significant impacts that would be felt by the Government, the Parliament and, most important, the people of Scotland throughout the majority of the parliamentary year. It would be possible to complete the necessary 40 days before the start of the next recess only for

instruments that were laid on 5 and 6 January, between 12 April and 16 May and between 25 October and 10 November.

15:15

Therefore, it is reasonable to conclude that, on average, an instrument that was laid under a 40-day regime would take around 54 days to come into force. The process would take just under twice that long for instruments that were laid in June. As can be seen from the table in my letter of 12 February, an instrument that was laid between 27 May and 28 June would take 103 days and an instrument that was laid between 29 June and 3 September would take anything up to 119 days to complete scrutiny. It would be wrong—for the interests of Scotland, not just for how we go about our business—to make any future Government of Scotland take that long to push subordinate legislation through the Parliament.

The timing of recesses acts as the primary constraint and there is little scope for rescheduling business in a way that would alleviate the detrimental effects of the proposal. A 40-day laying period would result, as an absolute minimum, in an effective doubling of the 21 days that currently elapse between the laying of an instrument and the point at which it can normally come into force.

As I explained in my letter of 12 February, such impacts cannot be addressed through improved management of Government business. Amendment 51 would inhibit the prospect of delivering improvements in that regard. The Government has a responsibility to ensure that its legislative proposals can be progressed without undue delay. A move to 40 days, coupled with recess periods, would leave the Government with little option but to lay instruments in batches—a practice that we try to avoid. We have been through a lengthy process to help the Subordinate Legislation Committee and other committees of the Parliament to understand when instruments will be laid, not only to manage our programme better but to help Parliament to manage its programme. Amendment 51 would undermine that work and would inevitably mean that instruments would be laid in batches, which cannot be good for Parliament.

Amendment 53, in the name of Helen Eadie, attempts to lessen such impacts. However, as we explain in our letter, those impacts will be felt throughout the parliamentary year. Amendment 53 would merely alter the points of the year at which problematic gluts of instruments occurred. It would also give rise to considerable complexity and confusion in practice. As Ian McKee indicated, there is no sensible reason why, at some points of the year, 28 days is thought to provide sufficient scrutiny time whereas at others 40 days is required. Such an approach is inconsistent with the ethos of the bill. The committee and the Government have striven hard to ensure that the bill simplifies the statutory framework and does not add additional and unnecessary layers of complexity, as amendment 53 would do.

Given the significant practical difficulties that amendment 53 would create, I would have expected the Standards, Procedures and Public Appointments Committee to have been given an opportunity to consider the ramifications of such a move, but I am not aware of evidence having been taken on the proposals at stage 1. The effect of the amendment would be to count days during a recess as laying days, removing available scrutiny days in which parliamentarians could go about their job. The proposal would constrain Parliament and result in less scrutiny, which cannot be a good or positive outcome for the Parliament. The committee should be proud of the fact that any change that has been suggested has emanated from evidence that was carefully considered and presented. Agreeing to amendment 53 would be a significant departure from that good practice.

I hope that the committee will accept that I have gone to some length to persuade members of the arguments for 28 days, as the previous Government did, particularly in my letter of 12 February. I hope that I have persuaded them that the proposed increase in the bill to 28 days strikes the right balance between effective scrutiny and the efficient conduct of business and that a move to 40 days would be of benefit to no one. It would be of no benefit to the Government, it would certainly be of no benefit to the Parliament and it would be of least benefit to the people of Scotland.

Helen Eadie: Amendment 51 was born of the evidence that Iain Jamieson of the Law Society of Scotland submitted to the committee. The Law Society suggested that it might be a good compromise to get round the timing difficulties that the minister has outlined and which amendment 53 seeks to overcome.

We heard what Dr Ian McKee said. When he talks about the past record of any member, he must remember that members have the prerogative to change their mind when they have heard further argument. He must also bear in mind the fact that when the Subordinate Legislation Committee conducted its inquiry into the regulatory framework in Scotland, I was a fairly new member of the committee. If I recall correctly, I joined the committee when it was in the middle of that work stream.

Parliamentary scrutiny is the bottom line. Amendment 51 was always intended to maximise the time that parliamentarians have to scrutinise instruments. We see orders going through

regularly and, sometimes, we even see orders being laid after the commencement dates, which cannot be helpful for the Parliament. To try to mitigate some of that, we need to be able to extend the time that committees have to undertake parliamentary scrutiny.

Having been a member of the Health and Sport Committee, which has as big a share of statutory instruments as any committee, I know that a lot of those instruments deserve much more scrutiny than they get. Sometimes that is simply because committees have very heavy agendas. If colleagues had more time to consider the implications, they might make different decisions. We see orders going through that really ought not to go through without detailed scrutiny.

I do not think that the mechanism is complicated. We are saying that the summer recess is the one time of the year that would not count as a continuous period and that it would be appropriate to allow Christmas, Easter and half terms to count as continuous periods.

In support of the Law Society's recommendations and what Iain Jamieson said, I am happy to press amendment 51.

The Convener: The question is, that amendment 51 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Eadie, Helen (Dunfermline East) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)

Against

Carlaw, Jackson (West of Scotland) (Con)
Doris, Bob (Glasgow) (SNP)
McKee, Ian (Lothians) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 51 disagreed to.

The Convener: Group 9 is entitled, "Negative procedure: 'responsible authority'". Amendment 20, in the name of the minister, is grouped with amendment 21.

Bruce Crawford: Amendment 20 responds to a specific point around the annulment of SSIs that was originally highlighted by the judges of the Court of Session, which was that in the event of the Parliament resolving that an instrument should be annulled, the authority responsible for the instrument should be the authority that is required to revoke it. Amendment 20 aims to make that clear in the bill. Amendment 21 defines the term "responsible authority" in the context of section 28(6) and will require that orders referred to in section 28(5) and section 28(6) are made by Scottish statutory instrument. The amendments were suggested by the committee and I hope that members will support them.

I move amendment 20.

Amendment 20 agreed to.

The Convener: Group 10 is on the annulment of instruments. Amendment 52, in the name of Helen Eadie, is the only amendment in the group.

Helen Eadie: The purpose of amendment 52 is to require and empower an order revoking an instrument that the Parliament has resolved to annul—other than an order in council—to restore the legal position to what it was before the instrument came into force, in so far as is practicable. In relation to orders in council, amendment 52 empowers any revocation order to make such provision, but does not require it to do so. The responsible authority must provide a written explanation to the Presiding Officer in the event that it is not practicable to restore the position to what it was before the instrument came into force.

The committee agreed in its stage 1 report that, when the Parliament has resolved that an instrument be annulled after it has come into force, it would be appropriate for the legal position to be returned to what it was before the instrument came into force, in so far as that would be practicable. The reason for that is that, in taking the positive step to resolve that an instrument be annulled, the Parliament expects the legal position to reflect its view. Recognising that ministers, or any other responsible authority, may not have the powers necessary to do so, the committee proposed that such powers should be available. The committee also recognised that there should be flexibility to deal with circumstances in which it is not possible to return to the original legal position.

These principles are given effect by amendment 52. The amendment also respects the superior authority of Her Majesty when making orders in council, so Her Majesty is empowered to take such action, but not required to do so.

There is a connection between the principles behind this amendment and those behind the 28-day rule. If instruments were not brought into force earlier than the date on which the 40-day annulment period expires, this provision would not be necessary. If revocation orders were made immediately following a parliamentary resolution within the 40-day period, the instrument would never have been in force. However, we require to deal with circumstances in which an instrument has been made so as to come into force within the 40-day period. As the Government has made the

instrument in the knowledge that it risks annulment, it seems sensible to provide that the default rule is for the legal position to be restored in so far as is practicable.

When that is not considered practicable, the Government should, as the minister has said to the committee previously, account to the Parliament for its decision. Amendment 52 adopts a similar approach to that used since devolution regarding the 21-day rule and provides for a written explanation to be given to the Presiding Officer.

In previous discussions with the committee, the minister has described the period after annulment as a "pause" for ministers—or any other responsible authority—to take stock. I do not disagree that, in the aftermath of a resolution of the Parliament that an instrument be annulled, ministers will require to consider very carefully how they pursue the policy intentions of which the Parliament has disapproved. However, I must disagree with any suggestion that the "pause" is to take place while the legal position of the instrument remains in limbo. Section 28(4) of the bill provides what the effect of a resolution will be, but that is not clear to readers of the statute book. Ministers are also under a statutory duty to make a revocation order.

Having listened to the view that it would not be sensible to express a time limit for fulfilment of that duty, I put it to the minister that, in the face of an express declaration of the Parliament's will on the matter, a revocation order should be made without delay. That is in the interests of the Parliament, which is the source of the power that ministers seek to exercise, and it is in the interests of the public that the legal position is clearly settled and reflected in the statute book without delay.

I move amendment 52.

Ian McKee: I am a little concerned that the amendment will make the legal situation slightly more confusing. If there is an order to restore, as far as is practicable, the position to what it was before the instrument was in force, certain things, such as the awarding of grants to bodies or people, might well have happened before that moment comes. In those circumstances would it be judged practicable to take the grant back? Would it be the case that, if the recipient had spent the money, they would not give it back or, if they had not spent it, they would? There would be a great deal of confusion if that were to happen.

When annulment takes place, the situation is more a subject for parliamentary debate rather than a legal matter. To bring the law into it when the effect that it would have is obscure would cause confusion rather than clarity; therefore, I do not agree with the amendment.

15:30

Bruce Crawford: I appreciate why Helen Eadie lodged amendment 52. The committee has been concerned that the bill should ensure that an annulment resolution is an effective sanction. However, as I informed the committee in my formal response, the Government still considers that it would be inappropriate to introduce provisions that require the restoration of the position before the annulled instrument came into force.

Let me explain why that is. If the Parliament has taken the unusual step—and it is unusual—of resolving to annul an instrument, it will be for the authority responsible to respond to the Parliament's concerns. It is a fact that annulments are rare and those that raise concerns for the Parliament are rarer still. In the Government's view, it is best that the matter be dealt with at a political level, rather than that we try to prescribe a legal solution. That is what Parliaments are about. The value of requiring statutory underpinning for such actions is certainly questionable and, the Government argues, to do so is unnecessary. In such circumstances, the will of the Parliament will always prevail without the need for statutory provision and its associated constraints.

Amendment 52 focuses on the restoration of the previous position. It fails to take account of the fact that simple restoration is only one option and could, in fact, be counter to the principles underlying the Parliament's decision to annul. Annulment means that the Parliament does not like the instrument, not that it wants the old position to be returned in whole or part. In the event of annulment, the Parliament will have sent a strong signal to the Government or, for that matter, any authority that is responsible for the particular instrument. From that point on, the public focus is on the responsible authority. The key point is that responsible authorities must be given full flexibility to identify alternative courses of action and to decide how best to implement remedial proposals to reflect the Parliament's views.

As I said, in such circumstances, the Parliament will always prevail. Any responsible authority would immediately seek to identify alternative courses of action and consider how to implement remedial proposals with the shortest possible delay, consulting as necessary and, as members would expect any Government to do in such circumstances, find agreement on a satisfactory way forward with the committee concerned. In the unlikely event that such remedial proposals remained unacceptable to the Parliament, any further SSI could in turn be annulled, leaving the Parliament in control at all times. Restoration of the previous position might be appropriate and, of

course, possible in certain cases. In others, it might be technically possible but counter-productive for the reasons that Ian McKee outlined—for instance, if a body corporate has already been dissolved, the Government may not have the necessary powers to restore the previous position—and, in some circumstances, restitution may simply be impossible.

A requirement to restore the previous position may also be problematic if the Parliament is dissatisfied with only part of the instrument, but supportive of other parts. In that case, it would be in nobody's interest—neither the Government's nor the Parliament's—to restore a position that all sides agree should be changed. That would be tantamount to throwing the baby out with the bath water. It is not a case of black or white; there must be space for the political process to take its course. Forcing such matters into a narrow, legal mould is not in the interests of good governance for the Parliament or the Government. Nor, as I indicated, does it respect the pre-eminence of the Parliament in such matters.

I strongly believe that by limiting our role to a narrow legal one, amendment 52 runs contrary to the purpose of Parliaments and politicians to debate, negotiate and reach conclusions. That would not be good for the Parliament or for politics. Instead of having legislation that imposes a course of action that might not satisfy the Parliament or the Government, we must retain the flexibility to negotiate a solution. As a result, amendment 52 must be rejected, because it undermines parliamentary democracy.

Helen Eadie: The issue in question is, indeed, parliamentary democracy and I object strongly to the fact that at the end of the day it will be ministers and not the Parliament that will have priority. The fact that time and again ministers have completely ignored the Parliament's will as expressed in the chamber only gives substance to what the Government actually thinks about this issue.

If instruments were not brought into force earlier than the date on which the 40-day annulment period expired, this provision would not be necessary. However, we see a constant stream of instruments from the minister and his officials being brought into force before the expiration date, and that really must be a concern for us all. As for the minister's point about the body corporate, I have to say that if that body were to be dissolved it would be back in place again pretty soon afterwards to address these issues.

I do not agree with Ian McKee's point that by maintaining the status quo we prevent confusion. The bottom line is that parliamentary democracy, not ministerial democracy, has to prevail. If members do not support this amendment, it will simply send the signal that the Parliament's will does not prevail in this matter.

The Convener: One assumes, then, that you will press your amendment, Mrs Eadie.

Helen Eadie: Yes.

The Convener: The question is, that amendment 52 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Eadie, Helen (Dunfermline East) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)

Against

Carlaw, Jackson (West of Scotland) (Con)
Doris, Bob (Glasgow) (SNP)
McKee, Ian (Lothians) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 52 disagreed to.

Amendment 53 moved—[Helen Eadie].

The Convener: The question is, that amendment 53 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Eadie, Helen (Dunfermline East) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)

Against

Carlaw, Jackson (West of Scotland) (Con)
Doris, Bob (Glasgow) (SNP)
McKee, Ian (Lothians) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

The Convener: The result of the division is: For 2, Against 4, Abstentions 0.

Amendment 53 disagreed to.

Amendment 21 moved—[Bruce Crawford]—and agreed to.

Section 28, as amended, agreed to.

Section 29—Instruments subject to the affirmative procedure

The Convener: Group 11 is on the consequences of a failure to lay instruments. Amendment 54, in the name of Helen Eadie, is grouped with amendments 55 to 59.

Helen Eadie: These amendments seek to ensure that the bill provides that an affirmative

instrument that is either not laid in draft or not approved by the Scottish Parliament before it is made, is invalid; that a negative instrument that is not laid before the Parliament is invalid; and that an instrument to which section 30 applies that is not laid before the Parliament is invalid. However, where there is simply a procedural error in the process of laying an instrument, the instrument will not be invalid, and where a negative instrument does not comply with the 28-day rule or a section 30 instrument is not laid before it comes into force, neither instrument will be invalid, but the maker of the instrument must explain to the Presiding Officer why it was necessary to disregard the relevant requirement and must lay that explanation before the Parliament.

Amendments 55 to 58 seek to amend section 31 to clarify the circumstances in which negative instruments and instruments to which section 30 applies are invalid.

Amendments 54 and 59 are probing amendments to clarify the limitation of the application of section 32 to procedural failures only.

The purpose of this group of amendments is to clarify the circumstances in which a Scottish statutory instrument will be invalid on account of a failure to follow the statutory rules that are set down in the bill.

The committee has had concerns in the past that the rules that are set out in the transitional order are not sufficiently clear with regard to the circumstances in which a failure to follow the procedures that are set down by the Parliament for the exercise of delegated powers will result in the proposed instrument being invalid. That lack of clarity is not helpful, and I welcome the opportunity to explore the matter with the Government and to ensure that the law is clear on it.

Sections 28 to 32 are all relevant to that issue. Sections 28, 29 and 30 set out the basic rules for, respectively, negative instruments, affirmative instruments and instruments that are neither negative nor affirmative. Section 31 deals with circumstances in which there has been a failure to follow the laying rules in sections 28 and 30. Section 32 deals with what is meant by

"Laying of Scottish statutory instruments before the Scottish Parliament".

I have lodged amendments to all the relevant provisions that concern validity, so that we can examine the issue in the round. It may not be necessary to pursue all of them if we can establish agreement between the committee and the Government on the proposed legal position, which we have a commitment to deliver fully at stage 3.

Having explained the intention behind the amendments, I will explain the detail. The easiest starting point is section 32. Amendment 59 seeks to omit subsection (3) of that section to test what its effect is. I understand that the purpose of section 32 is twofold. It is intended to provide a definition of

"Laying ... before the Scottish Parliament"

so that when a parent act refers to that, subsection (2) tells us that the standing orders of the Parliament will define what constitutes "laying".

That is about the process and the practicalities. I assume that section 32(3) is intended to mean that if there is some failure to comply with the procedural requirements in the standing orders—although the instrument can be said to have been laid—those procedural errors will not affect the validity of the instrument.

I would be content with that position, but I seek confirmation from the Government that section 32 addresses the limited question of procedural requirements, rather than the more fundamental rules, which I will move on to next. Perhaps further clarity could be achieved by reference in section 32(3) to a failure to comply with the standing orders, since that is where the relevant procedural rules are to be found.

Turning to affirmative instruments, section 29(3) makes it clear that an affirmative instrument that has either not been laid in draft before the Parliament, or has not been approved by the Parliament, has no legal effect. I am content that that is what the legal position should be, and that it is expressed clearly.

Amendment 54 seeks to leave out section 29(4), which says that the rule on invalidity is without prejudice to section 32(3). Again, the purpose of this probing amendment is to seek an assurance from the Government that all that section 32(3) does is to excuse errors in the process of laying, as opposed to excusing circumstances in which the draft is not laid before the Parliament at all.

I now turn to the most complex part of the issue: the way in which section 31 treats negative instruments and instruments to which section 30 applies. The central purpose of amendments 55 to 58 is to clarify when such instruments are invalid and so are of no legal effect, because the author of the instrument has not followed a fundamental requirement. It is important that we are clear about what that fundamental requirement is, and what the consequences of failure to comply with it are.

I make it clear that I do not consider compliance with what I will, for convenience, call the 28-day rule to be a fundamental requirement. The committee agreed at stage 1 that it did not wish instruments to be made invalid because the

reasons for not complying with that rule were not considered adequate or reasonable. That requires a political remedy rather than a legal remedy, and amendment 56 does not seek to alter it. The same approach applies to the reasons given for not complying with the rule that section 30 instruments must be laid before they come into force.

15:45

The purpose of amendments 55 to 58 is to establish clearly the principle that, if a negative instrument or a section 30 instrument is not laid at all, it will be invalid. I do not think that the bill deals with that question. It might be that that is a deliberate omission, but I think that it is a matter that should be dealt with explicitly in the same way as section 29(3) deals with a failure to lay a draft of an affirmative instrument before proceeding to make it.

The Parliament has given ministers the authority to make instruments, subject to the requirement that they are laid before the Parliament for possible annulment or discussion so that ministers are held to account for their exercise of delegated powers. It seems clear to me that a failure to give the Parliament the opportunity to conduct its scrutiny must make the instrument invalid. Of course, we hope that the circumstances will never arise, but that is not to say that we should not be clear about the consequences if they do.

As well as giving the Parliament the opportunity to scrutinise them, the laying of instruments is a significant element of publication of the new law. The Parliament is the forum in which the public expects the law to be produced for public consideration. When that does not happen, the proper publication of the law is reduced.

For those reasons, I propose that a failure to lay an instrument before the Parliament should be treated as such a fundamental departure from the procedure that is laid down by the Parliament for the exercise of delegated powers that it should render the instrument invalid.

Where an instrument is laid—so that the fundamental requirement is met—it should still be valid even if some other requirement, such as the 28-day rule, has not been met. However, if the 28-day rule is breached, the Parliament should be given an explanation. Amendment 56 deals with that and introduces the concept of "necessity", but only by requiring that to be the focus of the explanation to the Presiding Officer for a failure to comply with the 28-day rule or the requirement of section 30(2). That is intended to set a marker of the standard of behaviour that the Parliament expects, and not to reopen the question whether compliance with the rule is necessary for validity. Amendment 56 also requires the explanation to be laid before the Parliament so that there is a public explanation for the departure from the laying requirements.

Amendments 57 and 58 are consequential on amendments 55 and 56.

I move amendment 54.

Bob Doris: I congratulate Helen Eadie on her delivery of that incredibly complex and technical piece.

I seek clarification from the minister on some of the points that Helen Eadie made, but I raise a concern that, if we agree to her amendments, we will end up in a situation in which, if an instrument has not been laid in draft form for a sufficient amount of time—for whatever reason—it would make no difference whether the Parliament approved it, because its legal validity could be called into question by the courts. That would create a grey area around where the power lies with regard to the ability to legislate. Does it lie with the Parliament or with the courts? For me, it lies with the Parliament. If the proper procedures are not followed, for whatever reason, the Presiding Officer should be central to our efforts to get a full and proper explanation of how that situation arose. If the Presiding Officer accepted the explanation and the Parliament was content to approve a statutory instrument, it would be problematic if we had an act that said that it did not matter what the Parliament decided because the instrument's legal validity was flawed and, therefore, an individual could go to the courts to seek to disapply the democratic will of the Parliament.

I listened to what Helen Eadie said, and I accept that the issue is complex, but if we accept her amendments, does the Parliament—which speaks for the people—retain control of events or is that control left to the courts? That is the central point.

Bruce Crawford: I acknowledge the considerable work that Helen Eadie has put into the detail of her amendments. It has been a considerable exercise—I agree with Bob Doris about that.

I hope that committee members will understand that, in this whole process, I have genuinely tried to put the primacy of the Parliament at the heart of what I have been trying to achieve. Bob Doris's point about putting this whole area into the atmosphere of the court to be dealt with is valid and important, especially when we are trying to safeguard parliamentary democracy. As I said earlier, it is the job of politicians to negotiate, to discuss and to come to agreement on the way forward. We might not always agree, but that is our job and it would not be helpful to let the courts get in the way of our undertaking our job as parliamentarians.

I hope that I can respond satisfactorily and simply to Helen Eadie's probing amendments. The bill, as introduced, seeks to reflect the position developed in common law in relation to the validity of instruments. That is to say, where the affirmative procedure applies, an instrument that is not approved in draft by a resolution of the Parliament is of no effect. In the case of instruments subject to the negative procedure under section 28, and the simple laying procedure under section 30, a failure to lay an instrument does not affect its legal validity—that takes us back to the central point that Bob Doris made—but is a matter for which the instrument's author should be held to account politically. I do not believe that the lack of clarity that Helen Eadie described exists. That is the legal background against which enabling powers for Parliaments, including the Scottish Parliament, have been drafted for the past century or so and the Government sees no reason to change it radically in the bill. As Bob Doris said, that would be handing the power across to the courts and undermining the whole ethos of Parliament and how it goes about its business.

The Government acknowledges the importance of responsible authorities being held to account by the Parliament for the subordinate legislation that they make. That is why sections 28 and 30 impose express statutory duties on responsible authorities to lay instruments before the Parliament. Indeed, section 30 enhances the current position by converting what, in many cases, is merely a conventional practice of laying instruments before the Parliament into a statutory duty to do so. Already, in the bill, we have strengthened the position of the Parliament in regard to the Government. In the vast majority of cases, simply imposing the statutory duty to lay an instrument is sufficient. Responsible authorities are entrusted by the Parliament with the powers to make subordinate legislation because they are just that—responsible. As far as the Government is aware, there is no evidence that any responsible authority has ever neglected to lay an instrument before the Parliament when it had a statutory duty to do so. Should it ever happen—I cannot foresee the circumstances in which it would—that a responsible authority failed to lay an instrument, the Parliament would have powers to deal with the situation. There are many mechanisms available to the Parliament to bring to book a Government or a responsible authority that acted in that way without our having to resort to the courts—or to the narrow legal definition, at least.

Aside from the issue of principle, the amendments would not work in their own terms. If the amendments were accepted, the bill would provide that a failure to comply with the laying requirements would render the instrument legally invalid, despite the fact that, in the following subsection it would state that failure to comply with the laying requirement would not affect legal validity. The effect that is being aimed at is clear—that, if there has been a failure to lay an instrument over a prolonged period, that will render the instrument legally invalid. However, that is not what the provisions, as drafted, would do.

Amendment 56 would have the effect of changing the drafting approach regarding the need to explain to the Presiding Officer why the ordinary chronology for laying an instrument has been departed from. In doing so, the amendment would actually have the effect of weakening the requirement on the responsible authority to account for a delay in laying. In that sense, the amendment would contradict what it tries to achieve. The bill as drafted, requires the responsible authority to explain, as soon as is practicable, why the instrument was not laid in accordance with the laying requirements. Such a requirement would be lost if amendment 56 was agreed to.

As far as I can see, all that amendment 56 would add is a requirement to lay before the Parliament an explanation for the delay in laying an instrument. That would be in addition to the requirement currently provided for to give that explanation to the Presiding Officer. I am not sure what perceived problem amendment 56, which would simply add bureaucracy to the system and complicate the drafting of the bill, is intended to address.

By introducing unnecessary confusion and complexity in the bill's operation, the amendments would undercut one of the central objectives of the bill. For those reasons, I cannot support amendments 55 to 59. I ask Helen Eadie to withdraw amendment 54, in the spirit of its being a probing amendment. Failing that, I ask the committee to reject amendment 54.

Helen Eadie: I thank colleagues for their generous remarks, especially those of Bob Doris, but I claim no credit for the amendments. They are the work of the Law Society and other public service people, for whose help I am extremely grateful. I wish to place that on record. The amendments are the voice of the people, rather than my voice, although of course I agree with most of what I have said today.

Having said all that, having heard the minister's comments, and given the hugely technical nature of the amendments, I will go away and reflect on the technicalities of the arguments that have been made. Therefore, I seek leave to withdraw amendment 54.

Amendment 54, by agreement, withdrawn.

Section 29 agreed to.

The Convener: I adjourn the meeting for a five-minute break.

15:57

Meeting suspended.

16:02

On resuming—

Section 30—Other instruments laid before the Parliament

The Convener: Group 12 is on the power to change procedure. Amendment 22, in the name of the minister, is grouped with amendments 25 to 28.

Bruce Crawford: Thank you for the comfort break, convener. You can probably hear that my voice is struggling a bit, as I have a sore throat; forgive me if it starts to slow up as we go through the process—I will make it shorter and snappier, if I can.

Amendment 22 aims to address the concerns that the committee expressed at paragraph 217 of its stage 1 report. The committee wanted to ensure that schedule 3, which modifies the procedures that are set out in pre-commencement enactments, should not result in a class of SSIs currently defined as local instruments requiring to be laid before the Parliament. The clear aim of part 2 is to streamline and clarify the Parliament's processes for scrutinising instruments, and that aim would not be served by the bill requiring the Parliament to scrutinise instruments that are currently not laid before it.

Section 37 provides that "devolved subordinate legislation" does not include

"subordinate legislation which is in the nature of a local and personal or private Act"

and thereby excepts local instruments from the scope of section 30. The concept of a

"local and personal or private Act",

which appears in the transitional SI order, is borrowed from Westminster. Its meaning is not entirely clear in the Scottish parliamentary context. That was noted by the Subordinate Legislation Committee in the previous session of Parliament, which considered it ambiguous and in need of refinement. For that reason, it is appropriate that the bill, which aims to give a distinctive Scottish voice to parliamentary concepts, should clarify the position.

The bill's current approach to local instruments has the unintended consequence of excepting all instruments within that class from all forms of parliamentary procedure. The Government considers that amendment 22 will deliver clarity to this area of law. It will set down the order-making powers that currently give rise to SSIs classed as local instruments and make it clear that those instruments are not to be laid in the Parliament.

Amendment 28 is consequential upon amendment 22. Amendments 25 and 26, which are also consequential upon amendment 22, aim to clarify that instruments that are not laid in the Parliament are not caught within the scope of section 34, on the power to change procedure. The Government considers it reasonable to assume that the Parliament would not wish to make instruments that are not even laid subject to either negative or affirmative procedure.

Amendment 27 aims to respond to the committee's concerns, as outlined in paragraph 226 of its stage 1 report, about the need to ensure that the provision set out in schedule 4 operates effectively. Members will recall that schedule 4 makes provision in respect of statutory instruments made under Westminster legislation that require to be laid before the Parliament. The committee considered that, in respect of how such instruments were to be dealt with, the bill was not as comprehensive in its effect as the existing transitional order. The Government's response to the stage 1 report confirmed our intention to reinforce the statutory framework in that respect. Amendment 27 seeks to deliver on that commitment. Statutory instruments that are to be laid in the Parliament but which are not subject to the negative procedure or the affirmative procedure will be brought within the scope of section 30.

With that explanation, which was slightly lengthier than I had hoped, I ask members to support amendments 22, 25 and 26 to 28.

I move amendment 22.

Amendment 22 agreed to.

Section 30, as amended, agreed to.

Section 31—Failure to lay instruments in accordance with section 28(2) or 30(2)

Amendments 55 to 58 not moved.

Section 31 agreed to.

Section 32—Laying of Scottish statutory instruments before the Scottish Parliament

Amendment 59 not moved.

Section 32 agreed to.

Section 33—Combination of certain powers

The Convener: Group 13 is on the combination of certain powers. Amendment 23, in the name of the minister, is grouped with amendment 24.

Bruce Crawford: Amendment 23 seeks to extend the scope of section 33 in two distinct ways. First, it seeks to enable powers that are subject to the affirmative procedure to be mixed with other procedures in the same instrument. That would allow powers that are subject to any of the three key procedures established in the bill—affirmative, negative or no procedure—to be mixed in any combination. If I recall correctly, the committee indicated its support in principle for such a move. Secondly, the amendment seeks to extend the ability to mix procedures to any responsible authority, as opposed to only Scottish ministers. That move achieves consistency with other provisions in the bill.

In respect of the parliamentary scrutiny of instruments containing provisions that are subject to mixed procedure, the previously agreed principle would remain: the highest relevant level of procedure should apply to the instrument. It is appropriate that that should happen as far as this process is concerned.

I reaffirm the Government's view that section 33 does not disapply any preconditions attached to the exercising of any enabling powers that are being mixed. However, amendment 24 seeks to put the position beyond doubt. I therefore invite members to support amendments 23 and 24.

I move amendment 23.

Helen Eadie: I hear what the minister has said, but I think that the committee has some concerns about the proposal; if the committee does not, I do. I will run through some of those concerns with the minister.

I understand that the aim is to address a practice that the Government conducts but which is known to have some legal difficulties. However, amendment 23 is much more sweeping. It seems to permit the combination of all types of powers and potentially to include, under proposed new section 33(1)(c), some remaining classes of instrument, which the bill does not seek to regulate. It is currently accepted by the Government that it is not possible to combine powers in such a way. It has not been demonstrated that there is a need to be able to do so.

The committee agreed in principle with the idea of combining affirmative and negative powers, but amendment 23 will go further than what was proposed. There might be questions about whether it is good policy to extend the combination of powers so far. We want to probe that issue further with the minister.

There might be cases that should not be included. The obvious candidate in that regard is the category in proposed new section 33(1)(c), which is a catch-all category for any subordinate legislation that is not subject to affirmative or negative procedure, and in proposed new section 33(1)(d), on instruments that are not laid. It is not clear from the bill what is included. Members might want to ask the Government for an explanation, but given the catch-all approach it might not be possible to provide a definitive answer. There is a risk that something unexpected will fall into the category.

It is not clear what devolved subordinate legislation—if any—would escape section 30, with the exception of the local instruments that are provided for in amendment 22, which would be covered by proposed new section 33(1)(d).

One example is class 3 emergency procedure, which is not being standardised by the bill. It appears that section 30 will apply to class 3 procedure, which might not be necessary, given that I presume that class 3 powers currently make provision for laying and should not be affected by the bill. What is the reason for catching such powers in section 30? Class 3 is a form of affirmative procedure, so it seems inappropriate to treat it as a lower class of instrument for the purposes of identifying the appropriate power to apply to a combination. Class 3 is used only in special, tailored situations. It therefore does not seem sensible to make generic provision for such powers to be used in combination with other powers.

Currently, section 33 applies only to the Scottish ministers, but amendment 23 refers to "a person", in what appears to be an attempt to extend the application of the section generically. Elsewhere in the bill a different approach is taken. The Scottish ministers, the First Minister and the Lord Advocate, as well as Her Majesty the Queen, are dealt with separately, and the term "responsible authority" is used to include others who have powers in relation to subordinate legislation. It is not clear why amendment 23 departs from that approach and whether the Scottish ministers or the lords of council and session, for example, are "a person".

We would be grateful if the minister could respond to those points before we decide whether to support or oppose the amendments in his name. We appreciate that the issue is complex.

Bruce Crawford: It is indeed. I will try to deal with your points, although I will not necessarily take them in order.

You talked about the extension of section 33 to catch other types of instrument—it is not clear to me what instruments you mean, but you talked about, for example, class 3 emergency instruments. In the circumstances in which we would make a class 3 emergency instrument, I do not think that it would ever make sense to combine

that instrument with another instrument. That is not the purpose of class 3 instruments and I am not aware that such combination has ever happened. I cannot envisage any circumstances in which the procedures—negative or affirmative—would be set alongside a class 3 emergency instrument, which would have a particular purpose and would be subject to a different procedure.

I do not think that section 30 catches too much, as you suggested. It requires that an instrument must be laid before the Parliament

"as soon as practicable after the legislation is made".

We can see no reason in principle why that modest requirement should not apply, but if, for technical reasons, the application of section 30 caused a problem in a particular context—if I am right—amendment 40 aims to give the Government the powers to deal precisely with that sort of issue through an order. Even if there was a problem, we could deal with it through that order-making power.

16:15

Amendment 23 will extend section 33 to instruments made by a person. Elsewhere in the bill, the term "responsible authority" is used and Helen Eadie quite rightly asked why. The term "responsible authority" does not mean the person who made the instruments in all cases. If the instruments were made by the keeper but approved by the Scottish ministers, the Scottish ministers would be the responsible authority. That means that they are responsible for explaining a breach of the laying requirement. The Scottish ministers are not the person making the instrument. Section 33 is about what the person making the instrument can do by way of mixing powers that are subject to different procedures.

It is reasonable to ask about persons. If I understood her correctly, Helen Eadie said that it is not clear that Scottish ministers or lords of council and session are "a person". That has always been the case, but they can be referred to as persons as part of the legislative framework in which we work. The single includes the plural—if that does not confuse things even more, given the complexity of all this.

I hope that with those assurances—if I got all that right—the committee has been properly afforded the information that it needs to support the amendments that I have lodged.

The Convener: The question is, that amendment 23 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Doris, Bob (Glasgow) (SNP)
McKee, Ian (Lothians) (SNP)
Stone, Jamie (Caithness, Sutherland and Easter Ross) (LD)

Abstentions

Carlaw, Jackson (West of Scotland) (Con)
Eadie, Helen (Dunfermline East) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)

The Convener: The result of the division is: For 3, Against 0, Abstentions 3.

Amendment 23 agreed to.

Amendment 24 moved—[Bruce Crawford]—and agreed to.

Section 33, as amended, agreed to.

Section 34—Power to change procedure to which subordinate legislation is subject

Amendments 25 and 26 moved—[Bruce Crawford]—and agreed to.

Section 34, as amended, agreed to.

Section 35 agreed to.

Schedule 3 agreed to.

Section 36 agreed to.

Schedule 4—Application of Part 2 to statutory instruments laid before the Parliament

Amendment 27 moved—[Bruce Crawford]—and agreed to.

Schedule 4, as amended, agreed to.

Section 37—Interpretation of Part 2

Amendment 28 moved—[Bruce Crawford]—and agreed to.

Section 37, as amended, agreed to.

Sections 38 to 41 agreed to.

Section 42—Publication, numbering and citation: regulations

The Convener: Group 14 is on publication of acts and instruments. Amendment 29, in the name of the minister, is grouped with amendments 30 to 36.

Bruce Crawford: Forgive me, but this is a complex area and I want to explain it in an appropriate way. That will take a little while, but I think that it is appropriate to get it on the record—if my voice holds out that long.

The amendments in the group seek to make a range of alterations to the terms of section 42 and

to deal with other matters that are relevant to the publication and preservation of legislation.

Paragraph 260 of the committee's stage 1 report recommended that the bill should be amended at stage 2 to omit section 42(2)(d) on the disapplication of section 41(2) in relation to an instrument or class of instrument. It went on to recommend that the Queen's printer for Scotland should continue to publish all Scottish statutory instruments. The Government's response confirmed its agreement with those views and its intention to amend the bill at stage 2. Amendments 30 and 33 deliver on that commitment. Amendment 32 is consequential to amendment 30. It alters section 42(2)(b) to reflect the insertion of new section 42(1A).

Amendment 29 alters section 42 to make it clear that Scottish ministers are required to make regulations under that section. The Government considers it prudent to remove any potential for ambiguity about whether Scottish ministers will be required to make regulations under section 42. In practice the Government will make such regulations, of course, first on the basis of completing the new legislative framework for SSIs and secondly on the basis of good and competent governance. However, the current wording of section 42(1) might raise concerns that ministers could choose not to make regulations. We would never do such a thing, would we?

Amendments 31 and 34 are technical. They propose minor grammatical alterations to sections 42(2) and 42(2)(g) respectively.

Amendment 35 inserts a new section to ensure that Scottish statutory instruments are preserved. The amendment responds to the concerns that the committee expressed in paragraphs 247 and 248 of its stage 1 report. The new provision obliges the responsible authority to

"ensure that the Keeper of the Records of Scotland receives each Scottish statutory instrument that is signed by or on behalf of the responsible authority."

It also states that the keeper must preserve all SSIs that are received. The Government closely considered the committee's view that the bill should require the Queen's printer for Scotland to deposit print copies of each SSI with the National Library of Scotland. Our response to the committee's stage 1 report suggested that such a provision would be delivered by way of an amendment at stage 2. However, the Government now considers that such a provision falls within the scope of the regulations to be made under section 42, given that they will set out the detailed provision on the publication of SSIs. I hope that that approach is acceptable to the committee.

Amendment 36 was lodged for technical reasons. I will not read out the paragraph that tells me the reason for that.

The aim of section 44 is to remove the duty on the QPS to print SSIs. That duty was imposed by section 92 of the Scotland Act 1998. Its removal is entirely consistent with the agreed policy approach that the QPS should no longer be under a general obligation to print SSIs. However, further consideration by our legal advisers suggests that the provision as drafted could be read to disapply the QPS's responsibility to exercise Her Majesty's rights and privileges in connection with Crown copyright in respect of SSIs. That is not the policy intention. I mentioned that just in case Jackson Carlaw spotted it before we get to stage 3. Amendment 36 therefore alters section 44 to ensure that it amends the Scotland Act 1998 and removes the QPS's duty to print SSIs but in a way that avoids the perception that its responsibilities in respect of Crown copyright are affected.

Convener, I am sure you will be glad to hear that I move amendment 29.

Helen Eadie: We are pleased to note that hard copies will still be retained. The amendments are welcome.

Bruce Crawford: Thank you.

Amendment 29 agreed to.

Amendments 30 to 34 moved—[Bruce Crawford]—and agreed to.

Section 42, as amended, agreed to.

After section 42

Amendment 35 moved—[Bruce Crawford]—and agreed to.

Section 43 agreed to.

Section 44—No duty to print Scottish statutory instruments

Amendment 36 moved—[Bruce Crawford]—and agreed to.

Section 44, as amended, agreed to.

Sections 45 and 46 agreed to.

Section 47—Pre-consolidation modifications of enactments

The Convener: We move to group 15. Amendment 37, in the name of the minister, is the only amendment in the group.

Bruce Crawford: Amendment 37 will remove the whole of part 4. The committee has made it clear that it does not think that the provisions in part 4 are appropriate for the purpose of achieving the stated aim of assisting with the future

consolidation of Scottish legislation. I have always tried to note the committee's concerns about all matters and I accept the committee's position on part 4. I invite members to support amendment 37.

I move amendment 37.

Helen Eadie: It is good to hear that.

Amendment 37 agreed to.

Sections 48 to 54 agreed to.

After section 54

The Convener: Group 16 is on implementation of reports and the role of the Scottish Law Commission. Amendment 60, in the name of Helen Eadie, is grouped with amendments 61 and 62.

Helen Eadie: The purpose and effect of amendments 60 and 61 is to replicate, in relation to the Scottish Law Commission, the provisions of the Law Commission Act 2009, which inserted new sections 3A and 3B into the Law Commissions Act 1965. The amendments would facilitate the implementation of reports of the Scottish Law Commission.

In the Scottish Law Commission's 2008 annual report, the commission's chairman referred to the number of reports that had not been implemented and said:

"The danger is that Scots law will fall behind the rest of the world's legal systems in responding to the challenges of an era marked by rapid technological and economic change."

In paragraph 308 of its stage 1 report, the Subordinate Legislation Committee suggested that the inclusion in the bill of provisions similar to those in the 2009 act would be

"one way of stimulating action"

from the Scottish ministers

"in response to Scottish Law Commission reports".

The committee went on to say that

"further provision may require to be made in relation to Commission recommendations in respect of reserved matters."

Amendments 60 and 61 relate only to Scottish Law Commission proposals that relate wholly or in part to matters that are within the legislative competence of the Scottish Parliament.

Amendment 62 would insert a new section, which would give effect to the Subordinate Legislation Committee's recommendations in paragraphs 295 and 298 of its stage 1 report, by extending the kind of amendments that the Scottish Law Commission may recommend when consolidating the enactments or restating the common law that relate to a particular subject. Currently, rule 9.18 of the Parliament's standing orders provides for an expedited bill procedure for consolidation bills. For the purposes that we are discussing, a consolidation bill is defined as a bill that consolidates certain enactments, and the only changes that are allowed are those that are necessary to give effect to recommendations from the Scottish Law Commission, the Law Commission or both commissions. There is a similar provision in relation to codification bills in rule 9.18A. However, no statutory provision or rule in standing orders limits the kind of amendments that the Scottish Law Commission might recommend.

16:30

In the context of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill in 2003, which is the only consolidation bill that the Scottish Parliament has considered, the commission stated that it would recommend only amendments that were necessary for the purpose of producing a satisfactory consolidation. The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill Committee accepted that standard. During stage 1 of the Interpretation and Legislative Reform (Scotland) Bill, the commission suggested in evidence that it would be helpful if its powers were extended to enable it to recommend amendments that would be necessary or desirable in order to facilitate consolidation. The proposed new section will do that.

I move amendment 60.

Ian McKee: We are all interested in increasing the implementation of Scottish Law Commission reports. I have had considerable contact with the commission: I sponsored one of its meetings in the Scottish Parliament building. I note that its annual report for 2009 commented on the "excellent progress" on addressing the issue in Scotland but stated that progress at Westminster, where the new law is in force,

"is not satisfactory so far as Scotland is concerned."

I do not see what amendment 60 would do to improve the tremendous steps that have been taken since 2007 or 2008.

As regards amendment 61, the word "may" is one of those words in legislation that can be interpreted in all sorts of different ways. I wonder what the value is of an amendment that states that the Government "may" do things. Could the Government not deal with those things without an alteration to the law?

On amendment 62, I wonder whether there has been any consultation of relevant parties. It would be important to have such consultation before we introduced something as novel as the provision in

the amendment. On those grounds, I will vote against the amendments.

Bruce Crawford: At face value, Helen Eadie's amendments seem to be reasonable and I understand why she has lodged them. However, I hope that by the time I reach the end of my comments members will agree that there are good reasons why we should not proceed in the way that she suggests.

The Government values the important work that the Scottish Law Commission carries out and is aware of its concerns about implementation of its reports. Indeed, a joint law reform working group of officials from the Scottish Government and the Scottish Parliament was set up to consider possible ways in which to increase the Parliament's capacity to deal with Scottish Law Commission bills. The working group has submitted its report to ministers and we are considering the terms of the recommendations and possible next steps before we respond.

We will, of course, discuss the matter with the Parliament and the Parliamentary Bureau because, ultimately, it is all about parliamentary process, although I wrote to the Presiding Officer today with proposals for a pilot bill to be taken through the Parliament before the end of the session. I am more than happy to share that letter with the committee. I have asked the Presiding Officer to lay the matter before the Parliamentary Bureau so that it can decide what action would be appropriate. As the deliberations continue at the bureau or wherever it decides they should happen, we will let the Subordinate Legislation Committee know how they are progressing.

Helen Eadie mentioned the Scottish Law Commission's 2008 report. It did say the things that she quoted, but it is not the commission's most recent report. Its annual report for 2009 commends the "excellent progress" on addressing the issues in Scotland but states that progress at Westminster, where the new law is in force,

"is not satisfactory so far as Scotland is concerned."

I think that Helen Eadie's information will have come from the same source as her information on her other amendments. Those who provided it should have gone to the effort of ensuring that the most appropriate and up-to-date report was available to committee members to help them in their deliberations.

It is hard to see how amendment 60 will deliver the objective of increasing the implementation rate, because we are doing pretty reasonably. It is unclear how the provisions are supposed to achieve increased implementation of Scottish Law Commission reports—except beyond potential embarrassment of the Government of the day, although we have just had a good report from the SLC in 2009. All the details of unimplemented Scottish Law Commission reports are available on the Scottish Law Commission's website and in publications such as its annual report. Collating that information into another form does not appear to add any value to the processes that we already have available to us. In the light of that, we are not persuaded that a statutory requirement to consider Scottish Law Commission reports will result in increased implementation rates.

There is a practical limit to the amount of legislation that the Parliament can undertake, a limit on parliamentary time and a limit on the number of opportunities for legislation. That is not just an issue for the Government to manage; it is an issue for the Parliament to manage through the bureau and its various committees. We share a responsibility to ensure that appropriate time is made so that SLC reports are debated properly and that, where required, the legislation that is asked for is delivered.

At the moment, the Parliament can define its own rules on consolidations through its standing orders. Dealing with that in primary legislation would tie the hands of Parliament and not allow us to deal with such issues as quickly.

I am not aware that the provisions in amendment 61 have been suggested in a Scottish context, nor am I aware of any suggestion that the Scottish Law Commission thinks that the amendment is necessary. It is not clear what it is supposed to achieve or what is wrong with the current arrangements. The process by which the Scottish Law Commission's forward work programme is agreed is well established, widely understood and clearly set out in its documents. Its eighth programme, which will run until 2014, was published last month. The Government will continue to work closely with all interested parties to promote the use of appropriate mechanisms to update and improve the law of Scotland. As I have already said, the working group is working away.

Any move to legislate at this time would be premature, especially when progress is being made on the implementation of the commission's proposals, as the commission itself acknowledges in its most recent report of 2009.

I also consider that we should allow further time for both the Parliament and the Government to conclude what improvements can legitimately be made to the current procedures. As I have already said, that process is on-going.

Amendment 62 intriguingly proposes to bestow on the Scottish Law Commission powers that are equivalent to those that the committee asked to be removed from part 4 of the bill, albeit that, in that instance, it was proposed that the powers be exercised by the Scottish ministers. That was

done because the Parliament needs to be in control of its own processes. I am not clear what consultation, which Ian McKee mentioned, has been undertaken to support such a move, nor am I aware that the commission has sought such statutory powers. It is currently open to the commission to make recommendations of the nature that the amendment suggests, so the amendment's merits are questionable. The Scottish Law Commission is not asking for those powers and is not pushing for them. Why on earth would we give it something that it does not need and is not asking for, when we are dealing with all that adequately already? The same measures could be dealt with under the standing orders, alongside other procedures for handling potential consolidations. That is how we do it in the Parliament: that is where such procedures are contained.

I cannot support amendments 60 to 62. Given the length of the explanation that I have given Helen Eadie—I appreciate how the amendments came about—I hope that she will not press the amendments.

Helen Eadie: In response to Dr McKee's point, I point out that in our report, the committee recommended, without any disagreement, that we encourage the Government to take forward some of the issues that are referred to in the amendments. It is concerning when a member of the committee demurs from what we agreed fully as a committee.

On what has already been agreed at Westminster, a private member's bill that was sponsored by one of my colleagues, Emily Thornberry, and Lord Lloyd of Berwick became the Law Commission Act 2009. What was proposed in Westminster is exactly what we are proposing in the Scottish Parliament.

It is fundamentally about accountability and ensuring accountability for a variety of organisations. It is not only about accountability for the Law Commission; more important, it is about the accountability of ministers in relation to recommendations in Law Commission reports.

To pick up on the point about consultation, the committee issued a call for evidence and received information back from the various organisations that are listed in the report that the committee published. The proposals to implement the various Law Commission reports and proposals are eminently good.

However, I will consider what the minister has said and reflect further on his arguments. I will not press amendment 60 to a vote, but the issue is too important to lose at stage 2. We need to consider it further at stage 3. I would like to revisit it at that stage.

Amendment 60, by agreement, withdrawn.

Amendments 61 and 62 not moved.

Section 55—Meaning of "enactment" in Acts of Parliament and instruments made under them

The Convener: Group 17 is on the meaning of "enactment". Amendment 38, in the name of the minister, is the only amendment in the group.

Bruce Crawford: Let me cut to the chase—I know when I am beat.

I invite members to support amendment 38, which will remove section 55 from the bill, as suggested by the committee in paragraph 340 of its stage 1 report.

I move amendment 38.

The Convener: Have you said all that you want to say, minister?

Bruce Crawford: I am sure that I could say more, but I will desist.

The Convener: We thank you for that.

Amendment 38 agreed to.

Section 56 agreed to.

After section 56

Amendments 39 and 40 moved—[Bruce Crawford]—and agreed to.

Section 57 agreed to.

Long title agreed to.

The Convener: That completes stage 2 consideration of the bill. I thank the minister and his officials for their attendance and for the civil way in which they have treated matters.

I suspend the meeting for a brief time to give our guests a chance to leave.

16:43

Meeting suspended.

16:44

On resuming—

Instruments subject to Annulment

Beet Seed (Scotland) Regulations 2010 (SSI 2010/67)

The Convener: We move to agenda item 2. As we have seen from the size of the legal briefing, our legal advisers have raised several issues on the regulations, which are detailed in the summary of recommendations. Do members agree to report all the recommendations to the lead committee?

Members *indicated agreement.*

Helen Eadie: I am sorry to be a pain, but I have a point about the regulations. When I read the briefing last night, I was quite perturbed. We should call the officials to attend a committee meeting to answer questions about the quality of the drafting of the regulations, although I would hesitate to call ministers at this stage. The background information on our buff-coloured pages refers to fundamental drafting errors and the lack of priority for drafting and for transposing European Union legislation. Page 6 says:

"Of greater concern to members however may be the impression that the Government appears not to place any weight on the requirement to transpose EU obligations properly irrespective of the practical position on the ground."

Transposition is just one aspect—the more important issue is the quality of drafting. Having read our advisers' briefing, I would like us to call officials to the committee to answer our questions.

The Convener: Do members agree?

Bob Doris: I do not totally oppose the proposal, but I wonder what it would achieve. The person who answered questions could be the employee who was responsible for the poor drafting of the regulations. As a first port of call, should we ask the minister to respond in writing and hold our position on whether to call the minister or another individual to the committee? Should we give the Government an opportunity to respond first?

Helen Eadie: We could have an informal session—it need not be in public—but we need to send a strong message to officials. We pay attention to the documents that come across our desks and I am particularly interested in European transposition issues. We look for quality.

A side issue—although it is important—is that the Government was 10 months late in fulfilling its EU obligation to transpose the directive. However, the quality of the drafting of the regulations is much more important, which is why I would like a session with the officials.

The Convener: The trouble is that, if we have a private session with officials, we will—as a public body—be asked why we are meeting in private.

Helen Eadie: If you want to have the session in public, I do not mind—I am happy with that.

The Convener: We have the option of writing to the Government—we could do that.

Ian McKee: I suggest that we write to the Government, because that will allow us to lay out in proper form our objections to the totally intolerable situation, and it would facilitate a thoughtful response. If we were not satisfied with that response, we could go further. Otherwise, all that I see happening is that an official would come next week to say, "I'm terribly sorry—it shouldn't have happened," and we would not get much further than that. We want a response from the civil service.

The Convener: We will write first—

Helen Eadie: We will reserve our position on inviting witnesses.

The Convener: We will write but reserve our position. If the response is unsatisfactory, we will call people to appear. Thank you—that is good.

Food Hygiene (Scotland) Amendment Regulations 2010 (SSI 2010/69)

The Convener: Do we agree to report the regulations on the grounds that are set out in the summary of recommendations?

Members *indicated agreement.*

National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2010 (SSI 2010/74)

The Convener: Do we agree to report the two drafting errors in the regulations, as set out in the summary of recommendations?

Members *indicated agreement.*

Bankruptcy Fees (Scotland) Amendment Regulations 2010 (SSI 2010/76)

The Convener: Are we content with the Government's response on the authority for the savings provision in the regulations and are we content with the regulations?

Members *indicated agreement.*

Tobacco and Primary Medical Services (Scotland) Act 2010 (Ancillary Provisions) Order 2010 (SSI 2010/77)

The Convener: Although we might be content with the explanation for the failure to comply with the requirement that negative instruments be laid before the Parliament before they come into force and comply with the 21-day rule, under articles 10(1) and 10(2) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Statutory Instruments) Order 1999 (SI 1999/1096), we might want to draw to the attention of the lead committee, for interest, the particular circumstances that gave rise to the need for the order to be made, which members will have seen in the legal brief. Is that agreed? The circumstances are unusual.

Members *indicated agreement.*

Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment (No 2) Order 2010 (SSI 2010/78)

Police Pensions Amendment (Scotland) Regulations 2010 (SSI 2010/85)

Rural Development Contracts (Rural Priorities) (Scotland) Amendment Regulations 2010 (SSI 2010/87)

Zoonoses and Animal By-Products (Fees) (Scotland) Amendment Regulations 2010 (SSI 2010/88)

Fish Labelling (Scotland) Regulations 2010 (SSI 2010/90)

Registration Services (Fees, etc) (Scotland) Amendment Regulations 2010 (SSI 2010/92)

National Health Service (General Medical Services Contracts, Primary Medical Services Section 17C Agreements and Primary Medical Services Performers Lists) (Scotland) Amendment Regulations 2010 (SSI 2010/93)

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment Regulations 2010 (SSI 2010/94)

The Convener: No points arise on the instruments, but I point out that in relation to Scottish statutory instruments 2010/85, 2010/87 and 2010/94, there is a need for consolidation, which has been identified in the legal brief. We should put that on the record, given the problem with consolidation. Are members content with the instruments?

Members *indicated agreement.*

Public Services Reform (Scotland) Bill: After Stage 2

16:50

The Convener: We consider parts 1 to 2A of the bill today; we will consider the remaining parts at our meeting next week.

Section 8A will insert new sections into the Forestry Act 1967. Proposed new section 7C provides for the delegation of certain functions of commissioners of the Forestry Commission under the Forestry Act 1967. The delegated power confers the power to modify the provisions in section 7C(4) without further Parliamentary scrutiny of the modification. Such a Henry VIII power, where it is agreed to by the Parliament, would normally be exercisable by subordinate legislation subject to affirmative procedure.

Do we want to ask the Scottish Government to explain fully why it has considered it appropriate that the power of direction that will be conferred by new section 7C of the 1967 act should be exercisable in the form of direction by the Scottish ministers rather than by subordinate legislation?

Members *indicated agreement.*

The Convener: We move on to part 2, "Order-making powers", and the intended scope of the delegated power in section 10(5)(aa). The provision confers the power for a section 10 order, creating a new body, to include provision adding that "person, body or office-holder" to the list of Scottish Parliamentary Corporate Body-sponsored bodies in schedule 3A. However, we might want to ask whether it is intended that there should be powers consequentially to remove bodies from schedule 3A, if they are later removed from schedule 3, or to add a new person, body or office-holder to schedule 3A, other than where a section 10 order will create the new body. Do members agree to ask about that?

Members *indicated agreement.*

The Convener: On the intention behind section 25F, on the power to require the provision of information on expenditure, the supplementary delegated powers memorandum states:

"This power enables the Scottish Ministers to obtain further information on expenditure incurred by each person, body or office-holder listed in schedule 3 on any matter as the need arises, without resorting to primary legislation in each instance."

We should urgently ask the Scottish Government to explain, first, whether it considers that section 25F is sufficiently clearly drawn to give effect to that intention; secondly, and in particular, whether the power could be clearer and could be used to specify matters of different kinds and, in relation to any body listed, on a case-by-case basis; thirdly, to whom information is to be provided and whether the intention is that information will be provided only to the Scottish ministers, as the drafting suggests, or that it will be disclosed to others or published; and fourthly, whether the power could be more narrowly drawn, to enable particular types or classes of information to be prescribed, as the need arises. Is that agreed?

Members *indicated agreement.*

The Convener: We will consider the Government's response, along with the rest of the delegated powers at our meeting next week, when we will conclude our report.

Scottish Parliamentary Commissions and Commissioners etc Bill: Stage 1

16:53

The Convener: I pause while a member leaves the meeting. Mr Carlaw was a member of the Review of SPCB Supported Bodies Committee, which considered the bill, so he cannot take part in proceedings—I have certain powers, as you see. I thank him for his contribution.

The bill has one delegated power and a number of powers that are exercised in the form of directions. No points have been raised on these powers or directions. Are members happy to report to the Parliament that we are content with the powers that are proposed in the bill?

Members *indicated agreement.*

The Convener: I thank all members for their contributions. It has been a long meeting and I appreciate the work that members have put in. We meet next on Tuesday 23 March—in a room about which we will be informed.

Meeting closed at 16:54.

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