OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 1 May 2018

Session 5

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DELEGATED POWERS AND LAW REFORM COMMITTEE

14th Meeting 2018, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)
*Neil Findlay (Lothian) (Lab)
Alison Harris (Central Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bill Bowman (North East Scotland) (Con) (Committee Substitute)
Gerald Byrne (Scottish Government)
Jill Clark (Scottish Government)
Annabelle Ewing (Minister for Community Safety and Legal Affairs)
Luke McBratney (Scottish Government)
Neel Mojee (Scottish Government)
Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Sir Alexander Fleming Room (CR3)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 1 May 2018

[The Convener opened the meeting at 10:02]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome members to the 14th meeting in 2018 of the Delegated Powers and Law Reform Committee. We have received apologies from Alison Harris.

Before we take evidence from the Minister for Community Safety and Legal Affairs, the committee must make a decision on taking business in private. It is proposed that the committee take in private item 5, which is consideration of the evidence that we are going to hear on the European Union (Withdrawal) Bill. Do members agree to take that item in private?

Members *indicated agreement.*

Prescription (Scotland) Bill: Stage 1

10:02

The Convener: Item 2 is evidence on the Prescription (Scotland) Bill at stage 1. This is the last of our planned evidence sessions on the bill. We have before us the minister in charge of the bill, Annabelle Ewing, who is the Minister for Community Safety and Legal Affairs. She is accompanied by three Scottish Government officials: Jill Clark, head of the civil law reform unit, Michael Paparakis, civil law policy manager, and Neel Mojee, who has been here before and who is a solicitor on constitution and civil law. Welcome to all of you.

I will start with a general question, which is directed at the minister. Why did the Government decide to implement the Scottish Law Commission's report on prescription and what policy benefits will that bring?

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): Good morning. I refer members to my entry in the register of interests, wherein they will find that I am a member of the Law Society of Scotland and that I hold a current practising certificate, albeit that I am not currently practising.

The policy objectives behind the bill are to ensure that there is clarity, certainty and fairness in the approach to prescription and, in turn, to bring the issues of legal certainty very much to the fore. Of course, all such matters are balancing acts, but it is hoped that, through the hard work of the Scottish Law Commission, working in tandem with many stakeholders during its consultation process, people will consider that the bill has struck a balance between the respective interests of the creditor and the debtor while recognising that the overall objective to be secured is that of providing legal certainty, which is of benefit to wider society. In a nutshell, that is the objective of the bill.

The Convener: What are the gaps in the current law that need to be addressed?

Annabelle Ewing: The Scottish Law Commission made various comments in that regard. In its work on the issue, it has made clear that it is not looking at the law of prescription as a whole; it is looking at the law of negative prescription, and it is doing so because issues have arisen that in its view need to be addressed sooner rather than later. Those include in particular the issues of discoverability and latent defects. I am sure that we will get on to those, so I will not belabour the point at this stage. Issues

have arisen as a result of a Supreme Court ruling that has created some confusion in people's understanding of the existing position under Scots law. The Scottish Law Commission has also anticipated other potential problems, and it feels that it would be helpful, as part of its contribution to keeping Scots law under review, to address those issues in legislation.

Stuart McMillan (Greenock and Inverclyde) (SNP): The Scottish Government carried out a limited consultation on the proposals in the bill. In a previous evidence session, Jill Clark gave a list of the organisations that were consulted. Given that the Scottish Government consultation might have attracted interest from other organisations and stakeholders, in particular welfare rights organisations, can you explain that decision?

Annabelle Ewing: We adopted the procedure that has been used thus far with Scottish Law Commission bills that come to the Delegated Powers and Law Reform Committee, which fall within your remit and jurisdiction because they are not regarded as particularly controversial. I think that this is the fourth such bill. Stuart McMillan, who was also a member of the committee in the previous session of Parliament, will be able to give me chapter and verse on the other three, but I was involved in one of them—the Contract (Third Party Rights) (Scotland) Bill—as part of my duties in my current ministerial portfolio. There was also the Succession (Scotland) Bill and the Legal Writings (Counterparts and Delivery) (Scotland) Bill.

The procedure that has been used with regard to three of the four bills is that the SLC produces a discussion paper, takes on board the views that are expressed and then proceeds to consultation on a draft bill, after which the Scottish Government proceeds with a targeted consultation. That is the process that happened for the Prescription (Scotland) Bill. The one exception to that has been the Succession (Scotland) Bill, and that was because there had been quite a gap between the SLC processes and the Parliament considering the bill, so it was felt that we were required to proceed with a fuller consultation. However, for the Prescription (Scotland) Bill, we adopted the same procedure that has been followed with other bills of the same type.

Stuart McMillan: The Government consulted a fairly focused number of organisations but, when the committee put out a call for evidence, we were contacted by other stakeholders and organisations. Certainly, the evidence session that we had last week, particularly with Mike Dailly of the Govan Law Centre, was extremely interesting and opened up other avenues for discussion. Were the likes of the Govan Law Centre, welfare rights organisations and Citizens Advice Scotland considered before the Scottish Government undertook its consultation? I am keen to understand the rationale for not asking such organisations.

Annabelle Ewing: I would have to see the list of bodies that the Scottish Government wrote to in the targeted consultation and the list of bodies that responded to the SLC's consultation processes—the initial discussion paper and the consultation on the draft bill. Obviously, anybody can respond to a consultation, and it is up to them to do so or not, as they wish. I have read the *Official Report* of all the committee's evidence sessions on the bill, and I guess that we will get on to the substance of that shortly. However, on the number of people who have been engaged, there have been quite a few, and it is open at all times to Citizens Advice Scotland and others to make their views known.

I understand that Citizens Advice Scotland may have indicated a while back that, rather than commenting on everything, which I think had been its position, it would have to focus on particular issues that were of concern to it. At the end of the day, if individuals or organisations wish to respond to a consultation, their views are most welcome, but we cannot force people to respond; it is up to them to do so or not.

Stuart McMillan: Thank you.

Neil Findlay (Lothian) (Lab): I am relatively new to the committee so I am not too au fait with the background to the consultations that take place in this regard, but I am concerned about consultations that focus on certain groups or sectors. I do not have the list in front of me, but it appears that the consultation was targeted very much at the business community and professional bodies. Given that the bill deals with people's debts and benefits, I am quite surprised that we are not bringing in bodies that advocate for and work on behalf of people who are in that position. I am concerned that evidence is being taken too narrowly. The representatives who were here last week gave a different perspective on some of the issues.

Annabelle Ewing: As I say, the consultation approach that has been adopted for the Prescription (Scotland) Bill has been the same as those for three of the other four DPLR Committee and SLC bills. That is the first point to reiterate.

On the point about people with debt, solicitors act for both parties. That point was made in an evidence session with members of the legal profession. Maybe it was you, Mr Findlay, who asked directly, "Do you represent both sides?", to which they responded, "Yes, we do." It is important to bear that in mind as well.

We are keen to have as wide a consultation as possible. Individual stakeholders are absolutely free to make their views known, and I am pleased

that you had your evidence-taking session last week. We cannot force people to submit evidence. That is the position. The various bodies that have been involved since the start of the SLC's work include local authorities, so it is perhaps unfair to characterise the engagement as being just with business and people who do not represent debtors. You have already heard at earlier meetings evidence from people who represent different parties, and you have heard from academics. I think that it is fair to say that there has been a wide reach.

Neil Findlay: In order to submit to a consultation, people have to know that it exists—

Annabelle Ewing: Well, I think—

Neil Findlay: Just a moment.

Annabelle Ewing: Sorry.

Neil Findlay: Of course solicitors represent both sides, but the vast majority of people who are subject to, say, benefit overpayments or who have council tax debts will usually be represented through a welfare rights organisation, rather than by a solicitor.

Annabelle Ewing: I suppose that one would have to go and get the evidence to quantify that. In broad-brush terms, that may well be the case. As for the percentages that are involved, one would need to get the statistics to indicate that. However, it is clear that the process of engagement has been wide. As I said, local authorities have been involved and have made submissions to the SLC. I would need to go back and check to find out every single organisation that has been involved; I do not have that information off the top of my head, but I would be happy to supply it to the committee. The committee's role in calling for evidence also has an important role to play in terms of scrutiny.

Taking all the approaches and looking at them overall, I think that it is fair to say that we will capture all the various views, and that is quite right and proper.

The Convener: We will not labour that point any longer. I think that it arose because we all found last week's evidence session very useful.

Section 3 extends the five-year prescription to all statutory obligations to pay money. The list of exceptions to the general rule lengthened as a result of the consultation process. We acknowledge the SLC's point that the policy choice—which is between 5 years and 20 years—is, for several reasons, not as stark as it first seems. However, various stakeholders have suggested to us that the exceptions are essentially political choices for the Government and Parliament. Can you explain to the committee the policy rationale for each of the main exceptions listed in section 3?

10:15

Annabelle Ewing: You said that the list lengthened, but that section simply restates the status quo of the 20-year negative prescription in Scotland with regard to taxes, social security benefits and maintenance payments. It is not right to characterise that as extending it, because that might be interpreted in a different way.

I understand that Her Majesty's Revenue and Customs, and now Revenue Scotland, put clear policy objectives to the SLC that in their view justified the 20-year negative prescriptive period. The SLC accepted their position and that is one of its recommendations—and we have accepted all of the substantive recommendations in the SLC's draft bill. It is to do with opportunity to collect and so forth.

On reserved social security benefits, the bill is again restating the present position, which is 20-year negative prescription in Scotland. That mirrors what happens in the rest of the United Kingdom. Although, on the face of it, there is a six-year short negative prescription in England and Wales, the Department for Work and Pensions made clear in its recent submission of 23 April that it is in a position to pursue well beyond the six-year period. The argument again relates to public policy objectives, but also to what the DWP reiterated in its recent submission about the way in which it seeks to recover overpayments, taking into account that it can deduct from benefits. The DWP said that it has a particular approach to looking at hardship and may extend repayment over a considerable period of time in order to facilitate individual circumstances. It also said that it may have to queue repayment arrangements, because a number of benefits may be involved, and that it therefore feels that public policy is best served by maintaining the status quo.

Maintenance agreements ensure that the moneys that are due from the person who is required to pay the maintenance obligation are secured and that people are made to take financial responsibility for their children.

Those were the first three exceptions. On council tax and non-domestic rates, representations were made by some local authorities to the SLC at the time of its consultation paper, which was published in February 2016. The authorities argued that the public policy considerations for them were essentially the same as those governing HMRC and Revenue Scotland, so the position again maintains the status quo, as they asked. Vis-à-vis what is happening down south, I understand that, while the six-year short negative prescription is apparently in operation, if a liability order is secured within that time it can be enforced by local

authorities elsewhere in the UK without limit of time.

I think that what is being argued is that the position in the bill maintains the status quo, that there are public policy considerations for it and that it ensures that the arrangements are broadly in line with what happens elsewhere in the UK, as far as HMRC and the DWP are concerned.

The Convener: You are presumably agreeing with the DWP.

Annabelle Ewing: What has to be borne in mind with regard to the DWP is that it still has jurisdiction over most benefits—sadly, in my view, although perhaps not in the view of the members around this table other than Mr Arthur and Mr McMillan. We do not believe that the UK Government should have jurisdiction over any benefits. However, sadly, that is still the case, so about 85 per cent of spend—

The Convener: We are not really here to get in to that.

Annabelle Ewing: I know, but you asked whether I agreed with the DWP, and I am trying to give you an answer.

Some 85 per cent of social security spend is still decided on the basis of rules that are set furth of here. There are the reserved benefits, and then there is the policy to do with how the benefits system operates, which is also reserved. It is important to note that, with our new social security agency, the legislation on which the Parliament passed last week, we propose to take a different approach from the one that the DWP takes to how repayment takes effect and the grounds on which it can be sought.

What the DWP said in paragraph 13 of its submission of 23 April was troubling. It said that reducing the prescription period to five years

"could also lead to a greater pressure to secure full repayments of debt within a five year period and thus undermine or at least blunt the long-established hardship procedures the Department has to balance recovery against welfare needs. This would place debtors in a worse position than they are now if there is an expectation to pay debts off quicker and hence at an increased rate of repayment."

Sadly, the Scottish Government does not have any jurisdiction over policy decisions concerning the operation of reserved benefits. The fact that that is a matter for Westminster should be taken into account, as should what the DWP has said, which seems to be a shot across the bows. I do not want to put such vulnerable people in a worse position as far as reserved benefits are concerned, as that would be extremely unhelpful. Therefore, I must look at what the DWP has said, because it is in control of the matter.

The Convener: Mike Dailly, who appeared before the committee last week, has written a blog on the subject. I will read out a paragraph from it.

"In relation to social security benefits, we believe there is no justification for not having all devolved and reserved benefits subject to the five year prescriptive period. It is inequitable that people have a month to appeal a benefit decision, while the DWP would have 20 years to pursue reserved benefit debts."

What is your response to that?

Annabelle Ewing: As I have said, we do not—sadly—control the way in which the reserved benefits are operated. That is a matter for the DWP. I am sure that members of the committee will know of constituents whose experience of the reserved benefits system has not been positive. However, that is the situation that we face.

We hope to do things very differently here in Scotland; we want our social security system to be based on the key principles of dignity, fairness and respect. The grounds for recovery of overpayment will therefore be different in Scotland. It will not be possible for overpayment to be recovered if there has simply been an error on the part of the social security agency; there will have to have been a fault on the part of the recipient. However, if someone suddenly receives a vast sum of money into their account, they should be aware that it is likely that there has been a mistake and that it is not their lucky day. That will be a key difference in the approach to recovery that is taken by the new social security agency in Scotland.

That is not the position with the DWP. I am sure that members will know of cases in which the DWP has got back to recipients to retrieve sizeable sums of money, when it has made mistakes. We will adopt a different approach. Of course, we now have jurisdiction over all aspects of the matter, so we can do something different.

However, if Parliament were to seek to amend the prescription powers with regard to obligations to repay overpayments of reserved benefits, that would raise issues of legislative competence, which the Scottish Government would have to consider carefully.

The Convener: I have asked a few questions, so I will allow Neil Findlay to come in with a question about council tax.

Neil Findlay: There appears to be some uncertainty about how councils deal with council tax and business rates. Some use the five-year period and some use the 20-year period. Do you accept that there are uncertainties, and will the bill resolve them?

Annabelle Ewing: I understand that thus far some of the larger councils, including Glasgow City Council, Fife Council and South Lanarkshire

Council, made representations in February 2016 during proceedings by the SLC, indicating that they wanted to retain the status quo, which was 20-year negative prescription. They also indicated what public policy considerations they felt were applicable, which was basically reiterating HMRC's and Revenue Scotland's feeling that there are public policy considerations.

I note that technical questions have arisen in the committee about what the current practice is in each of the 32 local authorities; we will certainly be seeking further information from the Convention of Scottish Local Authorities. Of course, it would be entirely appropriate for the committee itself to write to COSLA seeking such clarification.

Neil Findlay: Do you think that there is uncertainty, or not?

Annabelle Ewing: Having read the evidence to the committee, and from my understanding of the submissions that were made to the SLC, I am saying that the status quo is the position that local authorities are seeking. I note that Mr Findlay has suggested that that is not the position of every one of the 32 local authorities, so we will seek clarification. I imagine that the committee might also wish to seek clarification from COSLA on that issue and on the general public policy considerations that have been raised, but that is up to the committee.

Neil Findlay: The Law Society of Scotland and others say that the exception for council tax is unfair and might discourage councils from collecting debts promptly, and that debts should not be pursued over decades. We know that a shorter period exists in England, so it really is a political choice not to use that. Could you explain the reason for that?

Annabelle Ewing: I will pick up on a few points. First, the status quo has for some time now been that there is a 20-year negative prescription vis-à-vis council tax and non-domestic rates. Secondly, it is not quite correct to say that the position in England is a flat six years; that is not the case. Councils in England can proceed with liability orders that can then be enforced without limit of time. That is important to note.

Neil Findlay: Do you know how often those are enforced?

Annabelle Ewing: I do not have chapter and verse about English court proceedings in front of me, but we can try to obtain that information. However, the fact is that liability orders can be pursued. In terms of the political position, the request came from some of the largest local authorities in Scotland, including Glasgow City Council and Fife Council. It was their request that the SLC reflect on the situation and make the recommendation that currently appears in the bill. That is where we are today, Mr Findlay. If you are suggesting that local authorities do not want that to happen, the need to seek clarification from COSLA becomes more imminent.

Neil Findlay: I am not here to express the views of local authorities. There are many things that local authorities want that the Government ignores. They want more money to run the services that are currently being cut. It is as though you are saying that whatever local authorities ask the Scottish Government for will be delivered, but that is self-evidently not the case. I am asking about the fact that there will be a six-year period in England and Wales and a 20-year period in Scotland.

Annabelle Ewing: I have explained that the six-year period is a bit of a misnomer, because a liability order can be secured and there is no limit on the time for enforcing it.

The Convener: Are you saying that there will be no difference between Scotland and the rest of the UK?

Annabelle Ewing: I am not saying that. I am saying that the position is analogous, and that to suggest that the period is simply six years and then it all stops is not quite correct in describing what happens in practice in England and Wales.

On the point about local authorities, the SLC proceeded with a consultation, local authorities responded, including some of the largest local authorities. Their view was that, in terms of the public policy considerations that had been set out by HMRC and Revenue Scotland, they required the same approach in order to ensure that they had the opportunity to maintain good order with regard to obligations that are owed to them.

10:30

Obviously, local authorities are very important stakeholders, along with many others. We listen to all views. In terms of local authorities' budget, we proceeded with a fair settlement of £10.7 billion in the budget, which Mr Findlay did not support. That represented an increase in income and capital, notwithstanding the cuts to the Scottish Government budget from Westminster.

We are digressing, convener. The position is as I have said, so it is important that there be further engagement with COSLA to tease out those issues.

The Convener: We will not get into the budget, Mr Findlay.

Neil Findlay: It was the minister who raised it.

Annabelle Ewing: No. Actually, it was the member who raised the budget.

Neil Findlay: We have received no evidence that I am aware of in relation to the situation in England and Wales, other than that they have a six-year period and that what is being proposed here would be worse. That is the only evidence that I have heard from people who have come before the committee.

If the minister is using the situation in England and Wales to rebut that point, we need evidence from the Government that sets out the situation in England, how debt is recovered after the six-year period, how many cases there are and how what is being proposed is a better system. We have had no evidence of that.

If there is such evidence, I am more than willing to look at it and consider it fairly. We want the fairest possible system. What is being proposed appears not to be the fairest system.

The Convener: Perhaps the minister could write to the committee on that point.

Annabelle Ewing: I will ask officials to do that. We will obtain as much information as we can.

The Convener: Mr Findlay is right: this is the first we have heard of it. All the evidence that we have had is that there is a six-year limit in England and Wales. The business about liability orders is new to us. If you could give us more information, that would be helpful.

Annabelle Ewing: We will obtain as much information as we can and write to the committee.

Neil Findlay: In relation to payments and penalties on reserved social security benefits, can the minister confirm that the exception is within the devolved competency of the Scottish Parliament?

Annabelle Ewing: When you refer to "the exception", Mr Findlay, what specifically do you mean?

Neil Findlay: I mean in relation to the prescription period relating to overpayments of reserved benefits.

Annabelle Ewing: I think I said this a moment ago, but I will reiterate it. As regards prescriptive periods for obligations concerning overpayment of reserved benefits, any amendment to the status quo would raise issues of legislative competence that the Scottish Government would require to look at very carefully.

Neil Findlay: The advice that we have is that it is within devolved competence.

Annabelle Ewing: As I said—

Neil Findlay: Have you not looked at that already?

Annabelle Ewing: With respect, the bill is presented as it is and for the reasons stated. In particular, there is the practical issue that the DWP has clearly indicated that, if the bill does not take that approach, a different approach might not be so beneficial to individual applicants. One has to weigh up all issues, including the practical impacts of any course of action.

The issue that Neil Findlay raises, as I have already said, raises issues of legislative competence that would require to be considered carefully by the Scottish Government.

Neil Findlay: I will put the question to Mr Mojee, as he is a solicitor. Have you undertaken that consideration? Has your department weighed up potential differences that could emerge on competence?

Neel Mojee (Scottish Government): I would reiterate what the minister has said.

Neil Findlay: You are allowed to say yes or no.

Neel Mojee: If we were to amend the current exception, that would raise issues of legislative competence that we would need to consider carefully.

Neil Findlay: Several stakeholders have suggested that it would be fairer to debtors and would encourage the DWP to be more prompt in its debt recovery if the exception for reserved benefits and tax credits were to be removed. What do you say to that?

Annabelle Ewing: I have to say that my experience with the DWP is that nothing happens terribly quickly. What I can go on is what the department said publicly in its memo to the committee of 23 April, which I read out. It seems to be saying that given that it has different technical methods of recovery, five-year prescription could mean that some approaches that mitigate the effect on the recipient might no longer be available, which could have a detrimental effect on the recipient. I am sure that none of us wants to do anything that would put vulnerable people in a worse position.

The Convener: Let us move on to forfeiture.

Stuart McMillan: An earlier version of the proposals had a specific exception to five-year prescription for forfeiture, which mirrored the legislation that applies to England and Wales. Why was the provision removed?

Annabelle Ewing: My understanding is that once an obligation is established and is subject to the normal prescriptive period, it can be enforced through forfeiture in certain ways. Customs and excise officers, for example, can seize ships. Forfeiture is an ancillary element; basically, as long as there is the overarching obligation, whatever the due date is, there are ancillary powers of forfeiture.

The removal of the provision was therefore a technical drafting issue. It was deemed unnecessary to repeat the exception, given that if the obligation persists and is subject to the normal prescription rules, the ancillary powers of forfeiture also persist. That is axiomatic.

I am sure that I am not explaining this in the best way—I am getting into legalese—but that was the feeling. Let me put it this way: there was no attempt to change the outcome. It was just a matter of technical drafting, and it was deemed unnecessary to include the specific exception, from a legal perspective.

Stuart McMillan: You mentioned seizure of ships, which is about the seizure of goods. The committee has considered the issue in the context of unpaid taxes. We are concerned that the general exception relating to taxes will not cover all situations in which forfeiture is used in practice, and that removal of the specific exception takes away the opportunity to clarify how prescription applies to forfeiture more generally.

Annabelle Ewing: It is my understanding that everything that had to be captured had been captured, but I undertake to reflect further on that point and report back to the committee.

Stuart McMillan: Thank you.

Bill Bowman (North East Scotland) (Con): I have some questions about discoverability. Section 5 sets out the new test associated with the start date for five-year prescription, in relation to the obligation to pay damages. The third part of the new test requires the pursuer to know the identity of the defender or defenders before five-year prescription starts to run.

How will the approach work where there is joint and several liability? We are particularly interested in situations in which potential defenders were not involved in the neglect and were linked to the case only financially.

Annabelle Ewing: I have seen references to joint and several liability in the context of tenants and council tax, for example. Joint and several liability is a general principle of Scots law. The bill sits alongside Scots law and does not change the rules of joint and several liability. It looks at the narrow focus of the rules on negative prescription in Scotland and it operates in the context of the current position for joint and several liability. Therefore, one has to look at the facts and circumstances of each case to determine what the legal position would be in that regard.

The bill looks at the position from the point of view of negative prescription to determine the start date from which prescription runs, when the relevant prescriptive period comes to an end and so forth. The bill does not attempt to deal with all aspects of Scots law, including joint and several liability; it just deals with negative prescription. In the instance that you gave, one would need to look at the relevant facts and circumstances of the case to determine the joint and several liability.

Bill Bowman: When there are unknown parties, what determines when the period starts to run?

Annabelle Ewing: They might be unknown, but if you are jointly and severally liable, you are liable for the actions of the others. If one debtor is identified, your prescriptive period in that instance will start to run, assuming that there has been loss as a result of an act or an omission of that person, even if that person is the only party to be identified. In circumstances in which you are able to identify other parties who were involved in the act or omission, there would be different start dates from which the prescriptive periods would start to run. That is clear in the bill.

Bill Bowman: If you discover someone else who is jointly and severally liable—

Annabelle Ewing: If you discover someone else, it is not necessarily a joint and several liability situation; that is subject to the rules on joint and several liability. However, if there are various actors involved in the loss through their acts or omissions, there can be different start dates for the run of the prescriptive period. I am sorry—I did not mean to conflate the two.

Bill Bowman: So you will be able to go after those who are jointly and severally liable.

Annabelle Ewing: As I said, the joint and several liability element is governed by the rules under Scots law. You would need to look at those rules to determine in the instant case that you raised what the position would be. The normal approach is that if you agree or are deemed to be jointly and severally liable, you are jointly and severally liable—that is that. One should always get legal advice about the obligations that one takes on in life.

Bill Bowman: So I would not be disadvantaged by the proposed change if I had to pursue the jointly and severally liable individuals to get payment.

Annabelle Ewing: I am sorry—who is jointly and severally liable? I am getting a bit confused. I thought that I understood your example, but you have veered off. Which perspective are you talking about?

Under the bill, the prescriptive period will start to run for the benefit of the creditor when three things are known: that there has been loss, injury or damage; that the loss, injury or damage has resulted from an act or omission by a particular person or people; and the identity of that person or those people.

Bill Bowman: Let us say that I am making a claim against the person whom I think has done the damage. For some reason, that person does not or cannot pay, so I want to pursue the jointly and severally liable partners. Is there anything in the provisions on the five-year prescription to prevent me claiming against those individuals because I have not gone after them within the five-year period?

Annabelle Ewing: I see what you are getting at. In that hypothetical situation, why would you not know their identity? However, taking the example to its extremes, if you do not know the identity of the other parties, for whatever reason, you could adopt a belt-and-braces approach, but the point of the bill is to provide as much legal certainty as possible. We cannot legislate for every single case.

Bill Bowman: Given that you are thinking about it, do we need further clarity on that?

10:45

Annabelle Ewing: I am certainly happy to look into the specific example that you have just raised. Let us say that there are two debtors. If you only identify one of them but, for whatever reason, you decide that it is not worth proceeding with legal action against them, you would then be trying to find out about the other debtor, and you might feel that you were running up against the end of the prescriptive period. In an extreme case, the joint and several liability would be such that you could not possibly identify the second party at that time. I think that that would be a less common circumstance, but we shall look into that.

Bill Bowman: The committee heard some oral evidence to the effect that the third part of the new test in section 5 might increase the complexity of the law in some situations, including where there are multiple potential defenders as a result of complex contractual or corporate structures. Do you accept that criticism of the new test? Is that risk offset by other benefits?

Annabelle Ewing: To go back to first principles, the reasoning behind this reformulation of the discoverability test is to seek to facilitate fairness for—in this case—the creditor. That is balanced by other aspects of the bill, which look at the position of the debtor and take into account the wider public benefit of greater legal certainty.

In the instance that you have just outlined, you could sue the different debtors at different times, so there should not be any particular problem.

At present, you would put out a number of protective writs to preserve your prescriptive period if you are not entirely sure whom you should be suing. In doing that, you would stop the prescriptive period from running. That is not really the best use of resources for anybody on either side of a legal dispute or indeed for the courts and society at large. It is not a very sensible way to do it—there must be better ways.

The SLC put forward a number of options in the consultation. The feeling is that, on balance, the option that has been decided upon by the SLC and which is represented in this bill is a reasonable one.

Of course, there is a countervailing issue around the need to pursue reasonable diligence, so there is already a balance written into the new rules. The balance of the evidence suggests that this solution is certainly an improvement on the current position. Of course, the current position was put into doubt as a result of the 2014 Supreme Court ruling in the Morrison case, because people thought that they knew what the rules were but found out that the rules might be something entirely different.

The new test introduces appropriate fairness into the process and I think that it is balanced by the reasonable diligence obligation.

The Convener: I have a question on the start date for 20-year prescription, which is in section 8. Like five-year prescription, 20-year prescription starts from the date that the obligation becomes enforceable. For obligations to pay damages, that is currently when the loss, injury or damage occurs. Section 8 changes the start date of 20-year prescription for the obligation to pay damages: it says that the 20-year period should run from the date on which the defender's act or omission occurred. This proposed change would be a shift in the law in favour of the defender, clearly, because the new start point would be much earlier than the old one in some cases and would never be later.

In evidence to the committee last week, Mike Dailly of the Govan Law Centre suggested that section 8 was unnecessary. He said that each proposal in the bill should be examined on its own policy merits and that it is unhelpful to regard the bill as something that has to offer benefits to both pursuers and defenders.

How would you respond to that viewpoint?

Annabelle Ewing: I noted Mike Dailly's view when I read the *Official Report* of last week's evidence session. Obviously, other people have other views. If you read the part of the SLC's report where it narrates the nature of its consultation and how the work progressed, I think that you will find that, thus far, the balance of the evidence that the committee has had before it absolutely supports the provision.

There is, indeed, a recognition of the balancing act that must be engaged in as we strive to reach a fair balance between the interests of both sides to a claim, and also of the importance of looking at the overall picture in terms of legal certainty, which we discussed as a key objective in response to your very first question, convener. That enhances legal certainty and allows fidelity.

In terms of the earlier start date that is likely to be the case in practice, by looking at the last act or omission, it was felt that, in many cases, the loss can arise many years down the line and for the 20-year prescriptive period—the long-stop prescription—to start running from then would elongate the process quite considerably.

You must also take into account the fact that, some years ago, Scotland decided to remove the 40-year negative prescription from our legal system. The proposal reflects the feeling that we cannot go on indefinitely with having obligations extant, and it improves legal certainty.

The Convener: Of course, changing that start date runs the risk of increasing the number of the harsh cases that we have heard about. As you will be aware, those are the cases where an obligation to pay damages is extinguished without the right holder ever having been aware that obligation existed at all. If that is the case, should that risk affect the policy that underpins section 8?

Annabelle Ewing: I note the reference to hard cases, and I know that the committee has an interest in a particular case—the Paterson case—that is before the Public Petitions Committee. It has been widely accepted that, if there is any potential remedy for the Patersons, it is not to be found under the law of prescription. Ultimately, when trying to come up with a situation that improves legal certainty, we cannot rely on the knowledge of any individual creditor, as that would not allow us to have a system at all—a point that was well made by the Subordinate Legislation Committee in its report. That means that we have to decide what our system is, and that—inevitably, as with any system in which there is a hard cut-off date—there will be some hard cases at the margins. However, the point has been made by a number of people who have given oral evidence to you that hard cases do not make the best law.

On the Paterson case, issues have been raised around the Land Registration etc (Scotland) Act 2012. I think that the Public Audit and Post-legislative Scrutiny Committee is examining that act, and it might be that there are some areas where improvements can be made. I regularly meet the Law Society of Scotland. When I had a meeting with it the other week, I asked it to consider what practice rules could be put in place in relation to the particular issue of the keeper of the Registers of Scotland and the need to ensure that the client is aware of that.

Other issues are in train as a result of the case being raised, but the solution will not be found in relation to the law of prescription.

The Convener: That is clear enough.

Some concern has been expressed by stakeholders, including the Law Society and the Faculty of Advocates, about how section 8 would work in relation to omissions to act and on-going breaches. Can you offer any reassurance to the committee in that regard?

Annabelle Ewing: If you are asking about the language of acts or omissions—in particular the word “omissions”—I can say that those are terms of art of Scots law, and this bill operates within the general context of Scots law. These are matters that the courts look at extremely frequently, and I think that other people who gave evidence and made written submissions expressed the view that those were terms of art and that the courts deal with such matters very practically, which means that including that particular phraseology did not introduce anything new.

Stuart McMillan: My question concerns section 6 of the bill and the provision that, although 20-year prescription can no longer be interrupted, it can be extended only to allow for on-going litigation or other proceedings to finish. The SLC suggested in oral evidence that in practice any extension would be fairly short, because courts tend to manage cases actively and do not let them drag on. With the challenges to public sector finances, could there be an impact on the court system in the future if there were longer delays as a result of the 20-year period being extended? Also, does the possibility of an extension to allow litigation to finish undermine the overall effectiveness of section 6?

Annabelle Ewing: First, I do not think that any particular impact is likely to fall on the operation of the Scottish Courts and Tribunals Service as a result of the provision.

On the second issue, the SLC was keen to recognise the practical situation in which there may be an on-going court case towards the end of a 20-year negative prescription period. It would not be appropriate to say, “Sorry, but your case didn’t reach the next stage by X date, so that’s it.” All the work that had gone into that court case, which could have taken years, would suddenly, on very arbitrary grounds, no longer be heard. The SLC desperately wanted to reflect that as a matter of practice but to keep it very tight, so what it said, and what has been reproduced in the bill, is that the period should be extended only until such time as the claim is disposed of or the proceedings are brought to an end, because proceedings could be

brought to an end without the claim being disposed of. That will ensure that extensions will be limited, and it reflects the circumstances that would pertain in such situations, so I think that the SLC has got it absolutely right.

Stuart McMillan: I have another question, and I may be stretching things a wee bit. You have said that an extension would be a very short time in addition to the 20-year period. Given your previous experience outwith Parliament, can you say for what length of time such extensions would normally be? Would it be a few months, or a year? I accept that every case is different, but what would the average be?

Annabelle Ewing: Every case is different. It is not really possible to say anything definitive, because I could say something now and further down the line there could be a different set of circumstances, and then you would say that I had not given you the correct information. It is fair to say that such circumstances will not be common, as has been said. We need to reflect, as a matter of practicality, that a question arises about what to do if a case is brought 19 years and 2 months in. Would we just say, "That's it" when we reach the 20-year mark, even if the case has a wee bit of time to go? It was felt that that was not the most appropriate way forward.

Bill Bowman: My question is still on prescription; it is about property rights aspects. Section 7 of the bill states that the 20-year prescription that applies to certain property rights will no longer be able to be interrupted, but can be extended only to allow on-going litigation to finish. Although that mirrors the approach in section 6 for personal rights, the Faculty of Advocates, supported by other stakeholders, has suggested that the approach in section 7 would not work well for property rights such as servitudes. In light of that evidence, are you minded to reconsider the Government's approach to section 7?

Annabelle Ewing: We have carefully reflected on that. We acknowledge the concerns that have been raised and are reflecting on whether we need to look at the language to make the position clear. If, having looked at all the concerns, we feel that the language is okay, that will be one thing, but we are going to reflect carefully on that point, so it was useful to tease that out in the evidence sessions.

Bill Bowman: It is work in progress.

Annabelle Ewing: It is.

Bill Bowman: In its written evidence, Brodies LLP has raised concerns about section 12, which defines what a final disposal is in court proceedings. In particular, Brodies says that

"Section 12 ... does not account for the possibility that a court or other body will grant leave or permission to appeal late or will allow an appeal to be lodged late."

Do you accept that interpretation? Are you minded to propose amendments to section 12?

11:00

Annabelle Ewing: That is another work in progress. We recognise the concern that Brodies has raised and will reflect on the matter carefully.

The Convener: So, there are a couple of areas that you are considering.

Annabelle Ewing: Yes. We are not against amending the bill, but we need to see whether the language is adequate. If it is not, we will consider amending it, in light of those concerns.

The Convener: Do you have a timescale for that?

Annabelle Ewing: That will be done in time for the stage 1 debate. I suppose that it depends when the stage 1 debate is.

The Convener: It is sometime in June, apparently.

Annabelle Ewing: That is a long lead-in time. Sometimes, it is much shorter. That should allow us to progress work expeditiously.

The Convener: Good.

Tom Arthur (Renfrewshire South) (SNP): Good morning, minister. Before I turn to my main line of questioning, I seek clarification regarding council tax. Am I correct in understanding that liability orders in England are roughly analogous to summary warrants in Scotland?

Annabelle Ewing: They may be. I refer to my entry in the register of members' interests: I am a member of the Law Society of Scotland and I do not profess any particular qualification on English law.

Tom Arthur: I appreciate that.

Annabelle Ewing: As we have indicated, we wish to obtain more information on the issue, but the fact is that England has the liability order process.

Tom Arthur: I would appreciate that information. From my limited understanding as a lay person, liability orders and summary warrants seem to have the same objectives. I was struck by the fact that one website—counciltaxadvisors.co.uk, which is accredited by Advice UK—says that

"Magistrates Courts in England and Wales granted over 3.5 million Council Tax Liability Orders"

in one year.

Annabelle Ewing: That is quite a few.

Tom Arthur: It would be interesting to have a better understanding of that method of recovering debt.

Annabelle Ewing: Indeed.

Tom Arthur: Section 13 of the bill seeks to replace section 13—a nice coincidence—of the Prescription and Limitation (Scotland) Act 1973. It pertains to so-called standstill agreements and would allow for a single extension of the five-year prescription period.

The committee has received a range of views on that. There is a suggestion that allowing a standstill agreement would risk abuse by the economically stronger party in a dispute. On the other hand, some stakeholders say that the measures do not go far enough. Indeed, we have taken evidence that suggests that the bill is fine as it stands, but additional safeguards could be introduced, including that any standstill agreement must be in writing and that the debtor in an obligation must have taken legal or money advice.

I appreciate that if one party says that the bill does not go far enough and another says that it goes too far, that might suggest that you have found the perfect balance, in the middle. However, I am keen to hear the minister's views on the policy arguments about section 13.

Annabelle Ewing: Section 13 recognises the need to balance the interest of legal certainty with the creditor's interest in getting a result. It was felt that, instead of having some generally applicable wide provision that would allow for extinctions of the prescriptive period, which would defeat the purpose of seeking greater legal certainty, the standstill provision, as it is called, would help to facilitate resolution.

The standstill agreement will be available under specified circumstances, as Tom Arthur rightly said. It will be only of a year's duration and that period cannot be extended. Importantly, it is also not to be a general contractual provision; it is to be invoked only after the dispute has occurred. Therefore, it is focused on dispute resolution. That is a good thing and I think that we would all welcome it as such.

In other areas we are seeking to facilitate mediation and dispute resolution, rather than all actions going straight to court. That is the motivation behind the provision. There is, again, a balance to be struck in terms of the circumstances under which a standstill agreement can be invoked.

On inequality of arms, it is interesting to note from the SLC's discussions in the report that some people called for consideration to be given to restricting the prescriptive period. Some stakeholders felt that there might be circumstances in which a creditor was less powerful than the debtor, which would involve a real inequality-of-arms situation. That was a road that the SLC chose not to go down. It feels that the standstill provisions for the short negative prescription meet the overall desire to strike a balance between respective interests.

On the final point about additional safeguards, I note that the matter came up in last week's evidence. As far as lawyers and solicitors are concerned, it may be that the Law Society of Scotland should be asked to look at the matter in relation to its practice rules, because I have some questions about how that would work. If we say that people must take legal advice, there may be a case in which one large organisation is in touch with another and there is no inequality of arms, but they might use in-house solicitors, which raises the question whether that counts. Would the organisation still be required to take legal advice?

I understand that it is not the intention to get into that kind of scenario, but when we are drafting legislation we have to contemplate as many possible scenarios as we can. I am happy to go away and reflect on the issue, but I feel instinctively that including that in the bill might cause issues.

Tom Arthur: Okay. Staying on section 13, Brodies has argued that rather than just allowing for extensions, suspensions of the prescriptive period should also be permitted. I understand that to be a pause, in effect. There have been various arguments made about that. Is there policy merit in the proposal?

Annabelle Ewing: Having read the genesis of the SLC's work—the entire report and all the subsequent submissions—I feel that the objective has been to find that balance. Taking into account the overarching objective of legal certainty, I agree with the SLC that the standstill, with the safeguards to be employed as set out expressly in the bill, is a better way of meeting the objective than the suspension that is proposed by Brodies. In fact, the standstill provisions have a good bit of support.

Tom Arthur: Various legal practitioners have suggested that, in its current form, section 13 might raise an issue in relation to contractual limitation clauses. The fear is that although such clauses are common and important in practice, they might be outlawed due to the current wording of section 13. How do you respond to the practitioners' points?

Annabelle Ewing: I have noted that point, but I do not feel that it is well founded. It is clear to me that contractual limitation clauses would not be affected. The bill is to do with negative

prescription, so it is important to bear in mind the very important difference between the definitions of "prescription" and "limitation". Prescription concerns the existence of the obligation itself, while limitation is a procedural issue concerning the point at which someone must pursue the claimant through court action and so forth. The two issues are entirely separate. There is no intention to impact on contractual limitation clauses. I feel that that is clear in the bill.

Tom Arthur: My final question concerns something that is omitted from the bill. We took evidence that one potential further reform to the 1973 act could be with regard to the definition of "legal disability". It is currently defined in section 15(1) of the 1973 act as including "unsoundness of mind". I think that we would probably all agree that that term is somewhat archaic and, indeed, offensive. In the course of our evidence taking, it has been suggested to us that that definition could be replaced with a definition that is used in the Adults with Incapacity (Scotland) Act 2000. What are your thoughts on that suggestion?

Annabelle Ewing: I noted that comment, which I think was made by one of the academics from whom the committee took evidence.

Tom Arthur: Yes—it was made by Dr Eleanor Russell.

Annabelle Ewing: I understand that the same point has been made with regard to other legislation. I go back to the fact that the bill deals with negative prescription and sits in the context of general Scots law principles. If one wants to amend general Scots law principles that apply in many other areas, it would be best to seek to do so through a different vehicle. The danger of seeking to change basic Scots law principles and definitions that apply in other areas in a bill that deals with a particular area of the law is that we end up with a bit of a hotchpotch and unintended consequences.

With regard to the drafting suggestion that the definition in the Adults with Incapacity (Scotland) Act 2000 should be used in the bill, one would need to consider from what point the prescriptive period would run. Should the rules in the bill be used, or should a different set of rules be used, whereby the prescriptive period would run from when the guardian was appointed? A series of other issues would be raised. The bill deals with the negative prescription rules as they apply to the general principles of Scots law. If one wants to amend those other principles, it seems to me that the bill is not the best way to do that, especially if we take into account the unintended consequences to which that could give rise.

The Convener: Dr Russell mentioned the 1973 act. In her evidence, she said that "legal disability" is defined in that act as including "unsoundness of mind".

Annabelle Ewing: But "unsoundness of mind" is the general concept that I am talking about.

The Convener: Is it defined in the 1973 act?

Jill Clark (Scottish Government): It is not defined in the 1973 act, which gives the courts some flexibility in how they interpret it.

The Convener: Thank you for that.

Members have no further questions. Would you like to make any closing remarks, minister?

Annabelle Ewing: No—other than to say that I have found it to be a very helpful session. I note the power of work that the committee has done thus far, and I look forward to further engagement with the committee as we go through the next stages. We will get back to you with the information that we offered to provide.

The Convener: It would be helpful if you could get back to us by 11 May. Thank you very much.

I suspend the meeting to allow the witnesses to leave.

11:13

Meeting suspended.

11:19

On resuming—

European Union (Withdrawal) Bill: Supplementary Legislative Consent Memorandum

The Convener: Item 3 is evidence on the supplementary legislative consent memorandum to the European Union (Withdrawal) Bill. We have before us Michael Russell, the Minister for UK Negotiations on Scotland's Place in Europe, and his officials: Gerald Byrne, head of constitutional policy; Luke McBratney, from the legislative consequences of UK withdrawal project—that is always a mouthful; and Graham Fisher, solicitor and team leader in the constitutional and civil law division. Welcome to you all.

Minister, I believe that you have an opening statement.

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): I thought that it would be helpful if I laid out the issues in the memorandum, as the Government sees them. Thank you for the invitation to give evidence today. The Delegated Powers and Law Reform Committee will be central to the programme of work that is required to prepare Scotland's laws for the shock of EU withdrawal—work that will be required regardless of the bill used to get us there and regardless of whether the United Kingdom Government and the Scottish Government agree about the bill.

The Scottish Government has always accepted that, no matter how much we may regret the UK's decision to leave the EU, we must prepare responsibly for the prospect of EU withdrawal. We have also said that that must be done in a way that respects devolution, and we have been working intensely towards that goal for nearly a year now. The Parliament has before it the position of the Scottish Government. We have set out the options, as we see them, for proceeding in a way that is compatible with the devolution settlement. Each of those options has its challenges and we will not shirk them; they are not, however, of our making.

The task of preparing for EU withdrawal would, on any scenario and in any Parliament, involve an extraordinary level of scale, pace, complexity, uncertainty and risk. There is no doubt that it would be done best by co-operation and co-ordination between the Governments, by each respecting the other's responsibilities, by coming together when interests are aligned, and by each being able to make our own preparations where that is required. I hope that we can still achieve that. The right way to do it would be to amend the European Union (Withdrawal) Bill so that it gives the Governments of these islands their proper roles. We have yet to see whether the House of Lords supports the UK Government's amendments, but the position of the Scottish Government is clear and I hope that it could be supported across the Parliament.

Our view has been consistent throughout the process. We have proposed two approaches to making the changes required, either of which would be sufficient to allow us to recommend consent to the bill. We would either take out clause 11 and related provisions and proceed by political agreement, or follow the arrangements in the Scotland Act 1998, which require the consent of the Scottish Parliament to any adjustments to competence, temporary or otherwise. I am pleased that the set of amendments that would achieve that has now been tabled for House of Lords discussion by Lord Hope of Craighead and Lord Mackay of Clashfern.

This Parliament passed the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill overwhelmingly as the best way to prepare for EU withdrawal if agreement cannot be reached. The policy memorandum lodged alongside the continuity bill sets out various scenarios for how the Parliament could proceed in those circumstances. However, given that agreement has not yet been reached, Parliament must now finally decide on three things: whether it agrees with the Scottish Government that the powers set out in clause 11 and related provisions of the European Union (Withdrawal) Bill are not acceptable; how best in these circumstances to ensure continuity of law in Scotland; and the scope of the powers to ensure that the law operates effectively and supports co-operation between the Governments, while maintaining the Scottish Parliament's rights.

It is open to the Scottish Parliament to withhold consent to the European Union (Withdrawal) Bill, given that alternative arrangements in the form of the continuity bill are in place. Alternatively, the Parliament could consent to parts of the withdrawal bill, primarily so that the fixing powers of the UK ministers are able to be used in devolved areas, which would allow the Governments to co-operate. The third option would be for Parliament to decide that sufficient changes have been made to the European Union (Withdrawal) Bill to address the concerns expressed by this committee and by the Finance and Constitution Committee. Consent could therefore be given to the whole bill, or to the whole bill except for clause 11 and schedule 3—the provisions that impose new and unwanted restrictions on our devolution settlement.

The Government has invited Parliament to consider those options and to set out its views. Legislative consent is, in the end, given or withheld by Parliament. I look forward to helping Parliament come to that conclusion. As I have said, the UK must then put forward amendments to the bill to reflect the extent and form of the consent provided by this Parliament. That is what our constitutional system requires. Deciding whether to take account of legislation passed by this Parliament and whether to follow the constitutional rules concerned is not optional. The UK Government acknowledged that at the outset, when it asked for the consent of Parliament to the bill, and it must recognise that fact.

Whatever the Parliament eventually decides, that should not be the end of the road. There has to be co-operation and co-ordination between the Governments, given the scale of the task, and we are committed to that co-operation.

The Convener: Thank you, minister. We will start with some general questions, before we get into the meat of the discussion. You have put three options in front of Parliament in the memorandum and you say that Parliament must finally decide. Can you clarify the timescale for that?

Michael Russell: The timescale is linked to the third reading of the bill in the House of Lords. As you know, the procedure requires us to agree to or to not agree to a legislative consent motion before the final amending stage of the bill, which is anticipated to be the third reading and is likely to take place on 16 May. The House of Lords timetable dictates that—16 May is the date in question, and it is our intention, with the permission of the Parliament, to have the final debate in the Parliament on 15 May, so I think that it will go to the wire. However, as I indicated, tomorrow's House of Lords report stage on the devolution clauses is significant, and there are amendments that could resolve the issue.

The Convener: When were they tabled?

Michael Russell: The closing date for tabling amendments was last night. I have found that I have to know a bit about House of Lords procedures, and the convention is that the Government tables amendments a week before the debate and members can table amendments up until two days before the debate. The amendments were finally tabled last night and are in the order paper today. There are also amendments from Jim Wallace and Dafydd Wigley, supported by David Steel, which are helpful, but the amendments tabled by Lord Hope and Lord Mackay essentially achieve the second of the objectives.

The Convener: You have been having discussions. Presumably, you will have further discussions with the UK Government and maybe with the Welsh Government as well.

Michael Russell: There is a joint ministerial committee (EU negotiations) meeting tomorrow afternoon in London. I am due to give evidence to the Finance and Constitution Committee tomorrow morning, but I hope to be away in time to get to the JMC meeting in London tomorrow afternoon.

The Convener: Could that meeting resolve any outstanding issues?

Michael Russell: It certainly could. One way forward is for the UK Government to accept the amendments that are in the House of Lords. As I have indicated, the amendments by Lords Hope and Mackay would do the job. That would be a way forward, and we are looking for that way forward. Discussion will continue, and the JMC will no doubt consider those matters.

The Convener: Last week, the Welsh Government, with which I know you have been working, basically agreed with the UK Government, and you did not. Why has there been that divergence?

Michael Russell: That would really have to be answered by the Welsh Government. We have to recognise that the context in which Welsh ministers are working is one in which Wales voted to leave the EU; Scotland did not vote to leave the EU, so that is a significant difference in our positions. The Welsh also have a different system of devolution. They only moved to the reserved powers system on 1 April. Before that, they had a conferred powers system.

In the end, of course, there is a political decision to be made, and the decision that we reached was that the proposals did not meet our basic test of consent. That was confirmed for us when we saw the amendments to the bill, which everybody would have to admit were not terribly well drafted in terms of securing support.

Stuart McMillan: In your opening comments, you spoke about option 2 and the amendments tabled by Lords Hope and Mackay. You also spoke about section 30 of the Scotland Act 1998 and the issue of the consent decision. In the previous parliamentary session, when I was on the Delegated Powers and Law Reform Committee and the Referendum (Scotland) Bill Committee, that section 30 process was extremely important and it showed the co-operation and co-ordination between the two Governments.

Under section 30 of the Scotland Act 1998, orders adjusting the competence of the Scottish Parliament must also be approved by this Parliament. From my reading of the UK

Government's amendments to clause 11, this Parliament is to be sent notice of proposed orders, but they are not to be subject to any procedure or formal scrutiny here. Will that provide sufficient scrutiny for this committee, and for the Parliament, of decisions that will affect the Parliament?

11:30

Michael Russell: No. That is a key point that we have to consider in these matters. The root of the difficulty lies in the desire in the EU withdrawal bill to have a second backstop to be able to overrule this Parliament. There is already a process in the Scotland Act 1998—I do not like it and I have frequently said that I would not want it—that allows this Parliament to be overruled. That is the basis of devolution—Westminster is sovereign, according to that interpretation. Therefore, we have to ask why a second backstop is being put in. It is unacceptable that a backstop should be put in that creates the circumstances in which, no matter what the Parliament did, it would be overruled.

Section 30 orders require the approval of both Parliaments, which is the way to proceed as it is written into devolution. All we are saying is that we should abide by the settlement that exists. The choice that we have laid out is either to take out the second backstop in its entirety and have a written agreement between the Parliaments, or, if that is not acceptable, to revert to what already exists. The section 30 order procedure already exists, and provided that we can revert to it, the system will work. It is the system that we have now and it has worked since 1999. We have never been in a position where there is the prospect of the Parliament being overruled, yet that is our position now. We are saying, as productively and positively as we can, that we should revert to the existing system of devolution, which nobody voted to change.

Neil Findlay: You have already said it, but I want it to be absolutely clear and on the record that if the amendments from Lord Hope and Lord Mackay go through this week, that would be sufficient for the Scottish Government.

Michael Russell: Those amendments were sent to all members of the House of Lords by the First Minister at the end of last week, with a letter to the Lord Speaker. They are amendments that we have drawn up and which we agree with. They have been tabled by two unimpeachable individuals who have been incredibly helpful during the process and with whom I have had a great deal of dialogue. Were the amendments to be agreed to in their entirety, that would resolve the issue.

Neil Findlay: All the way through, my party and I have supported the principle of devolution, and no one could say that we have not been consistent, whether in relation to the referendum on independence or anything else. We have been absolutely consistent in defending the principle of devolution, and that is where we stand at the moment.

You are right in relation to the Scotland Act 1998, but that has never been overturned by the UK Government—long may that continue. The principle is that if powers are not written down, they are devolved. That is a red line, and there is a lot of agreement on that.

One thing disappointed me during the events of last week. All the parties have worked closely with you through the process, but that stopped last week when we got an email that just said that there would be a statement that afternoon. There was no dialogue before that—it happened afterwards. I hope that you have reflected on that, and that that kind of thing will not happen again. We want to do this as collectively and co-operatively as possible. When goodwill is there, my plea is that it is not burned.

Michael Russell: I accept that, and I apologise that that action was clearly not as helpful as it should have been in the circumstance. I have asked for this, but I hope that it will be possible to have a conversation today with you and your party leader, who spoke about the issue yesterday; it would also be helpful to talk to the Liberal Democrats today. My office is trying to arrange that in advance of the JMC(EN), as you will know. I am happy to have a conversation today with representatives of the Conservatives, if they would like to do so, so that I am very clear when I go to the JMC(EN) meeting about the position across the Parliament. I will continue to ensure that information is provided and that I am listening to what you and your party say.

Neil Findlay: There are still 24 areas of disagreement. Only a few months ago, there were 111 such areas, so 87 have gone. We still have 10 months or whatever it is to go. Given that, surely it is not beyond the wit of man and woman to take that time to come to agreements on the 24 areas.

Michael Russell: To be honest, I do not think that there will be great difficulty in that. The issue is the approval of the frameworks and the Parliament's consent to the outcomes from them. There has been intensive work on the 24 areas. It is not absolutely right to say that the other areas have disappeared; rather, they have moved into categories that do not require such intensive work, which is either because existing arrangements between the Governments and the Parliaments can deal with them or because they do not have such a requirement.

The 24 areas will require actions of some sort; the question is what sort. Not all will require legislation by any manner of means.

There are two outstanding matters that the UK Government says are reserved and which we say are not, and we will have to come to a decision on that. The awkwardness is in the UK Government's continued view that there might be other matters, which are as yet unknown, for which frameworks could be established without consent. If we have a consent process, that will not be a worry, because if other issues are suddenly noticed, that process will be able to deal with them. However, if the process that is presently on offer applies, nothing will be able to be done about such issues. We are ready for that, but I see no difficulty in establishing effective frameworks in the areas that we have given consent in.

Neil Findlay: The general feeling out there in the real world is that people want politicians just to get on with it. You have said that there are not many problems in working with other parties to reach a sensible and workable conclusion. When the reality behind the scenes seems to be that things are a lot more calm and sensible than some present them to be, does the rhetoric that stokes up the situation as a big constitutional conflict help?

Michael Russell: I know that it will be regarded as unusual for me to say that I have avoided rhetoric, but I really have avoided it—

Neil Findlay: Unusually, I might not be aiming my fire at you.

Michael Russell: In that case, I shall act as a human shield for the rest of the Government and make it absolutely clear that an attempt has been made to present not just the problem but the solutions, which is what I will continue to do.

Neil Findlay: My view may differ.

Tom Arthur: Minister, you have said that the UK Government's amendments have been drafted in a way that makes securing support difficult. The drafting also makes them rather difficult to comprehend. You and other members of the Scottish Government have previously characterised your disagreement with the UK Government as coming down to whether the word "consent" or "consult" is used. I find the use of the word "consent" in the amendments to be alarming. Consent suggests a power to refuse consent, which will be acknowledged and acted on. The amendments that the UK Government has presented use the phrase "made a consent decision", which seems to be another way of saying "expressed an opinion".

I understand that the amendments represent a retrograde step, because they fall short even of requiring consultation. Under the amendments, the UK Government could lay statutory instruments regardless of whether the Scottish Parliament had expressed an opinion and, if it had expressed an opinion, regardless of what that opinion was. The Scottish Parliament's opinion would have no substance or weight. I understand that the UK Government would not have to give a substantial justification of its reasons for that, beyond issuing a written statement.

What is your understanding of a "consent decision"? What are the potential implications for the understanding of relationships between the two Parliaments and the two Governments as a result of consent decisions?

Michael Russell: We are talking about subsection (4) of proposed new section 30A of the Scotland Act 1998 in amendment 1, in the name of Lord Callanan, which is in the House of Lords order paper. It says:

"For the purposes of subsection (3) a consent decision is—

(a) a decision to agree a motion consenting to the laying of the draft".

That is fine, but the next two paragraphs state that a "consent decision" is:

"(b) a decision not to agree a motion consenting to the laying of the draft, or

(c) a decision to agree a motion refusing to consent to the laying of the draft".

At the very least, that is badly drafted. A minister who has seen that drafting might have said, "Look, I don't think that is going to help to conclude this matter. Let's try to understand it." It implies that there is no role for the Scottish Parliament in saying, even unanimously, "This is not on." No matter what is done, the Scottish Parliament will still be deemed to have given consent. That is foolish. That provision should not be there, and nobody could sign up to it.

Let us accentuate the positive, which is that the amendments in the name of Lord Hope and Lord Mackay can amend that amendment so that we can agree to it. If it is not amended, it cannot be agreed to.

Stuart McMillan: I want to follow on from Neil Findlay's comments about some of the dialogue possibly not fully reaching the population and there seeming to be just a discussion or an argument among politicians. On amendment 1 and proposed paragraphs (4)(b) and (4)(c), can you put into clearer language what the implications would be for Scotland and any of the examples from the list of 24 areas in which legislation could be required if that amendment were agreed to? How would that affect Scotland?

Michael Russell: I could deal with all of the 24 areas, but that would take too much of the committee's time. Let us start with "Agricultural support", which is one of the early items on the list. If a framework on agricultural support was established and did not have consent, it might not include less favoured area status. Even if we voted unanimously on that as a Parliament—to be honest, we probably would, as anybody who knows Scottish agriculture knows that LFA payments are essential to sustain Scottish agriculture—the UK Government could say that it does not really matter what that view is, it will not agree to that, and that it will do something different. There has to be consent.

The principle of subsidiarity underpins devolution. That means that decisions are best made closest to the places that are affected by them. That is what is at risk. The quality of life in many areas of Scotland depends on that principle being applied.

We probably need to look right through that list, from "Agricultural support" at number 1 to "Services Directive" at number 24. For each area, we could say that, without there being consent, things could and might happen that are not desirable. There might well be things for which a UK Government believes for the best reasons that a different system is needed, but the basis of devolution is that that is not how we operate. That is not how we have worked for the past 19 years. The system that we have is the system that the people of Scotland wanted, and I think that they want to keep it.

The Convener: We will move into the meat of what the committee deals with, which is the exercise of powers. You have put forward three options. That could all change, of course, but let us deal with things as they are.

Neil Findlay: Convener, I would like to ask what scenario planning there has been on the possibility of the continuity bill being struck down. What would be the implications if that were to happen?

11:45

Michael Russell: That would depend on the decisions that will be taken over the next few days and weeks, and what else takes place. It would also depend on what the legislative consent motion is. However, we remain very confident that the continuity bill is perfectly competent.

Of course, rather than striking down the continuity bill, the process would be to ask whether there are things in it that should not be there. The judgment of the Supreme Court might be to that effect—although we are very confident that it will not be—and therefore we would have to examine it at the time. However, at the present moment, we believe that the continuity bill is right and works well. The question here is whether all of it is to be used or whether it is to be used partially or not at all. That is the issue.

Neil Findlay: Just so that the committee is clear, are you scenario planning?

Michael Russell: We will meet every set of circumstances as it arises, but we are not preparing for failure in the Supreme Court.

Neil Findlay: Okay.

The Convener: Let us go back to the question. In your view, which mix of powers across the three options will best secure an accurate and functioning statute book by 29 March 2019?

Michael Russell: All of them can achieve that. The question is exactly the right one, convener. The issue breaks down into three things that need to be achieved. The first is continuity: to make sure that the laws work. The second is to make sure that powers for ministers exist in order for that to happen. The third is to set up the frameworks and the functions that will need to exist post-Brexit to allow those things to happen.

The question is how the options conform to all those objectives. The answer is that all of them do, to a greater or lesser extent. They can all work in that way, but the next question is what would work most effectively and efficiently. My own view is that we could work with any of them. We have always said that the most desirable outcome of the process would be to have a single statute that allows the two Governments to work effectively together, which would mean less work than there would otherwise be. There will be a massive amount of work, no matter what, but if we could achieve a single statute, that would be the best outcome.

If that could not be achieved, there would be a mix of possibilities. For example, the continuity bill plus clause 7 would allow us to meet the first objective, which is to make sure that the powers come back. That would allow co-operation between ministers, because it would empower UK ministers to act in devolved areas and we could work together on those. That is workable. The withdrawal bill minus clause 11 would also be workable: the first two objectives would be met, but we would deal with the third one ourselves. Of course, the continuity bill is workable. It was backed by this Parliament by 95 votes to 32, so it believes that it is a workable solution. It is also one that we can bring in.

Therefore a choice would have to be made, but there is no doubt that, all along, our first preference has been to get an agreement that would allow the withdrawal bill to operate.

The Convener: So your first preference is actually to have none of the three options?

Michael Russell: Well, the first option would be, as I described it, to give complete consent. Thereafter, there would be choices. We have tried to do the proper thing by being prepared for any set of circumstances, which is what those options do.

The Convener: So the option of giving consent to the UK bill could be before the Scottish Parliament on 15 May?

Michael Russell: Yes, it could be, if there is an agreement and the amendments tomorrow go through or another form of agreement goes through.

The Convener: Okay. Mr Findlay has another question.

Neil Findlay: Do you have any indication as to the Government's view on the amendments that have come forward?

Michael Russell: On the UK Government's view?

Neil Findlay: Yes.

Michael Russell: No, I have none as yet. There is a meeting of the JMC tomorrow, which is when the House of Lords will meet, so it could be that we will hear then—and it would be helpful to know that.

Neil Findlay: One of the concerns for businesses and many others is the issue of legal certainty. I cannot help but think, instinctively, that what we might call the mongrel option would not fill people with huge confidence and certainty. Is that a fair or an unfair comment?

Michael Russell: Whatever happens, the situation is difficult and, as I indicated, not of our making. I would like to provide as much certainty as possible. Any of the options performs the functions that need to be performed—the three functions that I declared. It is simpler to understand the two extremes. One is the continuity bill, under which we take the whole responsibility, and we have legislation that allows us to do that. The other is to agree to the UK bill, providing that we settle the difficulty that exists. Those are the clearest options, but the other ones are workable. I would not come to the Parliament with a legislative consent memorandum unless I thought that it could produce a functioning result.

The matter has dragged on for a long time, but the timetable for the European Union (Withdrawal) Bill is not of our making. It is entirely in the hands of Westminster. That bill was announced at the Tory party conference in September 2016. I think that the first JMC (European Union negotiations) in November 2016 mentioned it. It was certainly discussed at the second one in the December, because I remember a conversation about it in the margins of the meeting with Ben Gummer, who was then responsible for it. It has been on the go since then, so the uncertainty about it is a product of that timescale.

Neil Findlay: We want to ensure that there is parliamentary scrutiny of any proposals and proposed changes. Which of the options provides us with the maximum scrutiny?

Michael Russell: All of them. Scrutiny is also an issue for the standing orders of the Parliament. I think that you have already seen draft proposals on scrutiny.

The Convener: We have seen protocols.

Michael Russell: Yes—protocols. We intend to apply those enhanced protocols no matter what happens, because the decision on how this Parliament scrutinises the detail is not, in the end, a matter for Westminster legislation; it is a matter for this Parliament to decide. We made a commitment to enhanced scrutiny as the continuity bill went through the Parliament and we will stick to it.

Neil Findlay: The Parliament values engagement with stakeholders and outside bodies. Is there a similar commitment to ensure that, when there are changes to regulations, that commitment to scrutiny will apply to whatever the option is?

Michael Russell: Yes, because that was built into the process that was passed through the continuity bill and that is a process that we wish to be applied. It was certainly discussed at stage 2—in as much as I can remember anything that was discussed in the 11 hours of stage 2. It is built into the process and the committee's central role in that.

Stuart McMillan: The supplementary LCM talks about the practical difficulties that will arise if reliance is placed solely on the powers in the continuity bill. Will you provide more information on that?

Michael Russell: The difficulties are set out clearly in paragraphs 19 and 20 of the policy memorandum to the continuity bill, which I am sure is available.

We pointed out that complexity will be added to if we are not able to rely on joint activity between the two sets of ministers and the two Governments. It will require that a large number of technical instruments be laid and scrutinised in the Scottish Parliament while the same is being done in the UK Parliament. Clearly, for reasons of efficiency, that would be better done jointly. We would like to co-ordinate the instruments. The complexity would flow from the inability of the UK

Government to come to an agreement on the matter, which would be regrettable, but we could work with it: we would have to. I think that I said on a previous occasion at the committee that there is no option but to make provision. It has to be done.

If there is a transition period, which seems likely, the period in which the instruments will need to be considered is, fortunately, not between now and the end of March next year but between now and the end of December 2020. I think that I have also said at committee before that our estimate is that 300 to 350 instruments will be required, but that is only an estimate. That is about the same as a whole annual crop of statutory instruments; we will have to take a year's worth of statutory instruments and consider them probably from about this summer through until the end of 2020. It is a big job and we have two years to do it. There will therefore be an increase of 50 per cent in statutory instruments, but it can be done. It will have to be done.

Stuart McMillan: Paragraph 17 of annex D to the supplementary LCM states that

"where both governments have corresponding powers to make fixes in devolved areas, the ability of Scottish Ministers to make subsequent, different provision than that made by UK Ministers will protect devolved interests".

What will the impact of subsequent changes to legislation be, for example, in relation to certainty of retained EU law?

Michael Russell: Luke McBratney will address that.

Luke McBratney (Scottish Government): The important thing about that option is that it ought, in most circumstances, if the two Governments were to retain the ability to do something different, to prevent that. The fact that corresponding and equal powers would exist would ensure that each Government respected the roles, and would ensure that our seeking to reverse a change that the UK Government had made in a devolved area never comes about.

I have spoken to the committee about section 57 of the Scotland Act 1998 before—principally in terms of how it provides for scrutiny of instruments. However, far more significant is the bit between the Scottish and UK Governments. The way that section 57—which is an existing example of corresponding and equal powers—works is that it is very often the Scottish Government that goes to the UK Government with a proposal that things would be better done on a UK-wide basis. Because we could always choose to do something different later, section 57 regulations are invariably the product of agreement between the Governments, which is the situation that we envisage in paragraph 17 of annex D to the supplementary legislative consent memorandum.

Gerald Byrne (Scottish Government): One of the draft protocols that the committee has seen is intended to govern that position and to give this Parliament a role in scrutinising proposals from the Scottish Government to consent to UK-wide orders in those circumstances. It is one of the other limbs of ensuring a role for Parliament in situations such as we envisage, where we are looking for a UK-wide order. It is important to look at the detail of that protocol.

Stuart McMillan: Once again, that takes us back to the nub of the issue in terms of this Parliament providing consent, if it decides to do so.

Gerald Byrne: Although it is not written into statute, Parliament would in effect have the opportunity to scrutinise Scottish ministers' proposals to consent to UK-wide orders. It is not a statutory requirement, but because of the alternative mechanisms that Luke McBratney has described, we are confident that there would always be a process of agreement under the powers, as they would be equalised under proposed amendments to the withdrawal bill.

Stuart McMillan: In light of the differences between the UK Government's and the Scottish Government's views on the limits of the Scottish Parliament's and Scottish Government's devolved competences, how do you envisage agreement being reached on which areas the Scottish ministers may legislate for under the bills, in a way that avoids potential challenges to instruments that would be laid by the Scottish ministers?

Michael Russell: The matter will be resolved, should it require it, in the Supreme Court. That process is now under way. All I can say is that it will be vigorously pursued by the Lord Advocate. We would much rather see all such circumstances being addressed through co-operation and agreement. That has been our wish from the beginning and it continues to be our wish, but legal certainty will come, if required, from the Supreme Court.

Bill Bowman: The supplementary LCM mentions changes made to the UK bill that address concerns about the breadth of powers. Can you say more about those changes and how they address those concerns?

Michael Russell: The UK Government has introduced amendments that make some such changes. As we anticipated, it has removed clause 8, on the power to implement international obligations. It has removed the ability to set up new public authorities, and has prevented the powers being used to introduce new fees. It is preventing the withdrawal agreement power from

being used to amend the withdrawal bill itself, and it has introduced the new explanatory statements.

In the continuity bill, we have engaged with some of those things, such as the explanatory statements, and we go a bit further. We think that the amendments go some way towards addressing the concerns that existed. Some of those things have arisen as a result of the continuity bill and some have arisen because the continuity bill reflected views about difficulties with the withdrawal bill. There has been welcome change; nobody would deny that.

Bill Bowman: One of the committee's recommendations in its report on the legislative consent motion from last November was that further consideration be given to basing the powers in the bill on a test of necessity rather than on one of appropriateness. We understand that a non-Government amendment that makes such a change for the exercise of UK ministers' powers under the withdrawal bill has been made at report stage in the House of Lords. Do you plan to recommend an equivalent change to the Scottish ministers' powers under the UK bill?

12:00

Michael Russell: We have that in the continuity bill, of course. We accepted that change and, indeed, we assisted with amendments throughout the bill to put that in place.

The position would be one of equity. Whatever powers are granted to the UK ministers and however they are restrained, the equivalent should apply to Scottish ministers. We thought that we had got to a better position with the continuity bill, so we would welcome the amendment from—I think—Lord Lisvane. We do not know what the UK Government's position is on that amendment, but were it to succeed, we would want to see changes made to the powers of Scottish ministers as well.

Bill Bowman: Does that mean that you would recommend an equivalent test?

Michael Russell: Yes. We agreed to put that in the continuity bill, because we think that it is a good thing.

Bill Bowman: I might just have forgotten.

Michael Russell: Indeed. We like to be consistent, if we can be.

The Convener: To be fair to you, Mr Bowman, I note that you have not been here for all of the meetings. The issue has certainly been covered by the committee.

We recommended a change to the parliamentary procedure for the power in schedule 4 to create or increase fees and charges in connection with functions that public bodies in the UK become responsible for on exit day. The recommendation was that the power be subject to affirmative procedure not just for new fees, but for significant increases to existing fees. Are you aware of any pending amendments to the UK bill to make that change?

Michael Russell: The UK Government is going to promote such an amendment, I think.

The Convener: The supplementary LCM mentions proposed changes to the UK bill to extend the requirements for explanatory statements to Scottish ministers in relation to regulations that are laid in the Scottish Parliament. Can you outline what the new requirements will be?

Michael Russell: We are supportive of explanatory statements, and we are glad that there is movement in that regard. The continuity bill has additional elements that we are going to apply. They include the proposal that, when exercising powers under schedule 2, there must be a statement of the reasons for use of the power, which I think is welcome, and about its being a reasonable course of action.

There must also be such a statement on amendments to the Equality Act 2010, saying that ministers have paid due regard to the legislation, and explaining the relevant law before exit day, the instrument's effect on retained EU law and the purpose of the instrument.

If ministers exercise the powers in schedule 2 to create a criminal offence, there must be a statement of the good reasons for creating a criminal offence and the sentence that is attached to it.

If ministers make an instrument under the urgent procedure, there must be a statement of the reasons for the declaration of urgency.

Finally, if ministers amend regulations under section 2(2) of the European Communities Act 1972, the statement must set out the good reasons for the modification and state that the modification is a reasonable course of action, and it must contain an explanation of the instrument, say what the relevant law before exit day is, and state the instrument's effect.

We committed to providing further statements under the continuity bill, such as the statement about whether the regulations affect employment or health and safety matters—I think that those amendments were from Labour members during the passage of the bill. We will be held to that even if the continuity bill is not in effect. We think that that additional information will be useful, so it would be contained within the statements.

Tom Arthur: I would like to pick up on an issue that was raised at the tail end of Neil Findlay's

questioning earlier, when the subject of the protocols was touched on. Will you state for the record whether you think that those protocols are workable and sufficient, and is the Government content with them?

Michael Russell: The protocols are a product of discussion with the Parliament. I am keen to stress that they are not Scottish Government protocols; they are outcomes that the Parliament would take on. We suggested the arrangement at a committee meeting some time ago—last August, I think. I am glad that that has been agreed to, and I am grateful to the Parliament and the committee for being involved.

The protocols give the necessary flexibility to make procedural changes, and they create a higher level of scrutiny than would otherwise be the case. It is important that they give an effective steer about what matters are considered more important, because the process that we will be engaged in will be one of prioritisation of activity.

The protocols will enhance rather than supplant the committee's work, and they will help it—I hope—to make decisions about what the most important issues are, given that a flood of secondary legislation is coming down the road. They provide for good joint working.

The process has taken some time, and a lot of thought has gone into it. I hope that the protocols will—finally, when they are out of draft form—be welcomed by the committee and by the Parliament. The Government will certainly welcome them. They will enable more effective scrutiny and give the Parliament ownership of how scrutiny takes place.

Tom Arthur: In order to cover all eventualities, would you be in favour of applying a sift process to SSIs that are laid by the UK Government? How would that be achieved?

Michael Russell: That is interesting. The UK Government should not be legislating on how this Parliament scrutinises issues, and I want anything that has effect in Scotland to be effectively scrutinised.

With regard to the continuity bill, an agreement on the sifting process was reached after a great deal of discussion. Ross Greer's amendment, which was worked up by the committee, provided a conclusion on how the process should operate. My view is that the process should apply to all the material that will have effect in Scotland for which this Parliament is responsible. However, I cannot take any responsibility for what the UK Parliament chooses to do with issues that are relevant to it. In general, I think that the continuity bill puts in place a better and more effective system that will work well for us.

The Convener: We have just 10 months to go until exit day. Will we be able to deliver the programme of secondary legislation in that very short timeframe?

Michael Russell: I am going to use the word "we". We all will have to do that. The committee has an enormous role, and I accept that the bill—although I do not apologise for it—will be a big pressure on it. We all will have to deliver the programme because, as Neil Findlay indicated, we have to give every part of Scotland—every community, interest group and business—legal certainty that it can be done.

The Convener: Are there any final questions from members?

Neil Findlay: On that point, I have a practical question. Is there additional recruitment in Government and Parliament in order to deliver the programme? Is there additional resource?

Michael Russell: I cannot speak for the Parliament, but in the Government there has been an increase in the number of people who are working with us. Each area of Government is also looking at the matter individually. There is, of course, resource available from the UK Government, which has allocated resource for additional Brexit work. It is for Derek Mackay to account for that, but the money will have to be drawn down. Additional resource will need to be put in place, which is what we are trying to do.

Neil Findlay: Can you quantify that in terms of finance and bodies?

Michael Russell: I cannot quantify it in terms of either at present, but—if I am correct—the UK Government has allocated £3 billion, and discussion is currently under way about what proportion of that resource can come to Scotland and how that will happen. Derek Mackay would be the right person to respond to that question; I will ask him to make the committee aware of the resource that is available.

Neil Findlay: Thank you.

The Convener: That would be useful. As members have no further questions, I thank the minister and his officials for their time. The committee has another meeting on Thursday, at which we will have Chloe Smith and David Mundell in front of us. I thank you again, minister—we will perhaps see you again at some future stage.

Michael Russell: I fear that that may be the case. Thank you very much, convener.

12:09

Meeting suspended.

12:10

On resuming—

Instruments subject to Negative Procedure

Common Agricultural Policy (Miscellaneous Amendments) (Scotland) Regulations 2018 (SSI 2018/122)

The Convener: Item 4 is consideration of instruments that are subject to negative procedure. Scottish statutory instrument 2018/122 makes various technical provisions to implement regulation (EU) 2017/2393. There is a drafting error in the regulations. The provision defines "established local practices" for the purposes of paragraph (2)(b) of the new regulation 5, but the definition is contained in paragraph (2)(a).

Does the committee agree to draw the regulations to the attention of Parliament on the general reporting ground, as there is a drafting error in the new regulation 5(3) of the Common Agricultural Policy (Direct Payments etc) (Scotland) Regulations 2015, as inserted by regulation 4 of the 2018 regulations?

Members *indicated agreement.*

The Convener: Does the committee wish to note that the Scottish Government intends to correct the error by means of a correction slip?

Members *indicated agreement.*

National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) (No 2) Regulations 2017 Amendment Regulations 2018 (SSI 2018/123)

Act of Sederunt (Fees of Messengers-at-Arms, Sheriff Officers and Shorthand Writers) (Amendment) 2018 (SSI 2018/126)

Bankruptcy Fees (Scotland) Regulations 2018 (SSI 2018/127)

The Convener: No points have been raised on the three instruments. Is the committee content with the instruments?

Members *indicated agreement.*

12:11

Meeting continued in private until 12:32.

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