The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 14 January 2014

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
2nd Meeting 2014, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*Stuart McMillan (West Scotland) (SNP)

COMMITTEE MEMBERS

Richard Baker (North East Scotland) (Lab)
*Mike MacKenzie (Highlands and Islands) (SNP)
*Margaret McCulloch (Central Scotland) (Lab)
*John Scott (Ayr) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

David Balharry (Scottish Government)
Paul Cackette (Scottish Government)
Ashleigh Pitcairn (Scottish Government)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

Committee Room 4

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 14 January 2014

[The Convener *opened the meeting at 10:31*]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the second meeting in 2014 of the Delegated Powers and Law Reform Committee. As always, I ask members to switch off mobile phones.

We have received apologies from Richard Baker.

Agenda item 1 is a decision on taking business in private. It is proposed that the committee take in private agenda item 7, which is consideration of the evidence that we are about to take on the draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014. Do members agree to take item 7 in private?

Members *indicated agreement.*

Draft Instrument not subject to Parliamentary Procedure

Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 [Draft]

10:32

The Convener: Agenda item 2 is a draft instrument not subject to parliamentary procedure—although you would hardly know that from the amount of attention that we are giving it.

I welcome from the Scottish Government David Balharry, who is project team leader for the European convention on human rights compliance order, and Paul Cackette and Ashleigh Pitcairn, who are both solicitors. Thank you for coming to the meeting—I am sure that the discussion will not be short. I apologise, as you seem to be in a far county; that is simply because of the nature of the geography in this room.

We will go straight to questions on a subject that I think that we are all well briefed on. John Scott will lead the questions.

John Scott (Ayr) (Con): I would like to ask why you have chosen—

The Convener: I am sorry. I should have called Mike MacKenzie.

Mike MacKenzie (Highlands and Islands) (SNP): Yes. I wondered about that, although I would have been happy for John Scott to proceed if he had wished.

Good morning. Why have you chosen to resolve the defect that the Supreme Court identified in section 72 of the Agricultural Holdings (Scotland) Act 2003 by way of a compliance order and not by any other means, such as primary legislation? If your justification is that it enables you to meet the timeframe that the Supreme Court set, did you consider seeking an extension to that timeframe?

Paul Cackette (Scottish Government): On the first question, on the avenue for resolving the matter, we were, as you know, initially given a year by the Supreme Court to resolve the incompatibility issue. We considered various options on the way to go forward.

One option for us would have been to use emergency legislation. We could have asked the Parliament to agree to put such legislation through in accordance with the procedures that apply. Normally, we might look to do that in very quick order when an issue arises—we had a year to resolve the issue—and the process often involves relatively straightforward changes where there is consensus on all sides of the chamber on the detailed solution.

The difficulty in this case is that what we wanted to do—and indeed what the Supreme Court encouraged us to do—was to have an extensive consultation period and have regard to the interests of all parties to ensure that we could reach as sensible a way forward as we could within the timescale in question.

That suggested to us that the convention compliance order process, which allows a proposed order to be laid in draft—the stage we are currently at—and discussions on the draft order to be taken into account, would be the best way of proceeding. It would enable us to take time at the early stage of the process to gather views, take them on board and ensure that we reached an ECHR-compliant resolution that provided an appropriate way forward and balanced the interests of landlords and tenants.

The drawback with the order process is that the Parliament is not allowed to make amendments. Such amendments rarely happen with emergency bills anyway because of the timescales involved. However, we thought it best to carry out proper consultation in the time that we had, even though it would delay the date on which we laid the order, because it would allow us to introduce an order that met both sides of the argument and both sets of interests.

We were also a little concerned that because of the very sensitive nature of the balance involved—which I know has been troublesome to some of the witnesses who have already given evidence in Parliament—it would be difficult to ensure that any changes that were made during the passage of a bill did not have unintended consequences. We therefore thought that holding the consultation process earlier struck the best balance with regard to achieving the outcome.

Mike MacKenzie: From the discussions that the committee has had on the matter, it strikes me that even now Government does not know everything there is to know about the problem—

Paul Cackette: That is correct.

Mike MacKenzie: —and that not all of the affected stakeholders have responded to the consultation. Whatever the process might be, does that not provide a basis for arguing for more time to ensure that this is done properly?

Paul Cackette: I will ask David Balharry to comment on the choice of remedies, and then I will respond to your other question by saying something about timescales.

David Balharry (Scottish Government): I do not have anything to add about choices, but I was going to pick up on the question of timescales—

John Scott: Just before you do, I have to say that I am not yet satisfied that the reasons you have given us fall under the definition of "absolutely compelling", which is what you were invited to provide us with in your response. Given that the Parliament is unable to amend the legislation or even to debate the matter—which would surely have been a better approach—I am not certain that thus far your arguments have been compelling.

Paul Cackette: That might tie in with the issue of the amount of time that we have had. If any concerns arise about the solution before this committee and indeed Parliament, there is still time to seek an extension; in fact, I was about to talk about such options.

We were keen not to be in the position of having to ask the court for an extension, if at all possible, partly because the matter is at the court's discretion. We hope that an extension would be permitted, particularly if the Parliament were to express any concerns, but the issue is not entirely within our control. We therefore felt that it would be better to use the time to reach consensus among the parties as far as we could.

Because of the timing and the fact that the order has to be in place by April, it is likely that a further extension would take us a reasonable period beyond April, after which the summer recess would come into play. That would further delay the point at which certainty could be secured in order to have the resolution of the issues that everyone is keen to see. We could have asked for an extension, but it was a suboptimal option. I think that it was better to ensure that, as we hope will happen, the order becomes law on 24 April.

John Scott: Forgive me, but I am at a loss.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Convener—

The Convener: Hang on. Can we stick with John Scott? I know that there are lots of questions—I have one of my own—but we will stick with John Scott just now. We will let him go down his line of questioning.

John Scott: Thank you, convener.

Stewart Stevenson: I would like to make a point of order, if I may.

The Convener: Of course you can.

Stewart Stevenson: Before it gets away from us, can you take advice from our clerks as to whether there is anything in standing orders that prevents Parliament from debating the order? It has been suggested that we cannot.

The Convener: Sorry, but I missed that.

John Scott: I suggested that we cannot make amendments.

Stewart Stevenson: No, those were not the specific words that you used, but if that is what you meant, then I am content.

John Scott: I think that I said that we are unable to make amendments.

Stewart Stevenson: You said specifically that we could not debate the order, which is why I asked. However, that is all right. We are clear, John; we are together on this.

The Convener: Okay. On you go, John.

John Scott: I am afraid that I have lost my train of thought and what I was about to say.

Stewart Stevenson: My apologies.

Ashleigh Pitcairn (Scottish Government): I have a small point to make.

John Scott: I have got back my train of thought.

Mr Cackette said that, by extending consideration into the summer recess period, the ability to provide certainty would be lost. Anyway, I think that that is what he said—given that Stewart Stevenson is the *Official Report*, he will obviously know. Nonetheless, I am at a loss as to why that certainty could no longer be provided.

Paul Cackette: My concern is that certainty would be delayed. It would not be lost.

John Scott: Yes, it would be delayed, but we fundamentally need to get it right on this occasion.

Paul Cackette: Yes. Our view is that the approach is right both in policy terms and in legal terms and that it strikes an appropriate balance.

The order is a rebalancing of the rights of both landlord and tenant. It has been subject to a significant amount of discussion, which David Balharry has led, with representative groups. We knew that we had to make a decision shortly before 22 November, which was the date when we laid the order. That was the last date on which we could guarantee under parliamentary procedure that an order, if it was approved, would go through in time.

We certainly gave some thought at that stage as to whether we had the right answer that sufficiently balanced all the interests. We concluded that the order is the right answer to address the issues and that therefore we did not need to apply for an extended period.

Ashleigh Pitcairn: I appreciate that there are some concerns about whether the compelling reason test is met. In those circumstances, I wonder whether it would be helpful to look at when the Parliament has previously proceeded in this way and what was considered to be a compelling reason.

An example is the decision to proceed with the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011 to remedy an ECHR incompatibility in the Sexual Offences Act 2003. In those circumstances, the remedial order was proceeded with, and the reasons given were the absence of any suitable first session bills to rectify the incompatibility and the need to avoid undue delay. It was also felt that speedy action was necessary to avoid further costly litigation and the risk that domestic courts might decide to award compensation before the remedy was put in place.

I suggest that those reasons would apply in this case as well. David Balharry will know better than I do, but I think that the weight of the evidence given to the Rural Affairs, Climate Change and Environment Committee on 18 December was that everyone wants to proceed as quickly as possible.

I do not know whether those are relevant points.

John Scott: Thank you.

The Convener: Can I just pursue those points? I want us to be thorough here.

I simply observe that any further litigation would be sisted by the Scottish Land Court. Clearly, when there are Supreme Court judgments saying that a case cannot proceed, no court is going to proceed, so that argument would appear to be set aside.

Having been through the process that has resulted in the order that is before us—which I am not trying to disagree with—could the Government yet be in a position to bring in emergency legislation? After all, as its name suggests, such legislation can be passed quite quickly. That might be a practicable outcome at the end of this consultation. I am not suggesting that it is a good idea; I am just asking whether it is a possibility and a way of getting to the right answer at the end.

Paul Cackette: If issues arose from the Parliament's consideration that made it sensible for us to go away and think about whether the order is the right answer, we would certainly have two options. One would be to ask the court for an extension, and the other would be emergency legislation. Certainly, in procedural and process terms, that could be done. I suspect that it would be quite messy, but I do not see any reason why, in pure process terms, that could not be done.

10:45

David Balharry: This might just be going over the same ground, but I will lay out my understanding of where the question is coming from. As I understand it, there is a concern that the order is being rushed and, as a result, there are some groups of people who may be affected but are as yet unidentified.

I would like to go through why we are where we are, from the policy side. Ashleigh Pitcairn has made the point that, from the outset, the stakeholders were asked whether we should apply early for an extension, and they said no. There is a key emphasis on getting this right—the stakeholders want to get it right. Provided that we can work and get it right within the time allowed by the Supreme Court, we should try to do that.

That left us with no real argument to present to the courts for an extension, although we hold that option in reserve—albeit that, as Paul Cackette said, in holding it in reserve there is no guarantee of getting it. That is where we bounce into the issue of what would happen if we did not get an extension but needed more time because of issues that have come up through the committee stages. In that situation, emergency legislation would be an option.

Stewart Stevenson: I want to get clarity—which we may not be able to get—on the position of stakeholders. My understanding is that some stakeholders have said that they do not wish to disclose their position until Parliament has acted, which means that no amount of additional time will enable clarity on the position of those stakeholders. In other words, the situation is unresolvable unless those stakeholders choose to change their position, and the uncertainty that arises from the decision not to disclose is therefore unresolvable until Parliament acts. Is that the Government's understanding?

Paul Cackette: That is right. Obviously, people make their own decisions as to how they proceed with their own affairs. Equally obviously, the Government wants to ensure that the order is right, and it has sought to do everything that it can to inform itself on the circumstances in respect of which it needs to legislate.

It would be unfortunate if there were circumstances that the order did not cover. It would be particularly unfortunate if people have decided—perhaps for tactical reasons: to increase a claim for compensation, for example—not to come forward and tell us about circumstances that we do not and cannot know about. That would definitely not be an ideal situation.

For people in those circumstances, there is still time to come forward. If the order does not cover the scenarios that people are in and they feel that their rights are being prejudiced unfairly, they should come forward and speak to us. We cannot try to legislate to resolve the issues unless we know all the circumstances.

John Scott: Would there therefore be a benefit in introducing primary legislation? Amendments could be introduced at stages 2 and 3 in the process, rather than it being a case of, once the order is made, take it or leave it—or largely so, as I understand it.

Paul Cackette: That may be the situation, but the thing is that we do not know what the circumstances are. As Mr Stevenson says, we do not know whether even a parliamentary process will smoke out those cases. If the reasons why people are not coming forward are tactical, I suspect that it will not.

The Convener: Indeed. I think that your plea to anyone listening that it would be helpful if they told us that they have an interest is echoed on both sides of this table. At the end of the day, it is very difficult to legislate when you do not know what you are trying to legislate for.

Paul Cackette: Absolutely. It is surely in the general public interest that we know about the issues and try to legislate to respond to them.

David Balharry: I add one point, which is to draw a distinction between the groups of people who are affected by the proposed order and the individuals.

The stakeholders have all been asked whether they are content that we have identified the groups and, so far, no one has suggested that we have failed to do so. In effect, identity of the groups comes about from an analysis of the legislation and understanding the process. It would be extremely unlikely that we have failed to identify a group of affected people. The secondary question is about individuals. We are aware that some individuals, to avoid prejudicing their position, may not be coming forward—and we have spoken about that.

I flag up that we are alert to two other groups of individuals who might not be aware of the order. One is those individuals who have sold on. By selling their farm, they are no longer involved in farming and are therefore not part of any stakeholder body or following the relevant media. We also recognise that there is a possibility that some people have just been busy farming and have got behind with their paperwork.

We think that the number of individuals in those two categories who will be unaware of the order is relatively small, and we continue to do a lot through membership organisations and through the media to alert them to the possibility of change.

Stewart Stevenson: Do you have a view of what "relatively small" means? Are you indicating, in general terms without commitment, that the number is in single figures?

David Balharry: Yes. Very much so.

Stewart Stevenson: Thank you.

The Convener: Does that conclude the process questions at this stage, bearing in mind that the time when the instrument might come into force is a later issue?

Members *indicated agreement.*

The Convener: Good. That takes us to question 2 on our list, which is to be led by John Scott.

John Scott: My question deals with section 73 of the 2003 act. The judgment of the Supreme Court held that the effect of the operation of section 72(10) of the 2003 act contravened some landlords' ECHR rights to their property, as it prevented them from access to the section 73 procedure for recovery of vacant possession. Providing access to section 73 to landlords in groups 1 to 3 appears to be the proposed solution. Could you explain why that solution was chosen, how section 73 works and how that is different from the route to vacant possession under the Agricultural Holdings (Scotland) Act 1991?

Paul Cackette: We can both cover that point. The answer to why section 73 was chosen ties in with why section 73 exists in the first place. There was a recognition that, in the circumstances that covered the period that was not the bill period—there was a nine-month period that was a difficulty—even dissolution notices served after 1 July 2003 could nevertheless lead to the possibility that tenants would find themselves removed on no notice because of the collapse of the partnership. Section 73 was in effect the same as a 1991 act tenancy, but it did not have the succession provisions or the inability to bring it to an end, which were the difficulties that the court criticised in section 72 giving a full 1991 act tenancy. In effect, section 73 was a halfway house that provided extra protection.

What the court implied—and it was not directly addressed in section 73, so you cannot rely too much on this—was that a section 73 outcome would have been okay in the current circumstances. The difficulty is that the outcome of a 1991 act tenancy has a disproportionate impact on the landlords and the Supreme Court found that the reasons for permitting that were not clear. However, it was felt that section 73 was a sensible solution for addressing the situation, outwith that nine-month period of the process of the bill, back in 2003.

That being the case—that section 73 strikes the right balance between landlords' and tenants' rights—and given that the Supreme Court criticised the inconsistency of outcomes, we reached the view that the best way to resolve the issue was to try to ensure that everybody directly affected by the operation of law—the operation of section 72—would be put in the position of being in the same section 73 scenario. Although groups 1, 2 and 3 get to section 73 in different ways, the aim is to ensure that everybody ends up in the same section 73 outcome.

For sisted cases and for group 2 cases, there are different ways to get there, but there are also people who are already in section 73, because the notice was served after 1 July 2003 and they will already have got into that position. The basic outcome that we intended to achieve was to ensure—in as consistent a way as we could, to avoid falling into the same trap that led to the court challenge—that all tenants and landlords in those circumstances would end up with a section 73 outcome that, with the notice provisions, struck a fair balance between the rights of landlords and those of tenants.

To answer the final part of your question, the specific difference in terms of the rights of tenure is that the lease will have a termination date, because all leases require one. The lease will end upon that termination date, provided that the landlord gives notice—of, I think, a minimum of two years—under section 73 to ensure that the tenant has the opportunity then to make appropriate arrangements to wind down the farm and to move out at the appropriate date. Although similar, section 73 gives the landlord what he does not have under the 1991 act tenancy—the ability to regain possession after the due notice period. That period can be shortened if the Land Court permits, but it gives freer notice to allow those arrangements to come in a measured, sensible and co-ordinated way.

I do not know whether David Balharry wants to add anything to that background.

David Balharry: I do not think so. The only thing is to ask the convener whether the committee is up to speed on the limited liability partnership problem, which is the background to where this situation came from. I presume that we do not need to go over that or would it be helpful just to touch on that quickly?

The Convener: We ought to know that because we have been well briefed on the background to the matter. We all recognise that our understanding of the subject is growing and that, by the time we get to the end, we may even understand it.

John Scott: Yes, the background has been explained to us. Section 73 is the vehicle of choice, so to speak. Will you confirm that you are content with that and that it is working well as such?

Paul Cackette: I can from my point of view; David is on the policy side.

David Balharry: We have absolutely no evidence to suggest that section 73 is not working.

Indeed, it is a route to solutions favoured by stakeholders—

John Scott: That is fine. I was just seeking confirmation of that.

The Convener: That moves us to the next question.

Margaret McCulloch (Central Scotland) (Lab): My question builds on your answer to John Scott's question. Mindful of the varying circumstances applying to the different groups of cases affected by the judgment of the Supreme Court, how have you sought to ensure that each different group of cases is treated fairly and equitably?

Paul Cackette: There are two sets of answers to that, one of which is to say that what we have done in considering solutions is sought to rebalance and secure a fair balance between the rights of landlords and tenants in the different circumstances.

The circumstances are different from one another. For example, those in group 2, in which tenants in good faith may have thought that they had a full 1991 act tenancy for a number of years, are in a different factual position from tenants in group 1, who knew that there was the possibility that they may end up with security, although that could not be guaranteed. We have not sought to restore the position to what it was in February 2003, as some witnesses have suggested previously. We could have done that, but that did not seem to be fair on tenants in particular. Instead, we have sought to rebalance their rights. We have sought to give landlords further additional rights to respect the fact that, in certain circumstances, their human rights were breached, as the Supreme Court has held. However, we have also sought through various mechanisms, including what the Land Court can do under article 3 of the order, and the cooling-off period, to try to ensure that in giving the landlords additional rights the effect on tenants is minimised as far as it possibly can be. We have tried to do that and applied that reasoning to all three groups concerned.

Some cases are in court; some are not; and some could end up in court. Therefore, we have, as I mentioned, found ourselves in a position in which we have no choice but to have different avenues to get—I hope—to the same solution. We could have said that we would let the Land Court sort out all the groups, but we decided that that was not fair to the Land Court. We also decided that that would not achieve the minimisation of delay and the certainty that we are trying to secure. However, we recognised that, when cases are already in court, it is better for the court to sort them out, rather than for the order to do so. That is why we decided that the sisted, or on-going, cases in group 3 would best be addressed as outlined in article 3 of the order: the Land Court will be required to resolve them, bearing it in mind that the Land Court is a public authority for the purposes of the Human Rights Act and therefore all its decisions must be ECHR compliant. When it makes its decision under article 3, the Land Court will have to take into account representations made to it to ensure that it strikes the right balance. It is not open to it to make a decision that contravenes people's human rights. We felt that the solution was a sensible one in that context.

Given that in most cases people in groups 1 and 2 are not in court just now, we did not think that it was sensible to make them go to court to get a resolution, hence the reason for the different avenues.

Margaret McCulloch: Thanks very much.

11:00

John Scott: I would like to look at transitional provisions. What are the implications of the order for those in group 1 who are approaching the dissolution date in the run-up to the order coming into force?

Paul Cackette: Article 4 deals with the particular circumstance in which a notice under section 72(6) of the 2003 act is served on a landlord less than 28 days before the coming into force of the order. The landlord will have 28 days to go to the Land Court. Say the notice was served on 20 April and the order became law on 24 April. If it were not for article 4, the landlord would lose the right to refer the matter to the Land Court—or rather, he would have only four days in which to do so—whereas we have decided that 28 days is a reasonable period.

Article 4 provides that if the notice under section 72(6) of the 2003 act is served in the period immediately before the order becomes law, the landlord will still get 28 days to get the matter to the Land Court, to turn it into an on-going case, which article 3 will deal with. That would be the most acute timing difficulty if, by misfortune, any situation arose in which the timings were such that it would all be happening around that time.

If there are on-going cases that should be resolved, they could move between the groups. One possibility is that a case that is not yet sisted could end up being an on-going case that is covered by article 3. For example, a section 72(6) notice might have been served in November and the landlord might make an application to the Land Court today to say, "I did this in good faith; I should be allowed my order." The court will either decide that before April or, mindful of all the previous cases that have been sisted, sist the

case, which is more likely, in which case it will become an on-going case dealt with by article 3.

John Scott: The order does not specify when it will come into force—I will come back to that in a second. Until it comes into force, there is, as far as I can see, no certainty of outcome for those who have to make decisions about what action to take. What are you doing to ensure awareness of the implications of the order and understanding of the outcomes that the order will provide? If the order is approved, do you have in mind a date when it will come into force?

Paul Cackette: I will ask David Balharry to talk about ensuring that people know what is happening. We have indicated—although this does not appear in the order because it is a draft order—that the intention, subject to the parliamentary process, is that it will come into force on 23 April, which is the day before the one-year suspension runs out, so that we do not get into a position in which the judgment of the Supreme Court has effect before the fix is in place.

John Scott: Thank you. What are you doing to make people aware of the implications of the order?

David Balharry: The date that we have been working to—although we could not really say this publicly, because we could not commit to it—is 23 April. The stakeholders with whom we have been working are aware of that.

I mentioned earlier the attempts that we have made to contact those who are affected—those in groups 1, 2 and 3. They are now on a mailing list and are updated regularly on progress that is being made and on which stage we are at. In so far as the clarity that we have helps to inform their choices, they are in exactly the same position as we are.

John Scott: Did I see somewhere, perhaps in *The Scottish Farmer,* that one group or another has set up a helpline?

David Balharry: There are two. The Scottish Tenant Farmers Association has set up its own helpline to give legal advice to people who are affected. That might flush out some cases that we are not aware of. Also, the Scottish Government has its website, where people have registered and gone through a questionnaire to help us to identify which group they are in. By knowing that, we can give them relevant information.

John Scott: You will doubtless further encourage people to respond to one or other of the helplines.

Paul Cackette: Indeed. We might talk later about the cooling-off period and what is to be done about that, but a point to be made in this context is that the fact that people will know with certainty—we hope—what the final version of the order will be only on 23 April 2014 is an argument in favour of the cooling-off period, because it will give people time to take professional advice and then decide what to do, rather than feeling that they have to dash into a decision-making process immediately after that date.

Margaret McCulloch: With regard to the on-going cases, will you explain the effect of article 3 of the draft order as read with proposed new section 72A(1) of the 2003 act?

Paul Cackette: As I said, the purpose is for cases of one form or another that are in the Land Court to be resolved there. That is thought to be the appropriate place to resolve the disputes. I think that an earlier witness said that they thought that the Government's preference was for cases to be taken out of court rather than to go through article 3, but that is not what we had in mind, which is that the cases will be dealt with by the court, as the parties will ask the court to resolve the issues in an appropriate way.

We think that, once clarity is secured, reading the judgment with the final order, the court will make two decisions, one of which relates to the termination date. For the sisted cases—certainly for the vast majority—the termination date will be in the past, because the cases have been sisted for some time. I think that they are almost certainly proceeding by tacit relocation. To give the court the ability to decide what the appropriate termination date will be once the case proceeds seems to us to be a sensible way forward. The court will then be able to balance the different rights, and if the landlord is entitled to repossession they will get it at a date that reflects and allows the court to take into account what the tenant has said about when the date should be. In those circumstances, we hope that the court will achieve the right balance.

The aim is to enable the court to make a termination. It will not have the power to change the termination date unless that power is given to it, which is why article 3(3)(b) is in place. We were also mindful of the need to ensure that people do not have to go to the Land Court twice, so if a landlord wishes to secure a shorter notice period—again, given that the case is already in court and everybody knows what the position is—section 73 allows an application to the Land Court for a shorter period. The approach allows the Land Court to deal with the matter in the same on-going action rather than requiring the landlord to finish one case and then go back to the Land Court for a second case, which did not seem to us to be desirable.

The Convener: I think that I heard you say that the Land Court would be able to change the termination date if that was appropriate. I think that

you might have said "if termination was appropriate", whereas my understanding is that, in any case that has got to the Land Court, termination of the lease is not in dispute. It is only a matter of the timing.

Paul Cackette: That is correct. It is the term that is set out in the lease. The lease will have a termination date, whatever it might be, and the normal expectation is that it will end at that date.

The Convener: So there is no circumstance in which the court, through the route that we are discussing, will allow a lease to run on beyond a fixed termination date.

Paul Cackette: Not unless it requires to do that to respect the human rights of the parties concerned.

The Convener: Will you elaborate on that interesting thought?

Paul Cackette: That could arise if, by misfortune of timings, the termination date was, say, August 2014. When the order becomes law, as we hope it will on 23 April, the Land Court might decide on allowing the term date as per the lease. If the term date was August 2014, that would not be fair to the tenant who would have to get out on such short notice. Given the fact that section 73 requires two years' notice, the Land Court might decide that a longer period was appropriate in the circumstances.

If the termination date was more than two years hence, I would be pretty surprised if the Land Court gave a longer termination date, although obviously the test is whether it is reasonable. That is an example of a case that might be argued using the tenants' ECHR article 8 rights of occupation. As we all know, many of these farms are occupied as family homes as well as being working farms, so we can imagine circumstances in which it would not be fair to give effect to a very short termination date. Those circumstances are quite rare but the order gives us the flexibility to allow for them.

The Convener: Indeed. Everything that you have mentioned gives a termination date, rather than a termination event. Am I therefore right in thinking that there is no prospect of a court saying that someone has possession for life?

Paul Cackette: I would have said that that option was not open to the court in light of the Salvesen v Riddell judgment. In a situation in which an in effect uncertain date was set and succession rights were excluded, it would be up to the court. Again, I would be surprised if it considered that the right balance of the rights of the landlord and the tenant led to that conclusion.

The Convener: I concur with your scepticism, but I am not asking you to second guess what the court might say. I am asking what the order that is before us would allow. Am I right in thinking that it would at least allow the court to come to that conclusion?

Paul Cackette: In theory, it would. The Land Court would have to take into account the Salvesen v Riddell judgment in the Supreme Court, which was not that what happened in 2003 could not have been done, but that it had a disproportionate impact that breached the human rights of landlords in certain circumstances. If the outcome of giving an extended period—for life, for example—would go too far in protecting tenants' rights, it would not be open to the Land Court to do so. It is one of those instances in which it is, in theory, open to the Land Court to do that, but only if it breaches the landlord's rights, and the Land Court is not capable of doing that, for the reasons I set out earlier.

The Convener: You have now lost me. Does that mean that you think that it is open to the Land Court to allow a lease for life or is that inconsistent with the Supreme Court judgment?

Paul Cackette: It is potentially inconsistent with the Supreme Court judgment. We do not know whether that outcome would be regarded as disproportionate. The Supreme Court told us that the outcome cannot be disproportionate in its implications for the landlord.

The Convener: I know that members want to come in. David Balharry, do you want to come in on that first?

David Balharry: It might be extremely unwise, but I am not a lawyer so perhaps I can give you a policy answer to the question.

The Convener: A policy answer would be acceptable given that my question clearly falls somewhere in between.

David Balharry: The policy answer would be that my understanding of the Supreme Court judgment is that for a tenant in a limited liability partnership to end up with a fully secured 1991 act tenancy would be an unlawful and disproportionate outcome under the ECHR. Therefore, the Land Court acting reasonably, your question implies that it would have to go against that ruling and override a Supreme Court judgment that identified the situation as unlawful and disproportionate. I would say that that is not possible, although I am not a lawyer.

The Convener: Indeed. Thank you for the discussion. Do colleagues want to come in at this point?

John Scott: I hastily add that I am not a lawyer. You mentioned almost en passant implications of tacit relocation. Will you talk about that a little bit more? You could explain the term to me again, as

well as its implications in the context in which you have used it.

Paul Cackette: I apologise. Jargon tends to be a general fault of lawyers. When we are immersed in this kind of stuff for too long, we use it too regularly.

The concept of tacit relocation is that any lease will have a term date or a period of duration and it will come to an end if the landlord gives notice to the tenant. If the landlord does not give notice—often, they can be happy that the tenant stays in occupation—by tacit relocation, the lease will continue on a year-to-year basis in those circumstances. If no notice is given before the end of a lease, it will simply carry on on a year-to-year basis. The landlord could give notice ahead of the next year but would have to comply with the notice provisions. Therefore, they would be able to get repossession, but the lease would continue on a year-to-year basis on the same terms and conditions.

11:15

John Scott: That would not ultimately lead to a secure tenancy.

Paul Cackette: No. That in itself would not lead to a secure tenancy. Obviously, the 1991 act has special provisions that allow that to happen, but that in itself does not give rise to a secure tenancy.

Stewart Stevenson: I want to be clear about something. I have heard several times that the Land Court or, indeed, the Lands Tribunal for Scotland cannot in law act illegally. Can you explain to a layman how that can be so?

Paul Cackette: I refer to section 6 of the Human Rights Act 1998. If I talk slowly enough, I will be able to find it, as I have it here.

Stewart Stevenson: Forgive me: let me explain my likely misunderstanding. I am not questioning whether there is a legal provision that prevents them from acting illegally; I understand that. What was said was that, in law, they could not do so in practice. In other words, if they sought to do something that was in contravention of the provisions that govern their operations, how does that get sorted out? That is what I am asking.

Paul Cackette: The technical answer is in section 6 of the Human Rights Act 1998, which states:

"It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

That section defines "public authority" as including "a court or tribunal". That is the technical answer. If, in a particular case, the Land Court made a finding that contravened that, in our view the simple answer is that it would be appealable, as happened in the Salvesen v Riddell case. The decision of the Land Court ended up being appealed to the Court of Session and ended up in the Supreme Court.

Stewart Stevenson: I think that that is sufficient and is what I expected. I simply wanted to hear that said.

Stuart McMillan (West Scotland) (SNP): There appear to be different views about the scope of the powers given to the Land Court and the direction to the court to dispose of the application before it "as it considers reasonable". Could you explain what the court is being asked to do and what discretion it has? How may the powers in article 3(3) be used?

Paul Cackette: The first thing to say about the on-going cases before the court is that we would expect the sist to be recalled after the order becomes law. The courts will then have an application under section 72(9) of the 2003 act that, on the face of it, gives an option that is no longer open, as the option of giving a full 1991 act tenancy is now excluded by virtue of the decision in the Salvesen v Riddell case.

The order's effect is to say that the order giving immediate vacant possession is no longer available, as it will have been repealed when the order comes into force. In the context of the order, which in effect transfers the right of the tenant into a section 73 right, the court will make an order that in effect just confirms the existence of a section 73 tenancy. If it is minded to do so, the order will set out the issues as to whether the notice should be shorter or what the termination date should be. If it does not do those things, it will simply close off the case and give effect to the options that are open to it now, because of the order that excludes the ability to do anything other than go through section 73.

Stuart McMillan: Some stakeholders question whether the court could uphold the section 72(6) tenancy, which would conflict with the Supreme Court decision. Will the order give the court the power to do that?

Paul Cackette: The court does not have the power to give a 1991 act tenancy. That option is excluded by the Salvesen v Riddell judgment.

Stuart McMillan: There also seems to be a difference of view as to what will happen to group 3 cases when they reawaken in the Land Court. In particular, could landlords abandon such actions unilaterally or will the court have to determine what is to happen to the tenancy?

Paul Cackette: As in any other litigation, the parties will be able to abandon if they think fit. That would normally be done by agreement; it is not for the Land Court to determine the matter. There is

no necessity for the Land Court to make a substantive judgment, and there never is.

A Land Court will always want to have an order of the court that disposes of the case and, if the parties agree between themselves what the outcome should be, an order of the court will still be required, but the court will not necessarily have to apply its mind to the merits. In procedural terms, it will need to get out of the court, because cases should not sit in the court for ever. If parties come to an agreement between themselves on the resolution of their dispute, the court will have to give its blessing to the outcome, which it will do by a court order. However, there will be no necessity for the court to apply its mind to issues if the parties do not want it to.

John Scott: Scottish Land & Estates suggested that the order is

"Possibly not compliant with ECHR as it gives those landlords adversely affected by section 72 (10) a disadvantage of an additional year before gaining vacant possession, when compared with other landlords whose limited partnership leases are only subject to the section 73 double notice procedure."

Will you deal with that body's assertion, please?

Paul Cackette: I will refer to what I said earlier: we are not trying to restore the February 2003 position. We are trying to strike a different and better balance between the rights of landlords and tenants. There is no doubt that bits of the order will make a landlord wait longer than they would have done had none of this been legislated on, but to make such a change is a legitimate option of the Government, so long as it is reasonable and there is a counterbalancing reason to explain why it is regarded as necessary.

Something that comes into play in that context is immediate vacant possession. If it is literally taken to be the case that the collapsing of a partnership through a dissolution notice would allow a landlord to secure instant vacant possession at midnight tonight, that could contravene the tenant's article 8 rights to get some kind of notice.

Undoubtedly, bits of the order will make landlords wait longer, but that is balanced against the fact that we are looking at landlords' and tenants' rights. Provisions for a cooling-off period for some of the examples that have been given are designed to ensure a fair balance, so that landlords will get their vacant possession at the end of the day. They will have to wait a little bit longer for it, but that is needed to take into account tenants' human rights.

John Scott: Are there other areas in the order in which you would acknowledge that there may be an argument about whether the order will be ECHR compliant, or is that the only one? I can see that there is an argument there, and I accept your justification—that the grounds are reasonable—but are there similar areas?

Paul Cackette: We are not aware of any pinchpoints that are likely to or possibly might arise. David Balharry has just reminded me of one the issues that have been raised in relation to group 2 cases, which is whether there should be an opt-out of the conversion process rather than an opt-in. It is possible to envisage circumstances in which a landlord might get a windfall from being in group 2. For example, a tenant and a landlord might have reached an agreement way back in 2003 and the reason why the full 1991 act tenancy exists is that the tenant paid the landlord a sum of money not to go to the Scottish Land Court. The potential risk in allowing conversion is that a landlord might gain a windfall, having received money for not going to court in the first place. The order has the potential to put the landlord in a position of being able to renege on the previous deal and convert the lease to a section 73 lease, but the reason why we are making the landlord make that particular choice is that, if he were to do so—and, in our view, he would have to think very carefully before doing so—he might leave himself open to a claim by a tenant of unjust enrichment from having gone back on the deal. That is the reason why we have an opt-in rather than an opt-out.

The order is ECHR compliant as it stands because it requires the landlord at their own hand to serve a notice. That is not, as might have been suggested, an onerous thing to do, but a landlord will have to think before they serve any such notice because, if they had genuinely acquiesced either for an exchange of money or for other reasons and then still convert, they might leave themselves vulnerable to a tenant pursuing other court processes such as a claim for unjust enrichment or an enhanced claim for legal compensation at the end of the lease. In other words, an act by the landlord could leave the landlord open to a claim for compensation by the tenant.

That is an example of a situation where the order is designed to be ECHR compliant. It all comes down to the way in which a landlord operates it. If they take the positive step of converting the lease, they could leave themselves vulnerable to a claim.

John Scott: Many thanks.

The Convener: I had wanted to raise that very issue and, now that we have come to it, I think that we should pursue it. As you have said, the landlord might or might not have received money for the 1991 agreement. There may be very good evidence, in legal terms, that the landlord wanted to give a 1991 act tenancy to not just the tenant but his successors—that is not irrelevant in the

context of farming law, as I think everyone appreciates—and that he was not under duress to do so. Admittedly, both parties misunderstood the law, because everyone did, but there is nonetheless clear evidence of the landlord's intentions. In ECHR terms, is there not a reasonable possibility that some of those farmers might actually have more of a claim to the 1991 tenancy that they thought they had than the landlord has to getting his land back? If that is the case and your first answer is yes—indeed, I think that in principle it has to be—why does the order not give the tenant the opportunity to go to the Land Court to get his 1991 act tenancy confirmed, which, after all, is the correct ECHR-based solution, rather than proceeding on the presumption that the landlord can, regardless of whether he has sold for value or otherwise, get his land back and is merely left open to a claim? Is that really what we should be doing?

11:30

Paul Cackette: The option of treating landlords in that way is difficult to pursue, because of the way in which the Supreme Court issued its judgment. The court said that some categories of landlord could not have proved a case in court that they were acting in good faith, as was defined in 2003. It is difficult to do anything other than give the right of conversion. The order is designed to provide at least for an appropriate remedy for the tenant in the circumstances.

Could a Land Court process have been reinstated to allow the tenant to make a case? In theory, that is possible, but our concern was that the process of going to the Land Court to prove factual circumstances of good faith and bad faith was one of the problems that got us into difficulty in the first place. That was not felt to be a sensible way forward for allowing people to resolve their issues. As I said, people could look for waygo compensation. In so far as that was inadequate, they could make a claim for unjust enrichment.

The Convener: Surely the evidence that people would have to lead to claim unjust enrichment is precisely the same evidence that they would have to lead in the Land Court to retain a 1991 act tenancy, if that opportunity was available.

Paul Cackette: The process would allow people to get financial compensation, which would arise in either way. They would be put into the position before their financial loss through an existing process of law, rather than through the creation of an additional process of law. That might not make much difference at the end of the day, but our sense was that it is better to rely on existing processes and existing law to resolve such issues rather than to create new Land Court processes, when that has been unpopular in the past.

The Convener: I understand that. I say with the greatest respect that everybody—except the farmer—would see the situation in that way. The farmer is looking not for compensation but for the farm, which he has put a significant part of his life into, perhaps over the past 10 years. He wants to farm the land. He has perfectly decent legal evidence that the intention was that he should have a 1991 act agreement, but we are taking that away, although we are prepared to acknowledge that there might at least be an arguable case.

In ECHR terms—that is what the Supreme Court judgment is about—the balance of the arguments would be in favour of the farmer retaining the 1991 act agreement. That is a challenge to us. I confess that that is the one point on the order that I am still worried about. I am genuinely not sure that we have the right answer on that. I do not know whether there is more to say, but that is a concern, and I wanted to see whether we could get an answer.

David Balharry: I will reiterate what you see as the concern, to ensure that I understand it. You are talking about a situation out there where a farmer is in receipt of a full 1991 act tenancy that was not given as a consequence of anything to do with the defect but given in good faith as the end of the serving of the claim notice.

The Convener: I am hypothesising, but I am aware of farmers whose situations are close to that. I will not evaluate the evidence, but there could be sufficient evidence to demonstrate that it was the parties' intention that a 1991 act tenancy in good faith was to supersede a limited partnership, whether or not the law had changed.

David Balharry: I see your point. We need to take that away and reflect on it.

The Convener: That would be helpful, because that looks like a lacuna.

Stewart Stevenson: In paragraph 56 of the Supreme Court judgment, Lord Hope quotes the Marckx v Belgium case and other cases. He says that

"This suggests that closed cases of whatever kind should be allowed to stand",

but he gives the qualification that, when the legal application of section 72(10)(b) of the 2003 act caused the outcome, the case can be reopened, because that involves convention rights.

The conclusion that I draw from my reading and understanding of that is that it would be open for the agreement, which was made privately between parties, to be reopened only where the law had been applied directly. In other words, he appears to be saying that

"closed cases of whatever kind should be allowed to stand."

I say that as a layperson reading a judgment that is not without complexity. Is it a fair way for me to read it?

Paul Cackette: It is, absolutely.

Stewart Stevenson: So it is clear that Lord Hope is saying that, if a commercial arrangement were made, even though the hidden hand in promoting the outcome of that commercial negotiation was a law that is now being struck down, the arrangement is unaffected by the judgment that he is making that section 72(10)(b) is ultra vires.

Paul Cackette: Yes. That encapsulates why the order deals with groups 1, 2 and 3 and not group 5, which is the bilateral agreements. We have tried to provide a legislative solution for instances in which the operation of the law leads to a difficulty with the ECHR. Although some of those other agreements would undoubtedly have been entered into under the shadow of section 72 and influenced by it, they were, nevertheless, not required to be entered into and were not a necessary consequence of the section. That is why the distinction is drawn, so I agree with your proposition.

The Convener: I ask you to reflect on whether there is a sub-group in group 2 that is closer to group 4 or 5. That would be helpful.

I suspect that you have already said enough on the fact that, ignoring the previous discussion, tenants in group 2 will be subject to greater uncertainty or uncertainty for longer because of the cooling-off period.

Paul Cackette: Yes.

The Convener: I imagine that they are in the same place as their landlords have to be to allow them at least the opportunity of sorting themselves out before they have to go to court.

Paul Cackette: Yes.

John Scott: If I may ask a question that, possibly, strays into policy again, does the order have implications for the ministerially led review of agricultural holdings legislation in as much as that there is a renewed emphasis on being ECHR compliant in the 1991 act tenancy and the ability to terminate such a tenancy reasonably? There is an absolute right to buy. Is that now less likely to be interpreted as ECHR compliant than it would have been hitherto?

Paul Cackette: I will ask David Balharry to say something about the wider policy implications for the review.

I am not sure that the judgment has particular implications for the absolute right to buy because of the difficulty that arose in the peculiar circumstance of section 72 as it was enacted. The provision was an anti-avoidance measure because of the unusual circumstances that were in play, and the court said that anti-avoidance measures of that nature are not illegal as such. It said that an outcome with a disproportionate impact on a landlord and an inconsistency between pre-July 2003 and post-July 2003 circumstances had led to the need to set aside the implications of subsection (10).

I am not sure that there is a read-across to the absolute right to buy as such, but David Balharry may want to add something about the general policy context.

The Convener: I suggest that it needs to be very short unless it actually relates to the order that is before us, because I am not convinced that it does. However, Mr Balharry should feel free to answer it.

David Balharry: I was just going to make that point. There are two issues on the absolute right to buy: one that I can answer and one that I cannot. The issue that I cannot answer concerns the ECHR compliance of an absolute right to buy and the agricultural holdings review. That needs to overcome or provide the overriding public interest. That is beyond the scope of the order, so I will leave it, if I may.

However, the other issue, on which some stakeholders have commented and which is a genuine concern, is that the opportunity that is provided through the cooling-off period for mediation could be, to an extent, compromised because of a fear that the longer landlords stay in that position, the more time they are potentially exposed to an absolute right to buy. In effect, even though there is a mediation period, the wise money, from the landlord's perspective, would be on simply regaining vacant possessions as quickly as they can to avoid the threat.

In considering the matter, the confusion comes from the fact that there is no doubt that a person in a limited liability partnership had a 1991 act tenancy. However, the difference is that the 1991 act tenancy is not heritable as is the case for a normal 1991 act tenancy. In all the cabinet secretary's public statements on the absolute right to buy, he has made it very clear that that is being considered only in the context of secure 1991 act tenancies, which are those that are heritable. With that definition, none of the tenancies that we are speaking about is in the scope of what has been announced in relation to a review of the absolute right to buy. That should give reassurance to those involved.

Stewart Stevenson: I want to look a little bit more at the potential negative impact on tenants, because most of our discussion has been about the negative impact on landlords. Lord Hope says

that the process should be conducted in as "fair and constructive" a manner as possible. However, I note that, although he has indicated that section 72(10)(b) is incompatible, he has not yet struck it down. Is the process one that can be defended as "fair and constructive" with regard to the removal of tenants' expectations who, under section 72(10)(b), had made plans and were reasonable? How would you seek to say that the process is "fair and constructive"?

Paul Cackette: The processes for groups 1 and 3 were always going to be subject to a court determination and resolution: the position for tenants was never going to be one of any certainty that they could get outcomes until that bit of the process.

The circumstances of a tenant in group 2 have been recognised as different because they could have thought, in good faith, that they enjoyed the benefit of a full 1991 act tenancy. The difficulty, particularly in those circumstances, is that allowing that to continue, subject to the earlier discussion about a court resolving factual circumstances, is unfortunately an inevitable outcome of the court's decision. We have tried to reflect and respond to that in the order. There is a very difficult balance to be struck in trying to do something that accommodates what the court requires us to do on reconciling the two rights.

Stewart Stevenson: Will you remind us roughly how many group 2 tenants you think that there may be?

David Balharry: Five.

Stewart Stevenson: Five. And potentially five entirely different circumstances.

David Balharry: Yes.

Stewart Stevenson: Ultimately, the tenants, if they have been disadvantaged, have common-law recourse.

Paul Cackette: They have remedies. We were conscious of a number of aspects when deciding what was the best way forward, one of which is not to forget that there are other common-law and statutory remedies that can at least resolve some of the issues and they do not all necessarily have to be covered by the order.

Stewart Stevenson: I am trying to think ahead. Of the five tenants, how many acres are we talking about? You may not know.

David Balharry: We could probably get that figure and write to you. I would not want to say what it might be off the top of my head.

Stewart Stevenson: That is fine. The figure is for interest only. I do not think that that will influence the process; it will just give a sense of how much we are closing in on the last fragment of difficulty.

John Scott: It will very much depend on the type of farm.

Stewart Stevenson: Yes, of course.

11:45

The Convener: How are you communicating with those who are currently interested—we have heard lots about them—and with those who have been identified one way or another through the process? I suspect that some of them will literally be listening in and trying to understand what we are doing, but how are you communicating with those who are out in the fields doing other things rather than listening to this meeting? What do you see as the ultimate communication process on the issue? I know that statutes and instruments are published in the normal way, but there seems to be scope here for doing things slightly differently. Given that time is of the essence, how will the measure be communicated when the time comes?

David Balharry: I do not have a magic solution, but I am open to ideas. We are using the standard methods. We have our website and people have registered. We will write directly to those whom we are aware of to give them information. The stakeholders are letting their members know, through their committees, membership lists and so on. There are also news articles. Beyond that, I am unaware of any magic solution.

The Convener: I do not expect you to have one. We have been looking for magic solutions for a long time. Once the order is published, will it come with guidance on what it means, or will individual folk have to get their own—probably very expensive—legal advice as to what it means?

David Balharry: Paul Cackette has reminded me that, when we issue the order, we will issue a policy note. In the drafting of that note, we can be mindful of the need to set out in plain English the options that are open to people and to make them as clear as possible. Obviously, we could not make suggestions as to which option people should take.

Stewart Stevenson: Given that we seem to have established that five people are involved, is the Government prepared to allow its officials to sit down with each of those five people to talk through the implications of whatever solution is ultimately arrived at? Given the number of interested parties, would that be an appropriate way forward, rather than trying to second guess their interests? Is the Government prepared to do that or at least to take away the idea and think about it?

David Balharry: At the moment, we propose that, during the cooling-off period, the Government

will pay for independently accredited mediators to mediate. However, mediation requires voluntary engagement. If the tenant and landlord are willing to have the Scottish Government round the table, I am fairly sure that we will consider that.

The Convener: I think that John Scott wants to come in.

John Scott: I do. I want to apologise to everyone and in particular the committee, because I should have declared an interest as a farmer before this point in the proceedings. I now wish at least to set the record straight and declare my interest as a farmer and a landowner.

Stewart Stevenson: By the same token, I have a 3-acre registered agricultural holding. I derive no income whatever from it, nor do I receive any money from the Government. For the sake of completeness, I will join Mr Scott in declaring an interest.

The Convener: Thank you. It is always a sensible precaution to do that.

I will go slightly off piste and ask one more question. In discussions elsewhere, the idea of the time bar and the time within which any litigation has to be brought has been raised. People suggested that it had to be five years, but it was then reduced to three years. I have suggested that it might be one year. There is always at least a theoretical possibility that it might be one year from the point at which the Supreme Court rules, which of course would be undesirable. Is the Government minded to put anything about timing in the order, which of course we have not seen yet? Can you express any views on time bar in this context?

Paul Cackette: We do not think that it is appropriate to make specific provision in the order for time bar. The circumstances will be many and varied, and I am not sure that I can say what the period would be in any particular circumstances. As I mentioned, many of the remedies exist in common law or in other statutes. There is a provision in the Prescription and Limitation (Scotland) Act 1973—in section 19A, I think—that in effect enables a court to allow cases to be raised outwith the time bar period when it is equitable to do so. Where a case can be made that, in the circumstances, equity requires that to be allowed, the court would allow it. Our feeling is that that is the most appropriate way to deal with any suggestions of the sort of unfairness to which you refer. If that arises, the court is best placed to deal with it after assessing the facts and the circumstances of the applicant.

The Convener: Does that not put an onus on potential litigants to decide whether they want to put themselves at the mercy of the court or to raise an action in a hurry to ensure that they do not have to worry about the court's discretion?

Paul Cackette: Yes. That happens already—litigation is raised close to time bar periods to protect the position of parties, and then the case is sisted again, pending resolution.

The Convener: If there is any genuine uncertainty, would it not be appropriate—"kind" might be a useful word—to put something in the order to ensure that litigation can be started later? That would take pressure off people who probably feel that they are under enough pressure anyway.

Paul Cackette: We can take that issue back and consider it. As I say, our sense is that the provisions in existing legislation are sufficient, but we can review that and give some thought to whether it might be appropriate in the circumstances.

The Convener: As there are no more questions, that brings us to the end of the item. I thank our witnesses and suspend the meeting briefly to allow them to leave.

11:51

Meeting suspended.

11:56

On resuming—

Instrument subject to Affirmative Procedure

Proceeds of Crime Act 2002 (Disclosure of Information to and by Lord Advocate and Scottish Ministers) Amendment Order 2014 [Draft]

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

Members *indicated agreement.*

Instruments subject to Negative Procedure

National Health Service (Variation of Areas of Health Boards) (Scotland) Order 2013 (SSI 2013/347)

Colleges of Further Education (Transfer and Closure) (Scotland) Order 2013 (SSI 2013/354)

Plant Health (Scotland) Amendment (No 3) Order 2013 (SSI 2013/366)

Scotland Act 1998 (Agency Arrangements) (Specification) Order 2013 (SI 2013/3157)

11:57

The Convener: No points have been raised by our legal advisers on the instruments but, with regard to SSI 2013/347, the committee may wish to note that the Scottish Government has agreed to correct a typographical error that the order contains by correction slip. Does the committee agree to note that?

Members *indicated agreement.*

The Convener: Is the committee otherwise content with the instruments?

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

Bovine Viral Diarrhoea (Scotland) Amendment (No 3) Order 2013 (SSI 2013/363)

11:57

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

Members *indicated agreement.*

Public Bodies Act Consent Memorandum

Public Bodies (Abolition of the National Consumer Council and Transfer of the Office of Fair Trading's Functions in relation to Estate Agents etc) Order 2014 [Draft]

11:58

The Convener: The next item of business is consideration of a United Kingdom Government order under section 1 of the UK Public Bodies Act 2011. The consent of the Scottish Parliament is required to make an order under part 1 of the Public Bodies Act 2011 when such an order makes provision that would be within the legislative competence of the Scottish Parliament. The Delegated Powers and Law Reform Committee considers and reports on such orders under the same grounds that it considers and reports on instruments that are laid before the Parliament.

Paragraph 1 of part 1 of schedule 1 of the order provides for the omission of the entry that relates to the National Consumer Council in

"Part 2 of Schedule 1 to the Public Bodies Act 1958",

when it should omit the entry in the Public Records Act 1958. However, the committee may wish to note the explanation that the Scottish Government has provided. The Department for Business, Innovation and Skills has advised that the statutory instrument registrar will issue a printing correction slip to correct that patent error.

Does the committee agree to draw the attention of the Parliament to the order on the general reporting ground, as it contains a minor drafting error?

Members *indicated agreement.*

The Convener: Does the committee also agree to note that steps are being taken to correct that error?

Members *indicated agreement.*

The Convener: We move into private session.

11:59

Meeting continued in private until 12:13.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

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