The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 22 April 2014

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
13th 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:

Lindsay Anderson (Scottish Government)
Morris Fraser (Scottish Government)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Sir Alexander Fleming Room (CR3)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 22 April 2014

[The Convener *opened the meeting at 10:43*]

Decision on Taking Business in Private

The Convener (Nigel Don): After some delay—I thank all who are present very much for their patience—I welcome members to the Delegated Powers and Law Reform Committee's 13th meeting in 2014. I ask everyone to switch off mobile phones.

Item 1 is a decision on taking in private items 6 to 9. Item 6 allows us to consider further the delegated powers provisions in the Historic Environment Scotland Bill. Item 7 is consideration of the committee's draft report on the Courts Reform (Scotland) Bill. Item 8 is consideration of whether we wish to provide additional information to the Standards, Procedures and Public Appointments Committee as part of its inquiry into the procedures for considering legislation. Finally, item 9 is consideration of the evidence that we are about to take on the Food (Scotland) Bill. Does the committee agree to take items 6 to 9 in private?

Members *indicated agreement.*

Food (Scotland) Bill: Stage 1

10:45

The Convener: Item 2 gives members an opportunity to ask Scottish Government officials questions on the Food (Scotland) Bill. I welcome—after some delay—Morris Fraser, who is the bill team leader, and Lindsay Anderson, who is a solicitor. I thank you for being here and again for your patience. We have some questions for you and, provided that I can find the list in the right order, I will tell you who is to start.

John Scott (Ayr) (Con): It is me.

The Convener: Thank you, John.

John Scott: Good morning. Section 34 of the bill allows provision to be made for the purpose of regulating animal feeding stuffs that applies any provision in the Food Safety Act 1990—with or without modifications—or which is equivalent to any provision in the 1990 act. Why is it necessary for the power to be drawn in such wide terms?

Lindsay Anderson (Scottish Government): Section 34 contains not a new power but a rewriting of a power that exists in section 30 of the Food Standards Act 1999 and is available to ministers at present. When the bill was drafted, a decision had to be taken on whether we should amend the 1999 act, which we could have done by consequential amendment. However, we decided—mainly because consultation with the Food Standards Agency would be required, and given that draftsmen talk about orphan powers that are left in an act and are no longer relevant once a new bill is passed—that, rather than leave the power, we would replace it with a new power in the bill. Section 34 reflects a power that already exists.

I appreciate that members do not have the 1999 act in front of them, but it is drawn in almost identical terms and includes the ability for ministers to use provisions from the 1990 act in regulations that they make, as under section 34 of the bill. It was decided that it would be more convenient to have the power in the act that deals with the new food body and the new powers that the Scottish ministers are being given than to abandon that power—as it were—in the 1999 act. The breadth of the power is not new; it reflects what the Scottish ministers already have the power to do.

John Scott: We are living in rather different times from 1999. Because of the BSE outbreak, there was much interest in animal feedstuff at that time. I am not certain why we still need such wide powers, but I hear what you say.

The power in section 34 of the bill could be used to apply offence provisions under the 1990 act for the purpose of regulating animal feeding stuffs. Do you agree that the power to modify the provisions in the 1990 act that are applied for that purpose could be exercised to alter or remove any restrictions or limitations on the penalties for those offences that the 1990 act might otherwise impose?

Lindsay Anderson: Again, the power is not that unusual. I know that the committee spends quite a lot of time on considering food statutory instruments, and the 1990 act provides a lot of the enabling powers for implementing European obligations. Sections 16, 17 and 48 of the 1990 act contain the main powers that are used in that context, and those powers are similar to those in section 30 of the 1999 act. We are re-enacting section 30 of the 1999 act in section 34 of the bill, which has a similar provision to apply the 1990 act provisions and to adapt them to the terms of the regulations.

That is all that the power in section 34 reflects. The device is quite common and can be found elsewhere in the bill. From a purely technical point of view, I would say that it is very consistent with the provisions of the 1990 act and a well-understood body of law, including the many Scottish SIs that are made every year under the 1990 act. The policy point of view is more Morris Fraser's area than mine. The device is not unusual in food legislation and is well understood by the readers and users of food legislation.

John Scott: I take it that you agree with the proposition that I put. If so, will you explain why it is appropriate to take a power in subordinate legislation that, as we understand it, could be used to apply offences with unrestricted penalties?

Morris Fraser (Scottish Government): That brings us back to Lindsay Anderson's point about consistency. That can be done already under the 1990 act. Nothing novel is being introduced in that sense. The provisions are being made consistent with what already exists.

The Convener: If unrestricted penalties concern us, which they always do in principle, should we address the question to the policy committee, so that it may consider why the Government is happy to take the policy under the 1990 act into the bill?

Morris Fraser: Yes.

Margaret McCulloch (Central Scotland) (Lab): It seems that the effect of exercising the power under section 36(3) or 42(4) to prescribe additional information that is to be included in a fixed-penalty notice or a compliance notice will be that the information to be included in each type of notice will be specified in two places: the bill and any subordinate legislation that is made in exercising the powers. Will you explain why it was not considered that it would be clearer to take a power to modify sections 36(1) and 42(1), so that the information to be included in a fixed-penalty notice or a compliance notice was specified in the same place?

Morris Fraser: It is technically true to say that such information could be in two places, but there will be only one list. Some things are must-haves, which will be included in the bill. To allow fixed-penalty notices and administrative and other sanctions to work together, other things may be brought in.

The provisions allow us to have a bit more flexibility than we would have through just putting everything in the bill. We would not want to be too restrictive by saying only in the bill what must be in the fixed-penalty notice. When the Food Standards Agency consulted on the matter, it envisaged a blanket power simply to have the new sanctions. Our approach has been to put as much detail in the bill as we can—hence the two places. We have a list of must-haves, although we do not want to be too prescriptive, and we want to future proof the bill—we do not want things that will happen in the future to be missed out.

The Convener: On that same front, can you suggest anything that you think you might need to add? There is an element of futureproofing that simply says that it would be sensible to have the power in case we ever have a requirement—I think that we would understand that—and there is another respect in which we might see the list coming and wish to prepare for it. I guess that we would prefer you to see the list coming and prepare for it in a different way.

Morris Fraser: Absolutely. We would probably have things suggested to us in consultation. If we do something by order, people will have a chance to comment on that. I cannot think of an example off the top of my head, but I could probably go away and think about it and send something to you. I would not like to commit to anything specific at the moment.

Lindsay Anderson: The point of the section, believe it or not, is simply to be helpful. In setting up a new system, the Scottish Government is conscious that the administrative sanctions system is new. There is nothing similar in food law at the moment, although there are administrative sanctions systems in other areas, so the section is intended to give the system room to develop. The most likely scenario would be one in which it becomes apparent over time that additional information would be useful to recipients, and that is the main motivation. It is supposed to be a helpful provision, given the novelty of such a system in this area of law.

The Convener: I understand that. It makes perfectly good sense. Has any thought been given to the idea that, once a list is modified for any reason, the whole list should then be reproduced in another place so that somebody who is seeking the law has to go to only one place? I think that that is fundamentally what we would like to see.

Morris Fraser: In administrative terms, the list will be held on a website. I know that that is not the same as it being in the bill, but as time goes on people tend to use the original bill as a definitive list less and less because they know that amendments will be made in the normal course of things. Food standards Scotland will put the list on its website, and the Scottish Government will no doubt ensure that that happens, so there will be one place to go. Does that answer the question?

The Convener: Yes. Although lawyers may go back to the original materials, most people who have to fill in a form will go to where they find the form.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Section 60 provides that

"any supplementary, incidental or consequential provision"

and

"any transitional, transitory or saving provision"

may be made. Those are six headings with which we are familiar. Why is section 48(1) needed?

Morris Fraser: In policy terms, section 60 is very broad. Section 48 is much more specific. It has a similar effect, but I would argue that section 48 contains a more targeted and more specific order-making power, which we put in that section to help the reader to understand that there is always a power for the legislation to be changed. If we wanted to be as helpful in section 60 as we are in section 48, section 60 would have to be very long rather than just having the six headings that we are used to in those two categories.

We want to be as helpful as we can be in section 48, and our being helpful there helps the reader because the provision is right beside the rest of section 48. If we had put the provision in section 60 instead, it would have made section 60 very long.

Stewart Stevenson: I am more fundamentally puzzled as to why it needs to be in the bill at all. I can understand why one might put what is essentially in section 48 into the delegated powers memorandum that is available for people to read, because it touches on the exercise of delegated powers. I make a slight caveat in that section 48(4) gives some definitions that may add to people's understanding, but it does so only in the context of the knowledge that section 48 is not adding a single power to the bill in any way, shape or form, because those powers are already in section 60. Is that the case, or am I misunderstanding the bill from my non-legal, simple-minded point of view?

Morris Fraser: Lindsay Anderson might have a view on the legal aspect. From a policy perspective, my reading of section 48 is that, even if it is small, it adds—

Stewart Stevenson: Can you help us to understand what it adds? We can then see whether it should be there. It seems difficult to work out what is not included in section 60 as it is cast. I am not seeking to rebut the point that section 48 is helpful in terms of explanation, but I wonder whether it is necessary to put section 48(1) in the bill for readers to have access to that information.

11:00

Lindsay Anderson: There are some differences between section 48 and section 60. Section 60 is broader in that it allows for greater amendment of primary legislation, including the bill, as is quite often the case with ancillary provision. Section 48 is more limited because we are only able to alter the provisions—

Stewart Stevenson: Forgive me for interrupting. It would be helpful if you could point to any aspect of section 48 that is not created as a power by the quite modest and standard section 60.

Lindsay Anderson: I think that section 48 is there to avoid a debate about the width of section 60. It is probably there to be helpful, and there is this idea of having all the relevant provisions in one part. I can see that—

Stewart Stevenson: Would it be just as helpful if what is essentially in section 48 was put in the delegated powers memorandum as an illustration and explanation of what might be done with the section 60 powers?

Morris Fraser: It would be fair to say that.

Stewart Stevenson: Okay. That is sufficient for our purposes for the moment. We are not trying to examine policy matters as that is not our role as a committee, so I do not want to do that. The convener would surely pull me up if I strayed into policy matters.

Turning to section 48, because it is in the bill—what you have just said might suggest that the Government could consider whether section 48 is needed, but that is for another day in another place—section 48(2)(a) relates to fixed-penalty notices, compliance notices and other administrative sanctions. Will you flesh out the relationships between the various administrative

sanctions so that we can better see how the secondary legislation aspects interact?

Morris Fraser: A compliance notice is a useful tool for an authorised officer who perhaps notices something minor that is technically an offence. At the moment, the only sanction that is on offer to them is to prosecute, which might be totally disproportionate. As with improvement notices under the 1990 act for food safety purposes, the idea is to introduce something that is slightly more useful and practical—in other words, a notice saying that someone must make an improvement or face a penalty. We think that that is an entirely proportionate approach to take to minor offences.

Stewart Stevenson: It also gives legal force to something that officers could do informally anyway.

Morris Fraser: Yes, absolutely. At the moment, officers can either have a word with someone informally or take them to court. There are probably only about 15 prosecutions a year. That could suggest that everyone is doing absolutely wonderful work and there are never any breaches of food safety or food hygiene regulations. However, I think that it suggests that there is a lack of tools available to enforcement officers in local authorities and the Food Standards Agency. The compliance notice will give officers another tool as it carries slightly more force than just advice and there is a penalty for not complying with it.

The next step up from a compliance notice is a fixed-penalty notice, which can be used for something that is not such a minor offence or perhaps for an offence that has been committed several times and would normally attract prosecution. The authorised officer and the food business could agree that it would be more appropriate to have a fixed penalty for the offence than to go through with prosecution, in which case a fixed-penalty notice will be issued. After a certain time, the notice will be due for payment, and failure to pay is also an offence.

The compliance notice and the fixed-penalty notice cover two different levels. However, circumstances can arise where somebody does two or three different things wrong. Some of those things might require a fixed-penalty notice and some might require a compliance notice, rather than one blanket notice being issued. There are two separate powers, but notices might be issued simultaneously to the same business, so we must have a way of organising how notices fit together and how they fit with other enforcement tools that are available under the bill, such as improvement notices.

Stewart Stevenson: Section 48 talks about facilitating the issuing of further administrative sanctions. What does that mean? Will you give an example of how that facilitation would come into play?

Morris Fraser: The facilitation would be the ability to combine two types of notice. Combining them and seeing how they react with each other would require facilitation.

Stewart Stevenson: Is “facilitating” a standard legal term? I have not seen it in other legislation. The bill refers to “facilitating, prohibiting or restricting”. Will it be easy for the courts—if a case goes there—to interpret the word “facilitating”?

Morris Fraser: It is a legal term. I ask Lindsay Anderson whether it is standard.

Lindsay Anderson: I am not sure that I can think of another example off the top of my head.

Stewart Stevenson: So the term has the dreaded status in the civil service of being novel.

Under section 48(5), ministers may modify the arrangements, but the provisions seem quite unlimited. Ministers could modify the definition of “another sanction”. The power seems to be improbably wide. Will you give examples of what would justify changing the definitions and going to the heart of some of what the bill will do?

Morris Fraser: The power is not to create a new sanction but to describe another one.

Stewart Stevenson: That is a bit subtle for me. Are you saying that the power could be used to redefine the sanctions but not to create a sanction?

Morris Fraser: None of the sanctions in section 48(4) is created by that subsection; the items in the list are created elsewhere. Subsection (4) just defines; it does not set sanctions. Subsection (5) involves that terrible term “futureproofing” again. To ensure that something that is enacted is applicable along with the other sanctions as part of the toolkit for environmental health officers, we have a definition. Sanctions are not being created; there is a wide power of definition.

The Convener: That is helpful.

I cannot help wondering whether there are precedents in health and safety law, such as factories acts, for what the bill does. Perhaps you will not want to talk about that now but, if other people ask you about the policy background, that information might be helpful.

Morris Fraser: Thank you.

Stuart McMillan (West Scotland) (SNP): Section 48(3) permits the modification of sections 37 and 44 by regulations that are made under section 48(1) for the purposes that are mentioned in section 48(2), when ministers consider that

necessary or expedient. Sections 37 and 44 relate to the effect of a fixed-penalty notice or a compliance notice on criminal proceedings. Will you explain how the power is intended to be exercised? In what circumstances might it be necessary or expedient to modify sections 37 and 44?

Lindsay Anderson: The issue goes back to what Morris Fraser said about the regulation of the relationship between the different penalties that we are creating. The provisions address the possibility that a fixed-penalty notice and a compliance notice will be issued at the same time. Both notices have the same effect on criminal liability, but that is discharged in different ways, which depend on the type of notice.

The provision in section 48(3) is to help to regulate that process, so that there is not a discharge of criminal liability in both cases and the way that the two notices act together to discharge liability can be regulated. It was again thought that it would make more sense, if both a fixed-penalty notice and a compliance notice were going to be issued, to have one point at which liability was discharged in the observance of the two notices. Otherwise, there would be a slightly strange position whereby both notices discharge liability, but the effect that discharge with respect to one notice would have on the person's obligations under the other notice would not be obvious. That is why section 48(3) is in the bill.

Stuart McMillan: Is it viewed as more of a simplification of the procedure?

Lindsay Anderson: Yes, in an instance in which it is decided that the two notices can be served with respect to the same set of circumstances. The provision is intended to simplify the situation for the recipient of the notice when there is a layering of notices, so that their position is clear and they know exactly what they have to do and what the effect of that will be on their liability.

Stuart McMillan: My second question is on sections 37 and 44. Can you explain why it is appropriate to permit the modification of sections 37 and 44 using subordinate legislation? We must bear it in mind that sections 37 and 44 of the bill prohibit the bringing of criminal proceedings in circumstances in which a fixed-penalty notice or, as the case may be, a compliance notice, has been issued. They also prevent conviction in cases in which payment has been made under a fixed-penalty notice or the terms of a compliance notice have been met.

Lindsay Anderson: I suppose that the answer is the same as my previous one. The provision is there to regulate the relationship between the two notices. It is obviously not completely unheard of to give ministers a power to alter the terms of primary legislation through regulation. To go back to the discussion that we had about section 60, that section is broader and section 48 is narrower, so the provision is about allowing an amendment of the primary legislation only in very specific circumstances. The provision was thought appropriate because of the significance of what sections 37 and 44 deal with and the fact that they deal with liability. It is necessary to make that very clear when both types of notice are being used in one set of circumstances.

Morris Fraser: The provision makes it clear how the liability and obligation are discharged in relation to the two; it is about simplification.

The Convener: Would you accept, though, that the bill, in principle, allows the Government to alter the intention of sections 37 and 44 that something might be discharged and that it could do so by subordinate legislation?

Morris Fraser: I think that that is right, although it is not the intention.

The Convener: I am not arguing that the Government would want to do that, but at this end of the table we worry about what it is able to do.

Morris Fraser: I will turn to a lawyer at this point to ensure that I am not saying the wrong thing and making a promise that cannot be kept.

Lindsay Anderson: I suppose that this is a lawyer's answer: any change must be necessary or expedient in connection with the operation of the act; it would have to be exercised in a way that was lawful within the vires of the power. As I say, the intention is to regulate the liability. Beyond that, it would not be for me to comment on the policy.

John Scott: Nevertheless, it appears that in general the bill is largely about taking many more powers or the broadening of powers. If that is the case, what is the justification for it?

11:15

Morris Fraser: The broadening of powers is very much in reaction to the horsemeat scandal and subsequent situations, and they come from the Scudamore expert advisory group that the Scottish ministers set up and from the Elliott review for the UK, which called for a broadening of food safety and, in particular, food hygiene. People are looking at ways to tackle food fraud and so on.

The bill is not aimed specifically at that situation, though. The broadening of powers comes from that, but it also comes from stakeholders such as local authorities, which are clear that they see the bill as a very welcome tool. The bill does broaden

powers, but it also offers more practical administrative and non-court, rather than quasi-judicial, options to help food businesses and local authorities to avoid very costly prosecutions and so on. There is a widening of the available arsenal that is welcomed by stakeholders.

The Convener: I thank John Scott for his question, but we have to be careful not to get into the policy issue. What Mr Fraser said was helpful, but when we are considering law that is widening powers that in future could be—I hesitate to use the word "abused"—used by Governments to do something expedient, which is a historical word of some significance, we as legislators should ask why that is being done. We have heard what has been said on that, and I do not think that anything needs to be added.

Mike MacKenzie (Highlands and Islands) (SNP): Sections 48(3) and 48(5) contemplate potential modification of primary legislation. Why do you consider the negative procedure to be appropriate for that purpose?

Lindsay Anderson: It was thought that section 48 was relatively limited in that it applies as a specialist power for part 3 of the bill in relation to regulations made under that part. To that extent, the powers in section 48 are supplementary and incidental, but they are only for specific purposes. It was therefore thought appropriate to go with the negative procedure for that.

Morris Fraser: No new offence is being created. Section 48 just covers operational details and gives flexibility, rather than powers that could be much more widely used.

Mike MacKenzie: Okay. I am not absolutely certain that that satisfies me, but we might think further about it.

Is it intended that the guidance issued by the Lord Advocate under section 50(1) of the bill will be published? If so, why is it not considered necessary to include a requirement for such publication on the face of the bill?

Morris Fraser: It is really a matter for the Crown Office and the Lord Advocate to decide how best to make information about what they do available to the public. I do not know whether my colleague thinks that it is worth explaining a bit about that.

Lindsay Anderson: There is probably not a huge amount that we can say about it. Obviously, it is a matter that will be for the Lord Advocate's discretion, given that it is in relation to an enforcement and operational matter. The Crown Office would have to answer the question whether guidance should be published about it. The committee should probably ask the Crown Office about that.

Morris Fraser: I am not an expert on this, but my understanding is that the Lord Advocate's guidance on enforcement, criminal proceedings and so on is not always published, for fear of telling criminals what it is that they can and cannot do. That does not refer to Government policy, just to my understanding of what happens.

Mike MacKenzie: Okay. Thank you.

The Convener: Where do I find the boundary between, on the one side, enforcement and ultimately criminal proceedings—on which I entirely understand your answer—and, on the other side, administrative processes that are designed to seek compliance, which, after all, is what much of this and other bills are about? Is there any guidance for us as to how far over someone has to be before it becomes the Lord Advocate's bailiwick?

Morris Fraser: That is a matter for the Lord Advocate in giving guidance to the Crown Office, which makes its own judgments on how far things can go one way or another. All we can do is set out in the bill what we think is the right shape of things and the right level of penalties. The Lord Advocate's guidance will help the courts to decide.

Are you asking whether a food business should take a fixed penalty when it knows that the Lord Advocate's guidance suggests that the court has a lower penalty?

The Convener: I am asking not so much that specific question as whether there is a point in all those processes that is purely administrative—I am trying to coin a legal term—and, therefore, in which the Lord Advocate is not concerned. Is there a process that is simply administered by the local authority, which tells a food business to do something and that, if it does not do it, the matter will go to another level? Is there a legal line?

Lindsay Anderson: It might help to go back to section 48(2)(c), which concerns the application of provisions from the Food Safety Act 1990. Subparagraph (ix) mentions

"section 40 (power to issue codes of practice)".

The bill will make consequential amendments to the 1990 act. Section 40 of that act is a power to issue codes of recommended practice, which will sit separately from the Lord Advocate's guidance. That power might be drawn down in making regulations under section 48 of the bill, but the power exists anyway in section 40 of the act to issue guidance to food authorities, which, in effect, means local authorities in Scotland. That might also be relevant.

Morris Fraser: I should have started with the fact that the Food Standards Agency publishes a code of practice that sets out what food law is and how food businesses must comply with it. It also

sets out the relationship that you are discussing, convener: where things sit on the continuum from administrative through to legal matters. That is renewed regularly and we will use the power that Lindsay Anderson mentioned.

Stewart Stevenson: I will test an analogy and find out whether it helps us. Police Scotland has a number that is in excess of the legal speed limit, but below which it will not prosecute a driver for speeding. However, that number is not published because, of course, it would simply become the speed limit if it were. If, for the sake of argument Police Scotland decided not to prosecute someone who did 80mph in a 60mph zone—clearly, that is not the number—everybody would drive at 80mph.

On not publishing the Lord Advocate's advice in respect of the bill and other matters, is it fair to say that it is similarly not good public policy to publish the flexibilities that are expected in practice from the system and which could be changed at short notice if they proved to be overly flexible?

It is worth saying on speed limits that, in Australia, the flexibility is zero whereas, in Scotland, it is somewhat different, as I know from my previous experience—my experience as transport minister, not as a driver, I should hasten to add.

Lindsay Anderson: Yes. That is exactly the sort of scenario that we have in mind. However, as I said, it is not for the Government to comment on that.

The Convener: Thank you. That takes us to the end of our prepared thoughts. If colleagues have nothing else to ask, we have reached the end of the item. I thank the witnesses very much for their patience and for answering our questions so comprehensively. I will briefly suspend the meeting to give them half a chance to get away.

11:25

Meeting suspended.

11:25

On resuming—

Instrument subject to Affirmative Procedure

Single Use Carrier Bags Charge (Scotland) Regulations 2014 [Draft]

The Convener: We come to agenda item 3. No points have been raised by our legal advisers on the draft regulations; members have the written submissions before them. If members have no comments, is the committee content with the draft regulations?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Assigned Colleges (Scotland) Order 2014 (SSI 2014/80)

11:26

The Convener: We come to agenda item 4. The meaning of the transitional provision in article 3 could be clearer in that it would have been clearer to have referred to schedule 2B to the Further and Higher Education (Scotland) Act 2005 rather than just to schedule 2B to the 2005 act. In particular, it would have been clearer to have referred to the short title of the act instead of abbreviating it, given that there is only one reference to the act in the operative provisions of the order.

Does the committee therefore agree to draw the order to the attention of the Parliament on the committee's reporting ground (h), as the meaning of the transitional provision in article 3 could be clearer?

Members *indicated agreement.*

John Scott: 2B or not 2B.

The Convener: Indeed.

Electronic Documents (Scotland) Regulations 2014 (SSI 2014/83)

Road Traffic (Permitted Parking Area and Special Parking Area) (Argyll and Bute Council) Designation Order 2014 (SSI 2014/84)

Parking Attendants (Wearing of Uniforms) (Argyll and Bute Council Parking Area) Regulations 2014 (SSI 2014/85)

Road Traffic (Parking Adjudicators) (Argyll and Bute Council) Regulations 2014 (SSI 2014/86)

Glasgow Commonwealth Games Act 2008 (Duration of Urgent Traffic Regulation Measures) Order 2014 (SSI 2014/92)

Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014 (SSI 2014/95)

The committee agreed that no points arose on the instruments.

Instruments not subject to Parliamentary Procedure

Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2014 (SSI 2014/99)

11:28

The Convener: We come to agenda item 5. Our legal advisers have raised a number of points in relation to the instrument. First, it is defectively drafted in a number of respects. In rule 2, "presenting officer" is defined as the person appointed under rule 9(1), when the correct reference should be to rule 8(1). Again in rule 2, "investigating officer" is defined as the person appointed under rule 5(1), when the correct reference should be to rule 4(1). Rules 8(1) and 8(6) refer to the "presiding officer", when the correct references should be to the "presenting officer".

Does the committee therefore agree to draw the instrument to the Parliament's attention under reporting ground (i), as the drafting is defective?

Members *indicated agreement.*

The Convener: A further point has been raised by our legal advisers, which is that the meaning of rule 6(2)(a) could be clearer. Rule 6(2)(a)(ii) refers to

"the date on which the tribunal notifies the judicial office holder that it has determined an application under rule 5(1)".

Under rule 5(4), when the tribunal refuses an application under rule 5(1), it must notify the judicial office-holder of that decision, but there is no provision for the tribunal to notify the judicial office-holder in circumstances in which it has granted an application under rule 5(1). Accordingly, for the purposes of rule 6(2)(a)(ii), it is not clear what the relevant date is in circumstances in which the tribunal has made a determination to grant an application under rule 5(1).

Does the committee therefore agree to draw the instrument to the Parliament's attention under reporting ground (h), as the meaning of rule 6(2)(a) could be clearer?

Members *indicated agreement.*

The Convener: The committee may, however, wish to note that the Lord President's private office has laid a corrective instrument that rectifies the drafting errors and clarifies the meaning of rule 6(2)(a). The corrective instrument, which is also before the committee today, revokes the present instrument prior to its coming into force.

Does the committee agree to note that?

Members *indicated agreement.*

Post-16 Education (Scotland) Act 2013 (Commencement No 4 and Transitory Provisions) Order 2014 (SSI 2014/79)

Scottish Independence Referendum (Chief Counting Officer and Counting Officer Charges and Expenses) Order 2014 (SSI 2014/101)

Act of Sederunt (Fitness for Judicial Office Tribunal Rules) (No 2) 2014 (SSI 2014/102)

The committee agreed that no points arose on the instruments.

The Convener: The committee may wish to note that SSI 2014/102 corrects the errors in SSI 2014/99.

That brings us to agenda item 6, so I move the meeting into private.

11:30

Meeting continued in private until 12:00.

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