The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 16 December 2014

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE

36th Meeting 2014, Session 4

CONVENER

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

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Margaret McCulloch (Central Scotland) (Lab)
*John Scott (Ayr) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Paul Cackette (Scottish Government)
Joe FitzPatrick (Minister for Parliamentary Business)
Colin Gilchrist (Legal Adviser)
Steven MacGregor (Scottish Government)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 16 December 2014

[The Convener opened the meeting at 09:30]

Deputy Convener

The Convener (Nigel Don): Good morning. I welcome members to the 36th meeting in 2014 of the Delegated Powers and Law Reform Committee, and I ask them to switch off any mobile phones.

Agenda item 1 is the choice of a new deputy convener of the committee. The Parliament has agreed that members of the Scottish National Party are eligible to be chosen as the deputy convener. That being the case, I invite nominations for the post.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I nominate John Mason.

The Convener: Given that John Mason is not saying anything, I take it that he is happy to take on that role.

John Mason was chosen as deputy convener.

The Convener: That gives me the opportunity to thank Stuart McMillan and Richard Baker, who previously served on the committee. They have moved on to pastures new and have taken their skills with them.

Decision on Taking Business in Private

09:31

The Convener: Agenda item 2 is to decide whether to take items 9 and 10 in private. Item 9 is consideration of a paper that will inform our draft report on the Air Weapons and Licensing (Scotland) Bill at stage 1, and item 10 is a chance for the committee to consider the evidence that we are just about to hear from the Minister for Parliamentary Business. Are we agreed to take those items in private?

Members *indicated agreement.*

"Report on instruments considered in 2013-14"

09:32

The Convener: Item 3 is consideration of the committee's work during the parliamentary year.

I welcome the Minister for Parliamentary Business, Joe FitzPatrick, and two Scottish Government officials: Steven MacGregor is legislation programme manager in the Parliament and governance division of the Scottish Government, and Paul Cackette is a solicitor in the Scottish Government legal directorate. Good morning, gentlemen, and thank you very much for coming to the meeting.

This is one of the highlights of our year. We worry about the process and the things that have happened, and it is good to be able to review them in a positive way.

John Scott (Ayr) (Con): Good morning. I will start off in a positive way.

The committee's "Report on instruments considered in 2013-14" noted a reduction in the percentage of instruments that were reported on compared with the previous reporting period. Furthermore, the report was the second successive one to note a reduction in the percentage of instruments that were reported on. The committee welcomes those figures, but what steps is the Scottish Government taking to maintain that improvement and, indeed, to reduce further the numbers of instruments that are reported on?

The Minister for Parliamentary Business (Joe FitzPatrick): First of all, I thank the committee for highlighting a positive trend. It is helpful to us in Government and our officials that that is recognised.

We want that trend to continue. Obviously, we need to do our best to keep our standards as high as possible, and we have put a few things in place. It is a continuing development. We have detailed guidance for our policy teams that is constantly reviewed to ensure that there is best practice and that changes in the law and the committee's comments are taken into account in the advice that we give to officials. The quarterly seminars on Scottish statutory instruments for officials have also been very successful, and we will continue them. The clerks have been very helpful in taking part in them.

A major point is to keep that continuing improvement on-going. That is our intention. I thank the committee very much for recognising the progress that has been made to date.

John Scott: Indeed, and welcoming that makes our job a great deal easier. Thank you.

The Convener: In our report, we noted that the number of statutory instruments that had been laid seemed to be significantly lower than in previous periods. Is that significant, or is that just the way that things have fallen?

Joe FitzPatrick: That is not really significant; it is just the way that things have fallen. Different pieces of legislation will have different requirements for instruments. There is no underlying trend. Sometimes very complex laws have fewer secondary legislation requirements whereas what looks like a non-complex piece of primary legislation might require quite a lot of secondary legislation. As I said, there is no underlying trend.

The Convener: In that case, perhaps I can pick up on a trend that we have observed. In previous years, there have been spikes in the number of instruments, particularly coming up to a recess. However, the process seems to have been modified, and we are now seeing fewer such spikes, which is obviously welcome. Can you tell us about the processes in that respect?

Joe FitzPatrick: We have put in place mechanisms to ensure that, across the organisation, people understand this committee's desire not to have such spikes and to try to manage them down. Looking forward, we do not envisage any major spikes, but we are coming towards the end of the parliamentary session, when there is always a particular pressure. We have already started the process of alerting bill teams of that and making it clear that we need to do our best not to end up with a big spike at the end of the session that would put a huge pressure on the committee.

Paul Cackette will say a bit more about how we are managing the process.

Paul Cackette (Scottish Government): There are two sorts of spikes. The first are spikes at traditional times of year when instruments come into force and at the end of parliamentary sessions. We might well need to manage some spikes around next year's United Kingdom general election, when certain instruments might need to be introduced in parallel with Westminster.

The other sort of spike has to do with individual implementation processes, and we might discuss that issue a bit more during this morning's discussion. The concern was raised by the committee at our previous evidence-taking session in April, when the point was made that we needed to look forward and make plans. At that point, the implementation process for the same-sex marriage legislation was coming up, and we took the point away and spoke to the policy teams to ensure that the process was properly managed.

The risk of big-bang implementation is that it might require a cluster of instruments to be taken together, but there was planning not only to smooth things out but to ensure that the related instruments were put before the committee at the same time to allow members to see the broader picture.

We are doing some forward planning to ensure that we are alert to what is coming up, and that work will go on into the period ahead. Indeed, we are beginning to look at the clusters and groups of instruments that we expect between now and May 2016 so that we can—ideally—plan things to make it easier for the committee to carry out its scrutiny role.

The Convener: Thank you. We will, as you have suggested, discuss implementation packages later, but do colleagues have any comments at the moment?

Stewart Stevenson: Would you care to agree that convenience for this committee is one thing but that having a relatively uniform workload would be a more efficient use of Government and civil service resources in drafting and bringing forward these instruments?

Paul Cackette: I absolutely agree. Such a situation puts pressure not only on this committee; as far as our drafters are concerned, dealing with peaks and having to work to deadlines increase the risk of things being rushed. We hope that only minor issues will arise, but the situation enhances such risks and the more we manage the process to take the pressure off individual drafters and policy leads, the better. You make a good point.

Stewart Stevenson: There is also an increased likelihood of being accurate the first time round, which helps everyone.

Paul Cackette: Absolutely.

John Scott: You have already touched on the issue of the movement towards 2016. As far as I can see, historically there has always been a spike in the six months prior to an election. From what you have said, you are obviously aware of that.

Joe FitzPatrick: Yes. Guidance on managing the process in the best way possible is already at the planning stage, and that strong guidance will go out to bill teams and officials to ensure that they do their best. Obviously I cannot guarantee that there will be no spike at the end of the parliamentary session in 2016, but we are alert to the situation and we will do our best.

John Scott: Fair enough.

The Convener: You have already mentioned your interactions with the UK Government, which

of course happen for all sorts of very good reasons. I note, however, that a number of instruments breached the 28-day rule because you tried to lay an instrument in terms that were the same as the UK Government's instrument for the rest of the UK. That is entirely understandable, but I believe that you agreed to speak to David Mundell MP on how an approach to that matter might work. Can you report any progress in that respect?

Joe FitzPatrick: We have flagged the issue up with Mr Mundell, who has taken it back in good faith. However, I point out that officials in the UK Government, too, can face significant pressure from changes to the legislative programme, Opposition amendments and so on. Some things are not entirely within the UK Government's gift, but my understanding is that Mr Mundell is doing his best to ensure that other Government departments are alert to the different timings that this Parliament works under.

It will remain an issue, but we will continue to flag the issue up with Mr Mundell; he will continue to flag it up with Government departments; and I hope that the issue will not arise more often than it needs to. There will be times when, for various reasons, the different timescales will conflict.

The Convener: We understand that we live in the world of real politics and that not everything will work in the way we want it to work.

John Mason (Glasgow Shettleston) (SNP): You are probably aware of the committee's difficulty in scrutinising the delegated powers provisions in bills between stages 2 and 3 because of the timescales involved. As a member of the Finance Committee, I can say that we, too, have had some issues with timescales with regard to financial memorandums.

In its submission to the Standards, Procedures and Public Appointments Committee inquiry, this committee expressed the view that it might be beneficial to extend the period between stages 2 and 3 and in turn the time before stage 3 by which a revised or supplementary delegated powers memorandum might be lodged. When you came before the committee earlier this year, you said that you would review the matter. Can you tell the committee what progress has been made?

Joe FitzPatrick: We have taken on board the concerns that the committee expressed just prior to my appearance last year, when certain issues arose, and I hope that since then we have tried to ensure that those issues have not arisen again.

My bottom line in the remarks that I make to bill teams before a bill is introduced is that they should do absolutely everything possible not to bring in new powers at stage 3, because it puts pressure on this committee, and we have managed to manage that situation.

The other point that I would make is that, when the committee has made it clear that it would not be possible for it to look at certain powers, we have extended timescales to ensure that it can do so. We need to work together as much as possible, and I will try—within the powers that I have, of course; I cannot foresee everything that might appear—to ensure that the pressures that you experienced two years ago do not happen again.

John Scott: I wonder whether you will expand on that theme. Our legal advisers have raised the point that thoughts on the interaction between new powers introduced at stage 3 and existing powers, and the ramifications of such moves, might occur only over a period of time—indeed, they can even occur in the bath—whereas working to a very constrained timescale might make it harder to understand what issues might arise.

Joe FitzPatrick: The point is well made, and my message to bill teams is that, unless there are exceptional circumstances, they really should not be introducing new powers at stage 3. When such measures have to be brought in, I certainly appreciate the work that this committee and the Finance Committee carry out in looking at them. We need to ensure that you have the time to do your job, which is, after all, part of the process. We must remember that, at the end of the day, this is all about getting legislation that works and which is robust—that is in everyone's interests.

The Convener: Sitting at this end of the table, I think that my perspective is that we as a committee are almost bound to growl at the Government if it introduces things at stage 3, simply because, as a matter of process, it has to be bad and is asking for trouble.

Joe FitzPatrick: I will do my best to stop you growling, convener.

The Convener: Thank you.

With regard to packages of instruments, there have been cases in which the quality of drafting plainly was not as good as anyone would have wanted. In that respect, I quote the examples, which you will be well aware of, of instruments under the Bankruptcy and Debt Advice (Scotland) Act 2014 and the Public Bodies (Joint Working) (Scotland) Act 2014. Can you explain to the committee what you have done to ensure that such multiple errors do not occur again?

09:45

Joe FitzPatrick: Obviously, the first packages came under the Police and Fire Reform (Scotland)

Act 2012, and we all learned a lot from that process.

Last year, I said that the next major package would be for the implementation of the Marriage and Civil Partnership (Scotland) Act 2014. That example shows that we have learned the lessons. That process is what we should aim for in everything, working with the clerks to this committee and to other committees. However, there have been areas in which we have not worked quite as well as we should for particular reasons.

It is a question of communication between the committee and our officials to ensure that we all understand what we are trying to do and the processes around packages. There are a few more packages coming up, and we have continuing meetings to ensure that officials liaise with clerks as part of the process, so that there are no surprises, which is one of the important things.

The Convener: John Scott wants to extend that.

John Scott: Yes—I will develop that theme. We have had concerns about certain orders that commenced sections of an act being brought into force before Parliament was afforded the opportunity to scrutinise them. That occurred in relation to instruments commencing sections of the Public Bodies (Joint Working) (Scotland) Act 2014 and the Victims and Witnesses (Scotland) Act 2014. That practice is concerning to the committee, so we would welcome a commitment from the minister that efforts will be made to avoid repetition of those occurrences.

Joe FitzPatrick: With the Public Bodies (Joint Working) (Scotland) Act 2014, there was certainly an example in which we did not follow the correct practice, and a letter of apology was sent to the committee on that. The timescales for the implementation were tight, but nonetheless we should have followed the procedures that we have in place to alert the committee.

I think that there was a second occasion on which we did not meet the timescales. However, on that occasion, we followed the convention of giving an explanation in advance. It makes a difference if, before something has happened, we have explained why.

With the Victims and Witnesses (Scotland) Act 2014, the situation was slightly unusual in that the commencement date of 13 August had been agreed with the justice partners and practical arrangements had been put in place, such as information technology arrangements and staff training procedures. We were on course to lay the order within the correct timescale and then, close to the end, something was identified that meant that the order could not be laid.

There was not an intentional shortening of the time; instead, an unexpected change led to the delay in the order being laid. At that point, we had two choices: we could have either laid the order with a reduced time or changed the implementation date. Given that all the work had been done with the partners for a commencement date of 13 August, it would have been more disruptive to change that.

We always do our best to meet the timescales that we have agreed and which are best practice, but there will be occasions when we have to say, "Sorry, but we have not managed to keep to the timescale," and then give the reasons. I hope that the committee will accept that the reasons are valid.

John Scott: Of course we will—we are reasonable people, we hope. As a general principle, I am sure that those in the Government do not like surprises any more than we on the committee do. As a generality, if we can avoid such cases in future, we would welcome that.

Joe FitzPatrick: The message that I have tried to put out across the organisation is that, if at any point we cannot meet the timescales that we are expected to meet, we should be as transparent and as up front as possible about that, so that committees have the maximum time.

John Scott: That would be appreciated.

Stewart Stevenson: On a parallel matter, it occurs to me that there are bits of acts that have not been commenced although they have been on the statute book for a considerable time. In some cases, that is deliberate. For instance, when I took the Climate Change (Scotland) Bill through the Parliament, there were some provisions that we said in the debate would be commenced only under some contingent circumstances, and that is fair enough.

Do we have any sense of whether bits of the legislation that we have passed since 1999 have yet to be commenced? I suspect that you probably do not know, but I wonder whether it is time that we considered the matter.

Paul Cackette: I do not know the answer to that question off the top of my head. It is an issue. If the Parliament has decided that a piece of legislation should be enacted, there is clearly an obligation on the Government to respect the will of the Parliament and, at the appropriate time, give effect to it. Sometimes, that can take a little while.

The example that you gave is interesting because, in relation to the Climate Change (Scotland) Act 2009, the Parliament understood that there would be some delay before the provisions took effect.

Stewart Stevenson: And, indeed, that they might never be commenced. However, that was part of the debate.

Paul Cackette: Yes. The principle that respect should be shown for the Parliament's decision to enact legislation and that it should be commenced is important.

There are some older pieces of legislation from Westminster that, for various reasons, have not been commenced and some acts that, for various reasons, are not yet fully commenced. Do not pin me down on what they are, however; I would have to go back to the memory banks.

I am conscious of the issue, but I am not aware of any such examples from the Scottish Parliament since 1999. However, I do not have a comprehensive knowledge of the statute.

Joe FitzPatrick: We can take that away and see whether it is not too onerous to pull the information together.

Stewart Stevenson: It is a matter of curiosity only, not necessity, so if it proves too onerous, do not worry.

The Convener: I am not entirely sure whether it is in the committee's remit but, on the other hand, if we do not know what policy we are looking for, it is difficult to say which committee's responsibility it is, so perhaps it is ours by default. It might be worth a quick look sometime.

Joe FitzPatrick: We will see whether it is easy to do.

John Scott: If a piece of legislation has not been commenced and, therefore, not been required or used, is there an argument for saying that there should be a sunset clause on it after, shall we say, 15 years?

Joe FitzPatrick: That would be something for the relevant committee to consider. Such matters might be picked up by future consolidation exercises.

The Convener: We will move on to transitional provisions. We have had some cases that indicated that the processes perhaps need to change a little. The Government has made some commitments about the way that it introduces transitional provisions but, although we have a good working relationship on that—that is appreciated, although there is one exception—that mechanism is not yet in standing orders. My concern is that a future Government would not be bound by it. The committee would want you to be given some statutory instructions on how to deal with transitional arrangements, simply because they have caused trouble in the past. What is your feeling about that?

Joe FitzPatrick: We need to be careful to ensure that we continue to have flexibility within the system to ensure appropriate best practice. One of the challenges would be in working out what provisions are significant and how we would define such things. That might be difficult and we certainly do not want to end up spending huge amounts of your time and ours arguing about whether a package is significant.

We try to lay instruments before the Parliament with 40 days to give extra time for such packages. The time that we spend discussing matters with your clerks and legal advisers is all well spent and it helps us to ensure that we do not make errors in transitional provisions. Such errors are very infrequent, but I do not want to underplay the significance of the cases that you highlighted.

The Convener: The difficulty is that, although errors are very rare, they turn out to be significant when they do appear. That is the problem. If one does rear its head, it is not a minor case.

I wonder whether there could be some provision in standing orders whereby the time that you are now allowing must be allowed but you would be able to write to the Presiding Officer explaining that you felt that a certain case was an exception, as happens in some other instances. Could you live with such a provision? The committee could then see a process that had been written down.

Joe FitzPatrick: The challenge is around the complexity of determining what is a package, what is not a package and so on. We are trying to work to a standard that gives you the maximum amount of time.

We are working to ensure that robust executive notes are attached to instruments to provide a legal explanation. Perhaps more important for the committee, there are also clear, plain-English policy notes so that people can understand what the whole package is trying to do and why we are doing things in the way we are doing them.

Paul Cackette: I, too, stress the point about flexibility. Whether it is a practice or a standing order, there are circumstances in which it would not be appropriate to apply a provision. Things need to work in a flexible way.

We have worked hard to ensure, as far as we can, that policy teams know what the commitment is, and generally it has been adhered to. I suspect that, where it has not been, we will have written to you to explain why we have not adhered to it. There is a question about whether a difference would have been made in the circumstances.

There is also the issue that the minister raises about how we define "complex" in working out whether something will be caught by the rule. It would be unhelpful to end up having a discussion

with the committee about defining "complex", as that would take your eye off the real issue, which is to ensure that we do things properly in the first place.

The Convener: I am grateful for the discussion. Clearly, we will not resolve anything now, but those comments are now on the record.

Let us move on to consolidation.

Stewart Stevenson: Minister, you said that we should have legislation that works. In that regard, I am wondering in particular about significant sequences of amending secondary legislation, particularly where lists are updated. In one instance that we considered, there were 18 separate amendments to a list. Does the Government have a clear view on the point at which it should go back to base and consolidate so that someone who wishes to know what the law is does not inadvertently misunderstand things by failing to spot one of many amendments?

Joe FitzPatrick: That is an important point. There is a resource issue, in that we cannot consolidate everything. It is not just a matter of taking the amendments into the text of the legislation; it sometimes involves rewriting the instrument in modern-day language and with proper drafting procedure. That can be more work intensive than might appear to be the case to a layperson.

We took forward 10 consolidations in the reporting year 2013-14, which is more than in the previous year, and we have already done a further two this year. The trend is that we are doing more each year.

There is no question that a consolidated instrument is much easier for everyone to follow. It is less important to consolidate instruments that are intended for lawyers than it is to consolidate instruments that are intended for end users and members of the public to understand. We also have to take that into account.

When determining consolidations, we also take this committee's views into account. If you flag up amendments that you think are amendments to amendments—provisions that have gone a stage further—we will consider them for consolidation. Perhaps we could consider a way of formalising that in future.

Stewart Stevenson: I understand what you say about lawyers, but might there not be merit in legislation being so simple that even laypeople could understand it, thus avoiding the expense of employing the lawyers?

Joe FitzPatrick: In an ideal world, perhaps.

10:00

Stewart Stevenson: The fact that an amendment to a piece of secondary legislation may not conform to the present standards of drafting and layout will necessitate the drafter of that amendment considering what the instrument will look like after amendment, so they will of necessity have produced a copy of the secondary legislation in its new, amended form. Welcome though the consolidations have been, are there not even more opportunities for consolidation in future?

Paul Cackette: In practice, it would not necessarily be the case that the amender will have a consolidated version, but they would have to work through a heavily amended instrument to work out what the current law is and what amendments need to be made. That is certainly true.

In thinking of a response to your question, one of the things that I reflect on is that there are a number of different circumstances as regards the purpose of legislation and the purpose of amendment. You gave the example of lists and made the valid point that the purpose of legislation is for it to be used in the real world, and there are some pieces of legislation that are more directly used by the outside world. That factor suggests that legislation should be as up to date and modern as possible. Lists are an example of that, in many ways.

The age of the instrument is also important, as are the number of times it has been amended and the number of times amendments have been amended, which can make things complicated.

On the point about resources, in a strange way, the older the instrument and the more out of date the drafting, the more sensible it is to consolidate, but the harder it is to update the references and bring everything into line with modern drafting practice. That may mean that we do not achieve as many consolidations as we could, because we focus on the ones that need most work.

All those factors come into play in deciding the end outcome, but the idea of making legislation as modern, up to date and accessible as possible, and as easy to use as possible, is certainly an aspiration that makes sense and that we would agree with.

Stewart Stevenson: Let me move on to the accessibility issue. The website legislation.gov.uk, which I think is under the control of the UK Government but to which we clearly contribute with our legislation, will sometimes, where primary legislation is concerned—at a relatively leisurely pace of years—reflect amendments that have been made by other pieces of legislation, so we can see what has been deleted and what has

been added and we can, in essence, read from top to bottom. That is helpful, but there is no similar process for secondary legislation. Is it perhaps time to consider using that facility when we are not moving to consolidation, to at least give people better access to what an amended piece of secondary legislation might look like?

Joe FitzPatrick: One of the challenges would be the number of secondary instruments across the UK. If that was to be done quickly for the whole of the UK, it would be a pretty sizeable piece of work.

We are increasingly moving to online resources, and we need to ensure that we are using them to the max. Maybe we should suggest that Scotland be a pilot in taking such a project forward. There might be an opportunity there, but I do not know, because it is a UK-wide resource and the Northern Ireland Assembly and Welsh Assembly are also parts of it. We are not the major players, because the major player is obviously the UK Government, which passes the largest number of instruments. However, your point is valid and we should examine the potential to use that resource to get online transparency and usability.

Stewart Stevenson: It is certainly true that there is a lot of legislation. I looked at my records from my five years or so as a minister and I introduced 127 pieces of secondary legislation, so there is a lot of it.

Joe FitzPatrick: There is a lot of it even across the Scottish Government but, as you can imagine, there is even more across the UK.

John Mason: The committee previously expressed concern about the quality of the drafting of the Teachers' Pension Scheme (Scotland) Regulations 2014, although we welcomed the amended version, which corrected the errors. However, the committee understands that there are plans to lay other pension instruments. Can you give the committee any assurance that the problems that we had in the past will not be repeated?

Joe FitzPatrick: Sometimes we just have to put our hands up and thank the committee for bringing something to our attention, and that is what happened in that case. I think that we took the right action by withdrawing that instrument and laying another one. We have redoubled our efforts to make sure that there is proper checking so that the quality is as high as possible. A degree of work on that is going on across the organisation. Paul Cackette can talk more about our efforts to improve the quality of instruments.

Paul Cackette: There is no doubt that, as far as that instrument is concerned, the Government and my directorate did not do the professional job that we ought to have done. We were able to resolve the issue, at least in so far as nobody will be adversely affected as a result of the amendments not taking effect until 1 April next year. However, that was certainly an example of the proper processes not being applied and not being followed. It shows that we need to remain vigilant in relation to the overarching control processes and in responding to the scrutiny of the committee.

We have taken steps to make sure that, in the particular area of activity concerned, proper procedures are followed, and that will include future pension regulations. We will make sure that our processes for ensuring the high quality of instruments are followed in order to avoid that difficulty happening again.

Margaret McCulloch (Central Scotland) (Lab): Good morning, everyone. When the committee considered the Community Empowerment (Scotland) Bill recently, we were disappointed by the lack of explanation that was offered in relation to a number of powers in the bill and we found a number of powers to be broad and ill-defined. Although that is not common, this is not the first bill to present concerns of that nature. The committee has invited the Scottish Government to reflect on a number of powers in the bill, but we would welcome the minister's general perspective on the taking of broad powers where little explanation is offered for their being taken.

Joe FitzPatrick: The Community Empowerment (Scotland) Bill is unusual in that it is a framework bill. We try to avoid introducing framework bills. It is a wide-ranging bill and how it is implemented will be driven by communities. It would be difficult to rigidly say, "Here are the powers and this is what they are going to be used for", because it is not for the Government to say how the bill should be used; it is for communities to say how they will implement it.

One of the strengths of the system that we have in the Scottish Parliament is that, as powers are being drafted, they have to come back to the Parliament for scrutiny. There is a process to ensure that, when the powers are used, they are used appropriately and correctly, so there is still that opportunity.

Across the sessions of the Scottish Parliament since 1999, successive Governments have tried to steer away from framework bills as much as possible because of the concerns that the committee is raising. However, I think that this is one case where a framework bill is appropriate because of the type of bill that it is and what it is trying to do.

Margaret McCulloch: You say that you are leaving the powers quite broad so that communities can decide how to implement the bill. However, if the powers are that broad and there

are no defined guidelines, how will communities understand how they can use the bill?

Joe FitzPatrick: The bill has been drafted to enable communities. We have tried to improve the bill's memoranda, which I guess are the tools that folk use to understand what a bill is trying to do and how it is trying to achieve its aims. We have done a fair bit of work to get to a point where committees feel that the memoranda are more useful. I hope that we are making progress in that respect; that is our working practice. Steven MacGregor will say a bit more about how we can get the information that you seek into the memoranda. We are trying to give you what you want—although I think that, sometimes, we do not quite understand what that is. Trying to improve things is an on-going process.

Steven MacGregor (Scottish Government): We are trying to work with bill teams across the Government to drive up standards of delegated powers memoranda, but it would be really helpful if the committee could give us an idea of a good memorandum and a less good memorandum that we can show future bill teams as practical examples in trying to provide the sort of information that the committee is looking for. If the committee is saying that it had expected more information about the powers in this particular case, we will certainly reflect on that with similar bills.

John Scott: I might be a bit old-fashioned and naive, but this is a Parliament. It seems to be a new concept in law that we essentially make it up as we go along, and I have to say that I am not au fait with such an approach. Does that happen elsewhere in the world? What is the precedent for this departure from accepted norms?

Joe FitzPatrick: The bill is a framework bill. Perhaps Paul Cackette can tell us whether there have been other such bills.

Paul Cackette: A lot depends on context. In Europe, for example, framework legislation is often made to allow different member states to reflect their individual circumstances. The approach is less commonly used in the UK, but it can be relevant in situations in which it is understood that circumstances will change in the future or when inclusion of all the required detail would make the primary legislation absolutely enormous. In such cases, it is better to set out the detail in secondary legislation.

I am trying to think of other examples of framework bills. I suppose that the Welfare Reform (Further Provision) (Scotland) Bill, which is a short bill, allows for the detail to be worked out later in a way that means that there can be appropriate scrutiny at secondary level and relatively quick amendment as circumstances develop. The primary legislation process involves full scrutiny and usually takes some time to go through, whereas the secondary legislation process has the advantage of allowing both scrutiny and flexibility with regard to the speed of making change, if such change is needed.

John Scott: I suppose that we as parliamentarians are very jealous of our right to make legislation. Given the breadth of the powers that are being assumed and the communities' right to assume them, you appear, in essence, to be saying that our communities can ask us, "Can we float this idea past you and turn it into legislation?"

Joe FitzPatrick: No. The point is that when the powers are set out in instruments they will come back to Parliament. In other words, Parliament will have oversight of the final powers that will be used—

John Scott: But I am not certain whether Parliament is used to that level of scrutiny.

Joe FitzPatrick: Well—

The Convener: There is an interesting philosophical or jurisprudential—or something—conversation to be had about this issue, but given the timescales that we are working on, it is probably not something that we can extend. Nevertheless, the situation represents a change, and I think that colleagues are reflecting the fact that until now the committee has not, in practice, scrutinised secondary legislation in the way that it scrutinises bills. Perhaps we need to flag up that with such bills—perhaps the Regulatory Reform (Scotland) Bill is another—subject committees need to take a different approach to the secondary legislation.

We have finished up in a position such that even when we interrogate officials around the table, it is relatively rare that we receive an explanation about why a power is needed. Indeed, we have had some pretty vague answers as to why other powers are needed. I hope that you appreciate that that causes a problem; after all, if you cannot explain even theoretically why something might be needed, it is a tad difficult to see that it is, in fact, needed.

Joe FitzPatrick: That is a good point. Clearly our officials or the minister in charge should be able to give the specific reasons why we have drafted legislation. In an ideal world, that would be clear from the delegated powers memoranda. We want to get to the point at which the committee is satisfied that the information is in them.

10:15

The Convener: That is a very fair point.

John Scott: It is excruciatingly difficult for us, as a committee that deals with the minutiae of bills, when we are interrogating officials who apparently have no idea why the powers are there. I am possibly exaggerating the situation, but it is not reasonable, in parliamentary terms, to allow officials to come here with no concept of why the powers are there when they are offering an explanation of them.

Joe FitzPatrick: If you are looking for answers as to why we are asking for powers, you should be able to get those answers. There is no question about that.

John Scott: Excellent. Thank you.

Stewart Stevenson: Can we think of it in the following way, minister? We would normally expect secondary legislation to be about the implementation details of policies that have been discussed and agreed by Parliament and incorporated in primary legislation. However, when we are looking at framework bills, we move to something that often has a different character; it is often about the creation of new policy via secondary legislation, rather than merely the implementation of policy that has already been discussed. If the committee gives an indication that we need to tread carefully, that is probably what underpins our saying so.

There is a difference in process when we look at the creation of new policy by secondary legislation compared with primary legislation, in that the former denies parliamentarians the opportunity to amend—although they can reject instruments in total and invite the Government to come back with a revised proposal. Therefore, there is a process issue that should properly concern us, but the minister might care to consider that fundamental difference between using SSIs to describe implementations and using SSIs to create new policies.

Joe FitzPatrick: That is a reasonable point.

The Convener: It is a very helpful point.

Margaret McCulloch: The committee has been concerned by the number of minor points that have arisen from instruments in recent months. We believe that it is in the interests of the users of the instruments that such errors be avoided. What steps will be taken to reduce the number of minor points?

Joe FitzPatrick: You are absolutely right that it is in the interest of users that instruments are unambiguous and in language that clearly shows their intention. That is always our aim, so we are grateful to the committee for flagging up where we have got it wrong from time to time, and for pointing out ambiguity in drafting. We have on-going policies that are intended to ensure that we have clarity in drafting, including having a plain English policy. Paul Cackette can address the process.

Paul Cackette: It is important that we within the Government maintain and strengthen our cross-cutting role in ensuring that instruments of the proper quality come to the Parliament. We have processes in place and extensive guidance on good practice in order to eliminate major, as well as minor, problems. We need to continue to do that, and some of the experience that I spoke about earlier this morning shows the need to be vigilant in order to make sure that we maintain the quality of instruments.

We are conscious that we are a relatively small directorate with a lot of continuity among our legal staff, who gain experience and develop skills in drafting. That experience is helpful, but new people do come into my directorate, and there are policy people who are less experienced in instructing secondary legislation and who do not see the wider issues and the need for consistency.

The processes that we have in place are designed to ensure that we are consistently up to date in reflecting the points that are made by this committee, and that we are trying as best we can to minimise errors. We need to ensure that we train our staff and keep them up to speed with best practice. It is so important to maintain those standards and to eliminate especially the minor points, as far as we can.

The Convener: I move to the European Union opt-outs that occurred recently. You will be aware that on 1 December the Scottish Government had to introduce the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No 2) Order 2014 (SSI 2014/336) and the Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (SSI 2014/337). I think that that European legislation has worked well. We will be reporting on it later in the meeting, but it is worth putting on record the fact that it seems to have been a successful process. However, we could really do without such instruments having to be laid too often, so what is the likelihood of there being more?

Joe FitzPatrick: I cannot guarantee that we will not find ourselves in a similar situation again, but it is not something that will come about every week. That was an unusual set of circumstances and I guess that, if the same thing or something similar were to happen again, our approach would be to engage with the committee at the earliest possible opportunity in order to find a way forward that allows you to do your job within whatever restrictions are in place. It was a very unusual situation in that an instrument had to be laid on a specific day and had also to come into force on

that same day. The lesson is that we need to work out a way forward that allows the committee to do its job and which allows the Government to get instruments in place in time.

The Convener: Thank you. I reiterate on behalf of the committee that it was a successful process. We shall report formally on it later as being in default, because we have no other option, but it is worth noting that the procedure went well and that we are grateful for that.

Margaret McCulloch: The committee recently completed stage 1 of the Legal Writings (Counterparts and Delivery) (Scotland) Bill, which is the first Scottish Law Commission bill. Can you offer the committee any reflections on the process so far?

Joe FitzPatrick: The process has worked very well and has shown that we now have a mechanism that allows reports from the Law Commission—that were previously not given the attention that they deserved—to be taken forward under very strict circumstances and with clear criteria.

The first bill appears to have worked well and although we are not quite there yet we are already in the process of considering what the next bill will be. We have identified in the programme for Government a small technical succession bill that we think might fit the criteria, so consultation on that has started. Assuming that it meets the criteria, we expect that bill to be introduced soon and to come through the committee process. Our working assumption is that there will be one such bill every year. It is not a level of business that will swamp the committee and prevent it from doing other things that it has to do, but it will give the Law Commission due regard.

Margaret McCulloch: Thank you—and you have answered my second question.

The Convener: Do colleagues have any more questions?

John Scott: It may not be a relevant question for today, but what is the current level of on-going post-legislative scrutiny? All parties talk about that in the run-up to elections and say that we must do more, but I wonder how much we are doing at the moment. Given the increased workload that we are going to have post 2016, I suspect that we will have even less time thereafter to carry that out. Can you reassure me that there is a lot of it going on at the moment?

Joe FitzPatrick: It is probably for subject committees to determine when they should be doing post-legislative scrutiny. It would obviously be a matter for another committee to determine whether our processes need to be changed. There was a recent review by the Standards, Procedures and Public Appointments Committee on that very subject, but it is clearly up to subject committees whether they want to do more post-legislative scrutiny.

The Convener: I thank the minister and his colleagues for coming along. Almost inevitably, our discussion has gone beyond the remit of the report, which is already history. Formally, we would expect a written response from you to the report, but I suspect that today's *Official Report* will be far more interesting than what you might want to send us.

Joe FitzPatrick: We will take into account the discussions that we have had today as part of that response.

The Convener: Thank you. We are much obliged.

10:25

Meeting suspended.

10:35

On resuming—

Instruments subject to Affirmative Procedure

Regulation of Investigatory Powers (Modification of Authorisation Provisions: Legal Consultations) (Scotland) Order 2015 [Draft]

Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 [Draft]

Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 [Draft]

Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2015 [Draft]

Secure Accommodation (Scotland) Amendment Regulations 2015 [Draft]

The Convener: No points have been raised by our legal advisers on the draft instruments, but the committee might wish to note that the draft Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2015 and the draft Regulation of Investigatory Powers (Covert Human Intelligence Sources – Code of Practice) (Scotland) Order 2015 were initially laid before Parliament on 2 December. They were then withdrawn and relaid on 8 December, because the committee's legal adviser identified that the date of issue of the code of practice, as stated in article 2(1)(b) of each of the draft orders, was not correct.

Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No 2) Order 2014 (SSI 2014/336)

Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014 (SSI 2014/337)

10:36

The Convener: Our legal advisers have raised the same point on both instruments: there has been a failure to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. As the instruments were laid before Parliament and came into force on 1 December 2014, the requirement to leave a minimum of 28 days between the laying of an instrument and its coming into force has not been complied with.

In this instance, however, the committee might wish to find the breach acceptable, because of the urgent circumstances that have arisen. The powers in section 2(2) of the European Communities Act 1972 could only be used to make the instruments no earlier than 1 December, because that was the date on which the UK Government opted into Council framework decision 2009/299/JHA, to which the instruments give effect. The framework decision also required to be fully transposed and implemented on 1 December. The committee might welcome the fact that the Scottish Government provided it with early notice of its proposals for the instruments and of the unusual set of circumstances that required the breach of the 28-day rule.

Stewart Stevenson: Although I recognise that we are obliged, under the rules, to report the breach, we should record our forgiveness of it and our congratulations to the Government on its dealing quite properly with the matter. If we forgive and therefore discount the two breaches, we are—anticipating the rest of the agenda—probably now in a position to be pleased with all the procedures before us. We would like that to continue.

The Convener: Indeed. Would I be right to reflect that the committee's view is that the procedure that we have been through and which we briefly discussed with the Minister for Parliamentary Business seems to have been the right one for these very rare circumstances—which, I hope, will not be repeated? We can encourage the Government to think in such terms in future, should it have to.

John Scott: Speaking as far as my limited knowledge takes me, I think that the Government has played this absolutely appropriately. In the unlikely circumstance of a similar set of events occurring in future, we now have a model to follow.

The Convener: Does the committee agree to draw the instruments to the Parliament's attention on reporting ground (j), as there has been a failure to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

The Convener: However, does the committee agree to report that it finds the breach to be completely acceptable in this instance and to welcome the fact that the Scottish Government gave the committee early notice of its proposals with regard to the instruments and the reasons for the breach?

Members *indicated agreement.*

Land and Buildings Transaction Tax (Prescribed Proportions) (Scotland) Order 2014 (SSI 2014/350)

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

Members *indicated agreement.*

Land and Buildings Transaction Tax (Qualifying Public or Educational Bodies) (Scotland) Amendment Order 2014 (SSI 2014/351)

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

Members *indicated agreement.*

Land and Buildings Transaction Tax (Definition of Charity) (Relevant Territories) (Scotland) Regulations 2014 (SSI 2014/352)

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

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Reservoirs (Scotland) Act 2011 (Commencement No 1) Order 2014 (SSI 2014/348)

10:39

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

Members *indicated agreement.*

Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Miscellaneous) 2014 (SSI 2014/349)

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

Members *indicated agreement.*

Mental Health (Scotland) Bill

10:40

The Convener: Agenda item 7 is consideration of the Scottish Government's response to the committee's stage 1 report on the Mental Health (Scotland) Bill. Members will have seen the briefing paper and the response from the Scottish Government. Are there any comments?

Stewart Stevenson: I am still not very comfortable with the Government's response. Although it has restated its intention to publish guidance made under new section 17C(2) of the Criminal Justice (Scotland) Act 2003, which section 45 of the bill seeks to insert, it still contends that there is no requirement for the guidance to be published. That is fine as far as it goes, except that it goes on to say that the guidance will achieve its intended purpose only if it is made available to victims who wish to make representations under the new victim representations scheme. It seems rather strange that the Government asserts that the guidance will achieve its objective only if it is made available to people while simultaneously asserting that it does not wish to make it a legal requirement for the guidance to be published. I find myself unable to reconcile those two points.

The Convener: As I understand it, I think that that is probably acceptable. It is a principle of law that we do not write down anything that we do not need to write down. As a car cannot operate if it does not have an engine, we do not need to say that a car has to have an engine; in the same way, if something cannot operate unless it is published, it does not need to be said in law that it must be published. I wonder whether our legal advisers would care to comment on that. Was that a fair interpretation of the principle?

John Scott: I absolutely—and perhaps unusually—agree with Stewart Stevenson. Earlier this morning, we heard a Government minister make the case for introducing framework legislation, as I think it was wonderfully called, when there is apparently no reason for introducing it at all. The fact that there are different sets of standards operating within Government in itself poses questions.

As I have said, I agree entirely with Stewart Stevenson, and we as a committee should adhere to our position, which is that the guidance should be published. If any committee in Parliament is about openness and transparency, it has to be this one. Let us stick with our position.

The Convener: I merely reflect that the Government says that it is going to publish the guidance, simply because it must.

I wonder whether one of our legal advisers could comment on the position.

Colin Gilchrist (Legal Adviser): The bill would have to contain a requirement for publication to bind the Government and future Administrations to that. If that were not specified in the bill, there would be no statutory requirement for publication.

The Convener: Forgive me—I seem to be the only person arguing this corner—but I am still not concerned about a statutory requirement. If the only way that the guidance can operate is by its being published, I do not see why, as a matter of law, it needs to be published; it must be published—if that does not sound totally perverse.

Stewart Stevenson: I agree with you that the "must" is the logical imperative if the policy position is to be delivered, as the Government explains. However, in the absence of a legal requirement to publish, this Government or any future Government would be acting within the law if it chose not to publish, and there would be no parliamentary sanction short of introducing proposed legislation to require a Government to publish. That would mean that the policy of making a victim representation scheme available to complainants would fail. It is an important part of the bill.

I understand the analogy of tyres, wheels and cars, convener, but I am not convinced by it. Do forgive me.

The Convener: As we have heard enough to know that there is a disagreement on this point, I can offer to write to the Government, drawing its attention to this conversation and asking it to clarify why it thinks that it is in this particular position.

John Mason: Perhaps I am not understanding this, but just for clarification, is the Government drawing a distinction between, on the one hand, publishing the guidance and, on the other, making it available to victims? Are those two separate things?

10:45

The Convener: Yes. Let us be clear: the Government is not suggesting that the guidance will not be available. It will operate only if it is available.

John Mason: But it is suggesting that the guidance can be available without being published.

The Convener: The Government is arguing that there is no need to say that it must be published, because it has no existence if it is not published. It cannot operate if it is not published, in exactly the

same way that a car without a motor is not a car, but a go-kart.

Margaret McCulloch: Again, I apologise if this is a stupid question, convener, but if the guidance is not published, how do victims know that it is there for them to access?

The Convener: That is precisely the point. As I understand it—and I am arguing its corner here—the Government is saying that as a matter of policy the guidance will have to be made available and therefore will have to be published. As a result, there is no need to say that it must be published, because, actually, it must be published.

Margaret McCulloch: On the back of that, then, why is there a problem for the Government in not wanting to publish it?

The Convener: I would argue that that comes back to the legal principle that we do not write something that is redundant, in exactly the same way as we do not write something twice. We do not want something twice in statute; after all, we complain if a provision can be found in two different places. As a matter of drafting practice—as I understand it; I am speaking now as a non-lawyer, never mind as a drafter—we would not write it down if it was a logical imperative. We would simply not write it down, because it is a logical imperative.

Stewart Stevenson: Convener, you have offered to write the Government in light of this discussion. I think that your offer is a helpful one.

The Convener: If the committee will allow me to do that, I will do so. The point has been very well made and will be extensively reviewed in the *Official Report*.

Let me come back to wherever on earth I had got to. The question was, "Do members have any comments?" and the answer is, "Yes, quite a few." On the question whether we want to note the response, I think that the answer is yes, and we are agreed that I will write to the Government to seek clarification on that point. Are we content with everything else?

Members *indicated agreement.*

Public Bodies Act Consent Memorandum

Public Bodies (Abolition of the Home Grown Timber Advisory Committee) Order 2015 [Draft]

10:47

The Convener: Agenda item 8 is consideration of a United Kingdom Government order under the UK Public Bodies Act 2011. The Scottish Parliament's consent is required to make an order under part 1 of the Public Bodies Act 2011 where such an order makes provision that would be within the Scottish Parliament's legislative competence, and the Delegated Powers and Law Reform Committee considers and reports on such orders on the same grounds as instruments laid before the Parliament.

No points have been raised by the legal advisers on the draft order, which, it is worth putting on the record, seems to do nothing other than abolish a body that is no longer in existence. Does the committee intend to report that it is content with the draft order?

Members *indicated agreement.*

The Convener: As that completes the public agenda, we will move into private.

10:48

Meeting continued in private until 11:13.

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