OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 7 December 2021

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 7 December 2021

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DELEGATED POWERS AND LAW REFORM COMMITTEE

13th Meeting 2021, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Craig Hoy (South Scotland) (Con)
*Graham Simpson (Central Scotland) (Con)
*Paul Sweeney (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dr Ruth Fox (Hansard Society)
Morag Ross QC (Faculty of Advocates)

CLERK TO THE COMMITTEE

Andrew Proudfoot

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 7 December 2021

[The Convener opened the meeting at 10:04]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Good morning and welcome to the Delegated Powers and Law Reform Committee's 13th meeting in session 6. I remind everyone who is present to switch their mobile phones to silent.

Agenda item 1 is a decision on whether to take item 8 in private. Is the committee content to take that item in private?

Members *indicated agreement.*

Made Affirmative Procedure Inquiry

10:04

The Convener: Item 2 is an evidence session for the committee's inquiry into use of the made affirmative procedure during the coronavirus pandemic. This is the first of two evidence sessions that are planned for this month, before the committee takes evidence from the Scottish Government in January.

I welcome to the meeting Dr Ruth Fox from the Hansard Society, who is appearing remotely from London, and Morag Ross QC from the Faculty of Advocates, who is joining us in the committee room. We are very grateful that both of you are able to attend the meeting.

I will start the questioning. I would be grateful to get an understanding of your general views on the made affirmative procedure. For example, what are your observations on the frequency of use of the procedure during the coronavirus pandemic compared with its use pre-pandemic?

Morag Ross QC (Faculty of Advocates): I would like to say a little, if I may, about what I can and cannot say based on the experience that I bring.

Obviously, I am here on behalf of the Faculty of Advocates. My experience and expertise are predominantly in administrative and public law. Parliamentary procedure is not normally considered in the context of litigation, so I cannot say that I have direct professional experience of such measures.

However, there are general principles that relate to decision-making processes in general, the way in which statute law is made and—this is important—the accessibility of law. All those things are at the heart of public law in practice, which is what I do, so I might be able to offer observations from an external legally informed perspective, which might assist.

As members will be aware, there have been cases in which the courts have looked at the lawfulness of coronavirus regulations, in particular in relation to worship in churches and aspects of regulation of the hospitality industry. However, those cases have not, at their core, looked at the process. I am aware of the cases, but have not been directly involved in them. Speaking on behalf of the Faculty of Advocates, I cannot make any comment on the political aspects, and I cannot really say whether any one case or individual regulation was justified or not, either as a matter of policy or procedure.

Having made that introduction, it is important to say that there are general issues of principle and practice for the faculty and lawyers. I will say briefly what I consider those to be, chiefly. They are to do with, first and foremost, the rule of law and the place of parliamentary democracy in how law is made; clarity in legislation and the risk of complexity in legislation, which might come about in how law is made; the accessibility and visibility of law to society at large, but also to lawyers; and whether it is possible to define or to be more specific about urgency. Those are probably the critical areas that will be of concern to the committee. I am happy to expand on any of those, but that is probably sufficient for now.

I am happy to answer questions.

The Convener: Thank you. Will you give us your thoughts on urgency, which the committee will, clearly, look at in more depth? It is clear that, pre-pandemic, there were very few made affirmative instruments but, obviously, the situation has been totally different since the pandemic began.

Morag Ross: Yes. As I understand it, on the provisions that the committee is looking at, the regulations that have been made have chiefly been made under one of two statutes: the Public Health etc (Scotland) Act 2008 and the United Kingdom Coronavirus Act 2020. Those acts have very similar provisions—members will, of course, be aware of those—that refer to circumstances in which the ministers consider the situation to be urgent.

I am glossing that slightly. It would be tempting to think that we could narrow that down to say that "urgency" definitely means X or Y and that it does not mean Z, A, B or C. Tempting though that might be, it is likely in practice to be impossible to do that in any meaningful way. We do not necessarily have to be able to anticipate all eventualities, but there must be room to allow for the unforeseen. Also, things change, so there must be flexibility to allow decisions to be made that respond to changing circumstances. "Urgency" might mean one thing in week 1 and something else in week 2, so you have to allow for responses to be developed.

Something that occurred to me when I was thinking about this was the question whether there were useful parallel circumstances of decision makers being constrained by urgency and by having think about what that means. I am not saying that this is a direct parallel or obvious analogy, but public procurement regulation obliges contracting authorities—generally, public authorities—to follow really strict rules before they can award contracts. I pause to say that I am aware that awarding of public contracts is an issue in the coronavirus context, but I will leave that to one side.

In routine public procurement, people have to follow certain steps—there has to be a timetable and everything is very highly regulated. However, there are exceptions that allow contracting authorities not to apply the rules and to award a contract without advertising it. In fact, provision is made for that in European Union law and in domestic legislation with regard to the regulations that apply in Scotland. Under such provision, that sort of thing happens

"only if strictly necessary ... for reasons of extreme urgency brought about by events unforeseeable".

That is an example of regulation going a bit further under the stipulation that any such move must be "unforeseeable" and "strictly necessary", and should happen in "extreme" circumstances.

I am not advocating that model, but it is as well to be aware of other circumstances in which legislators have made an effort to define what is meant by "urgency". Moreover, it is important to understand that, when the courts have had to construe that, they have taken quite a strict line in testing Governments or contracting authorities on the circumstances in question.

As I have said, I mention that not as a model to adopt but as something to be aware of. In general terms, you are left with the term "urgency" in the framework; the question is how that is applied.

Dr Ruth Fox (Hansard Society): Perhaps I should start by setting some context. The Hansard Society has been monitoring all statutory instruments that have been laid before the Westminster Parliament since the start of the 2017 session, so my remarks will almost universally be about the approach to made affirmative instruments at Westminster and what lessons might be transferable from that experience. I have not been monitoring instruments that have been laid before the Scottish Parliament and am not as familiar with the Scottish Parliament's procedures as I obviously am with those at Westminster.

With regard to the UK Government's approach to made affirmatives, it is certainly true that use of the procedure was relatively rare until the past few years. We have certainly seen an increase in its use—not just because of Covid-19 but because of Brexit. Quite a number of provisions in Brexit-related legislation that went through the Westminster Parliament included something that is similar to provision in the Public Health etc (Scotland) Act 2008, and that provision has been replicated in, for example, the European Union (Withdrawal) Act 2018, the Taxation (Cross-border Trade) Act 2018 and the European Union (Future Relationship) Act 2020 that went through Westminster between Christmas and new year

last year. A number of provisions for the made affirmative procedure are now on the statute book.

Prior to Brexit and Covid, the procedure tended to be used a lot in relation to financial or tax-related provisions. In evidence to the House of Lords Secondary Legislation Scrutiny Committee earlier this year, the first parliamentary counsel—the head of the Office of the Parliamentary Counsel in Whitehall—said that prior to the Covid legislation

> "The only legislation ... that I was aware of having this procedure was either civil contingencies legislation or a lot of indirect tax legislation".

Certainly, we see a lot of use of the made affirmative procedure when there is urgency—for example, in relation to the application of sanctions regulations, when there is a need to control capital flight or to introduce provisions very quickly in relation to high-risk countries and so on. We also see it being used in relation to taxation and customs issues.

10:15

However, we have never before seen the made affirmative procedure used under the Public Health etc (Scotland) Act 2008 on this kind of scale. Whether it was necessary for it to be used in all circumstances is obviously highly debatable. To give some context to the debate, in terms of the volume of use of the procedure at Westminster, since the start of the 2017 session, there have been 221 made affirmative instruments, which is just over 5.5 per cent of all instruments that have been laid before that Parliament. However, if we look at specifics, such as the height of the Covid crisis and the height of the provisions for Brexit, we see that at times the figure reached 10 per cent, and in the short period around prorogation and part of the 2019 election, the figure reached nearly 17 per cent of the share of all instruments that were laid before Parliament. Its use certainly has increased, and peaks can definitely be seen in use in the height of the pandemic and in Brexit delivery.

The Convener: Thank you, Dr Fox.

It would be useful to make anyone who is watching these proceedings aware of the figures. Sixty-three made affirmative instruments were laid under the Public Health etc (Scotland) Act 2008, while 61 were laid under the Coronavirus Act 2020. In total, the procedure was used 132 times in Scotland between 20 March 2020 and 2 December 2021.

I think that we would all agree that it is difficult to do a direct comparison of uses of the procedure. Every instrument in the Scottish Parliament goes through the Delegated Powers and Law Reform Committee, whereas there is not a comparable arrangement at Westminster. I want to make anyone who is watching aware of that, because it is an important point to recognise.

Dr Fox, notwithstanding the numbers that you outlined, and recognising that your focus is on Westminster and not so much on the Scottish Parliament, do you have any thoughts on the nature of the instruments for which the made affirmative procedure has been used? With regard to the increase in the number of such instruments relating to public health—you indicated that, for a period, 17 per cent of instruments at Westminster were made affirmative instruments—do you think that the use of the procedure, from the point of view of the policy areas that such instruments have been used for, is appropriate and correct, or is it potentially overbearing?

Dr Fox: It is a question of urgency. There is no constraint on a minister's use of the power. He or she only has to declare that they consider the matter urgent and that they therefore have to use the power.

With a number of the regulations during the pandemic—particularly last summer, as we were emerging from lockdown—there were particular concerns at Westminster, which I think were replicated in relation to the actions of the devolved Governments, about the fact that although the policy direction of some of the regulations had been discussed and debated at some length, through media press conferences and debates in the Parliaments, the regulations often emerged very late on, shortly before they were brought into effect. Sometimes, they were published as little as half an hour before they came into force.

Given how long they had been discussed and how long the direction of policy had been there, there was a question as to whether they were urgent and whether it was necessary for them to be published as late as they were. Would it not have been possible for the instruments to have been brought in through the draft affirmative procedure, albeit with a commitment on the part of the Parliament to expedite its procedures in that respect so that the scrutiny could take place before the instruments came into effect?

We have seen throughout a real concern about the absence of substantive supporting information and documentation; inadequate explanatory memorandums; and a lack of impact assessments or an evidence base for the policy.

The question of the extent to which that is partly a product of the developing nature of policy during the pandemic, and the extent to which it is about the way in which ministers have been able, for reasons of political and administrative convenience, to push these things to the wire and get away, if you like, without producing information

and doing substantive policy work, because they have had the option of resorting to the made affirmative procedure, is hotly debated. At Westminster, there is a concern—as I know there is in this committee—that ministers are using that power rather than doing some of the policy work in order to provide the information when the regulations are brought forward.

Morag Ross: I would like to develop a point that Dr Fox made a moment ago, on the question whether giving information in general is a substitute for parliamentary procedure. It might be suggested that, as long as the Government communicates and tells everybody what it is thinking of doing, that is enough. It can be said that, as long as there is a clear public message that tells everybody, in simple terms, what is happening, that satisfies the requirement for certainty.

However, I suggest that that is not a substitute for proper parliamentary procedure. The message can be properly clear only if the law that underpins it is clear. A clear message has to have a grounding in law, and law has to have a grounding in proper process. One cannot get over that simply by putting out statements that say what is going to happen.

It may be suggested that it is enough for Government, in order to meet the requirements of transparency and accessibility, to simply say, "Here's what we're thinking of doing" or "Here's what we're planning" with regard to future regulation. Communication is, of course, a good thing, and nobody would say that that should not be said in public. In addition, any statement has to allow for the possibility that things might change.

However, with regard to both the statutes that you are looking at, the default is affirmative procedure. Made affirmative procedure is the exception, but the default, for public health regulations of the type that would be needed, is that affirmative procedure should be used.

If there is enough time to discuss options in public, and to canvass views, there is likely to be enough time to introduce legislation in the conventional way. People can accept that communication is a good thing, but it should not be allowed to become a substitute for proper process; that would be a mistake.

As I said at the beginning, there are important issues to do with the accessibility of legislation and law, and all of what I have just discussed is connected to those issues. I am happy to say more about that, and to respond to your questions.

The Convener: You touched on the final point that I want to explore, which concerns the consistency of the instruments that are brought forward. With every piece of legislation that comes forward, some individuals will criticise it no matter what it says, while others will look at it from a different perspective.

With regard to the made affirmative instruments that have been brought forward, do you have any thoughts or considerations as to how they have been drafted? Do you have any opinion as to whether any of the instruments has not been drafted well, and whether that has created a situation in which the law may be difficult to understand? Alternatively, do you believe that the majority, if not all, of the instruments are easily read and understood?

Morag Ross: You will not be surprised to hear that I cannot say that I have been through every instrument that has been before the committee. I cannot offer a view on individual items of drafting, but I can offer observations on the tendency of accelerated procedures to result in risks. The courts have had to look at some of the instruments that have been made, and part of lawyers' day-to-day work is to scrutinise small parts of primary and secondary legislation but, for the inquiry's purposes, perhaps it is more important to step back and look at general tendencies.

Clarity is absolutely fundamental to good legislation. Legislation must be clear and capable of being understood and applied consistently. In general, legislation that is made in a hurry is unlikely to be of the same quality as legislation to which great thought has been given and for which preparation has been undertaken. I do not criticise those who draft legislation; drafting is a tremendous skill, and doing it at speed and accurately is a valuable skill. A great deal of respect is due to those who work in pressing circumstances. However, it is inevitable that there is room for mistakes to be made.

Bringing legislation into force without the ability to scrutinise it properly beforehand takes away at least an opportunity for checks. I make it clear that that is not just about technical defects and checking punctuation. I pause to say that the technical side of legislation is really important—defects in structure and expression and so forth can have significant consequences—but the issue is about not just technical drafting but policy.

Only if we understand a policy and test it by asking questions about it can we be satisfied that any piece of secondary legislation is necessary and will achieve what it says that it will achieve. We can get to grips with all that only if we have had some opportunity to ask questions. There must be such an opportunity, whether it is for this committee or—as I understand it—a policy committee. We cannot say that it must be the maximum possible opportunity, but it must be there.

My next general point is about complexity and the repeated making of instruments on the same subject. The more instruments are made and the more they add to, qualify, revoke in whole or in part or update existing regulations, the more complex the picture becomes. If the made affirmative procedure is used repeatedly, there is a risk of accumulating rapidly changing regulation, which becomes confusing.

Such problems become acute when we are looking at criminal sanctions—when there is a risk of lack of certainty about whether people are breaking the law. That matters not just for individuals but for lawyers who advise on the legislation. In the context of criminal sanctions, for fairness to the individual citizen, and for the police, prosecutors, the defence and the courts to fulfil their functions, there must be clarity. Repeated cycles of changing this or that are not conducive to accessibility.

In other areas, clarity is an issue for those whose businesses are affected by emergency legislation. When the made affirmative approach is taken, there is at least scope for those who are affected by it to lose the opportunity to make preparations and organise their affairs in advance in anticipation of what might happen. Sudden changes, particularly if the consequences take a while to understand, are quite unhelpful.

10:30

As Dr Fox said, there will be circumstances—for example, with tax legislation—in which that approach is absolutely fine, and everybody understands that. However, in a much more unforeseen environment, the ability to plan and understand the law in advance is really important.

Dr Fox: I agree with much of that. Morag Ross made a point about the complexity of the legislation as a result of frequent amendment, and the layering of statutory instruments on top of one another, which has been a significant problem at Westminster. I am not a lawyer or a policy sector expert, so I cannot comment on the quality of the legal drafting or the policy direction, but when you see frequent amendment soon after an instrument has been laid, that is a strong hint that there is problem with the drafting.

For example, the statutory sick pay regulations were amended twice in four days last summer, and the localised health protection restrictions affecting Blackburn and Bradford were amended twice in 12 hours. In September 2020, face covering regulations were amended by three different statutory instruments that were made in two days. Last autumn, the Covid restrictions provisions amended the main lockdown number 2 regulation. When it came to listing permitted exemptions to the restrictions on gatherings, the drafter had remembered to make provision for remembrance Sunday, but had forgotten about armistice day itself. A new instrument had to be laid that was subject to the made affirmative procedure, and we had to go through the whole process again in order to make the amendment.

One problem with the made affirmative procedure is that, due to the pressure of urgency, legislation is pushed through quickly; therefore, the scrutiny and the technical legal checks—which are carried out at Westminster by the Joint Committee on Statutory Instruments, and by your committee in the Scottish Parliament—are missing. Therefore, the drafting problems get through, and you have to either amend the regulations, which adds to their complexity, or revoke them.

At Westminster, in summer 2020, because debates to approve the instruments were not happening quickly, and there was a long delay due to parliamentary recesses, we had the bizarre situation in which MPs were voting to approve instruments that had already been amended. Therefore, the debates did not make an awful lot of sense. As a result of the upstream drafting problems, there emerged a problem with scrutiny at the end of the approval process.

The Convener: Thank you, Dr Fox.

Craig Hoy (South Scotland) (Con): I will backtrack a bit. Is there a contradiction or tension between the necessity for emergency legislation to be urgent and of significant importance, and the fact that it gets the least, or a limited, amount of scrutiny? One example, to which Ms Ross might have been alluding, is the recent Covid passport scheme regulations, which were before this committee. As a new member of the committee, I was concerned that, although the regulations might have been framed exactly as they should have been, the policy to which they gave effect was sadly deficient. The passport did not prove that the person who presented it was the person to whom the passport had been issued, so there was an element of possible impersonation. In addition, when we introduced lateral flow tests to the scheme, it did not involve proof that a person had had a negative test; they could simply declare themselves negative, whether or not they had had the test.

The question that I am getting at is this: how do we manage the tension between the debate that is held and what seems to be an absence of scrutiny, both of the detail of the made affirmative instrument and, more importantly, of the policy to which it gives effect? How do we manage that tension between the debate and the lack of scrutiny when the legislation comes forward?

Morag Ross: Your starting point was to identify the tension. That arises because scrutiny takes time, albeit not necessarily lots of time. Almost by definition, an urgent measure is something that must be done right away. There is necessarily a tension, therefore, between the amount of time that can be spent in the process, thinking about something and discussing it, and the need to do something immediately that stops people behaving in a particular way or obliges people to behave in a particular way.

You can then add the question about the debate into the mix—if there is time for that, why not follow the process? Bluntly, the answer is that that is a political issue for you, as politicians, to discuss with the Government, as to the place of public discussion as opposed to or in addition to what happens in Parliament.

I am not seeking to tell you how to do your jobs but, if you are looking to explore ways in which you as a committee deal with made affirmative instruments where there has been some discussion—it may not matter whether or not there has been discussion—it is important to remember that anybody who is looking at something that is already in force and is effectively a fait accompli will approach the matter in a particular way, and that way is likely to be different from the way in which the person applying scrutiny approaches legislation that is prospective. If there are two instruments, one of which has already been made, you are likely to look at it in a different way from how you would consider an instrument that will come into force in 28 days' time or whenever.

How you scrutinise something that is made under the made affirmative procedure might be something to look at. Do you give it the same amount of time? Do you approach it in a way that is based on your being prepared to say, "Actually, no."? I am putting those questions back to you. There might be something in your own processes about what it is that you do when you are examining made affirmative instruments. Do you just accept the instrument? To what extent do you test it? There might not be a long-term answer there, but how you deal with that might inform where you go next.

Craig Hoy: Do you foresee that there would be more recourse to the courts as a result of continued application of the made affirmative procedure if we carried on in these circumstances? Would that be a route that industry would look to utilise if Parliament is not effectively scrutinising instruments or holding the Executive to account for those laws?

Morag Ross: In the first place, I will be cautious: I would say that it would depend entirely on the circumstances of any particular measure and on the circumstances of anybody who sought to challenge it.

It might be surprising if the sole complaint were about the way in which an instrument had been made. It is much more likely, if someone were seeking to challenge a piece of legislation, that it would be on the substance of the policy and what was sought to be brought forward or what had been put in place. That would be much more likely to exercise those who are affected by specific legislation. If, however, the instrument had been made in a way that was suggested to be objectionable, that might be brought before the courts alongside a challenge to the substance.

No one wants to go to court just to make a point about procedure. It has to achieve something. There must be an end result. It would perhaps be unlikely, but I cannot say that the thought would not occur to anyone in the future, because it might well do.

Craig Hoy: Dr Fox, I have a question about the differences between the ways in which Holyrood and Westminster look at such instruments. We were able only to ensure that the Covid passport regulations were soundly framed; we could not dig deeper into the policy, although some members of the committee thought that that was defective and deficient. How does that differ at Westminster? Would those who were looking at the instrument also look into the policy, or would they look only at how the legislation is framed?

Dr Fox: The procedures are different in the House of Commons and the House of Lords.

A made affirmative instrument going through the House of Commons would be subject to consideration by 17 MPs in what is called a Delegated Legislation Committee. They would have a 90-minute debate. They would have the instrument and the supporting documentation. That committee is not like a select committee or a subject committee. It does not have a secretariat, there are no policy research notes or briefing materials and no legal advice is provided. MPs carry out their scrutiny in quite difficult circumstances, given the technical nature of the regulations that they are looking at.

For some regulations, of which the vaccination regulations are an example, the debate does not take place in the committee with a small number of MPs for later approval by a motion in the House of Commons. Instead, those regulations go to a full debate in the chamber, in which all MPs can participate. That debate is subject to a 90-minute restriction under standing orders, unless a business motion is moved to extend that.

MPs rely on advice and information about drafting and policy matters that is provided either

by the House of Commons library or by external civil society organisations and campaign groups.

The process is different in the House of Lords. The Lords has a Secondary Legislation Scrutiny Committee that looks at and reports on all instruments. The committee looks at the instruments from a policy perspective. It looks at the merits of regulations and draws those to the attention of the House.

There is a joint committee of both houses, called the Joint Committee on Statutory Instruments, that looks at technical and legal drafting matters. That is similar to the remit of your committee. The JCSI reports on issues such as the vires, or drafting irregularities.

The House of Commons can consider instruments without reference to reports by the joint committee. The Commons might sometimes debate and approve an instrument before the joint committee has reported. The House of Lords operates a scrutiny reserve, which means that the committee must have reported before the Lords will schedule a debate on an approval motion.

There is a problem with the made affirmative procedure. Because of the time constraints, and particularly because of the desire to give approval as quickly as possible after the made affirmative has been laid and has come into effect, there is pressure to hold debates quickly, rather than at the end of the 28-day period. That means that the scrutiny reserve in the Lords has had to be lifted. In effect, both houses have been scrutinising those instruments without access to committee reports.

On the vaccination regulations, there was a lot of criticism of ministers because of the lack of supporting information and evidence and because of inadequate impact assessments. The Secondary Legislation Scrutiny Committee hauled the minister in to give evidence about the lack of supporting information and the inadequacies of the impact assessment. However, while that committee session was going on, the House of Commons was debating and approving the regulations. Westminster has a problem in normal times with the inadequacy of scrutiny in the House of Commons. That is exacerbated in urgent circumstances. We then also have the problem of the bicameral scrutiny and the fact that much of the committee-based examination of the detail of both the policy and the legal aspects is done by committees in the House of Lords, to which the House of Commons does not have access.

10:45

Craig Hoy: Do you see merit or benefit in giving a committee such as this one or the group of parliamentarians who look at the regulations some authority also to probe the impact of the policy? Should that committee or group consider not only whether the regulation or instrument is well drafted, but ensure that it leads to good outcomes when it is applied in policy terms? Is there merit in bringing those two functions together within the same group?

Dr Fox: There may be. The nature of how it is drafted will sometimes impact on policy, and what is trying to be achieved in policy terms will affect the drafting. It has therefore always seemed a bit of an odd demarcation at times. Nonetheless, that has certainly been the way in which Westminster has handled it for many years.

One of the issues, particularly with the made affirmative procedure during the pandemic, relates to what the system in effect allows. The way in which powers are framed inherently favours the Government; it can get its legislation through quickly and achieve its policy objectives, but Parliament gets nothing in compensatory scrutiny provisions.

The question is whether there should be some kind of bespoke procedure for these kinds of instruments that enables either one committee acting jointly or committees acting separately to have a second bite at the cherry, as it were, in relation to either legal drafting issues or policy merit questions. Those committees would be able to come back after the instrument had been in force for a period of time and after the approval motion had been granted, have the time to look in more detail at the instruments in relation to both legal and policy matters, and then report back. Enabling that to happen would perhaps require some kind of sunset provision.

That is the direction of thinking at Westminster. It is certainly the direction of travel that both the Secondary Legislation Scrutiny Committee and the Delegated Powers and Regulatory Reform Committee, which looks at the powers in all bills that are laid before the House of Lords, are looking at for the future.

Graham Simpson (Central Scotland) (Con): I thank both witnesses for coming. It has been very interesting so far.

I have to praise Dr Fox for some of her work so far, including her book “The Devil is in the Detail: Parliament and Delegated Legislation”, which I was thinking of putting on my Christmas list. However, knowing my family, I will probably end up having to buy it myself. It looks like an absolute bargain, so I will be rushing out to get it.

Morag Ross made a number of interesting points earlier, one of which was about how we as parliamentarians deal with stuff after it has become law. When something has been put through under made affirmative procedure, it is

already law, and we scrutinise it as such—as opposed to as something that is not already law. She is absolutely right that there is a tendency for parliamentarians to look at stuff that is already law and say, "Well, it is done; we will just nod it through." Sometimes, the law has already been overtaken or amendments have been lodged or it is null and void, and so we think, "Well, I'm not going to bother with this." However, that is not the way it should be, and the purpose of this mini-inquiry is to consider that issue.

In the interests of time, I will not go over the same ground. I am keen to explore solutions as to how we improve things. When the Scottish Parliament debates regulations, they go through this committee, as we have a remit; then to a policy committee—in terms of this inquiry, coronavirus-related regulations go mostly to the COVID-19 Recovery Committee—and then to the full Parliament. When regulations get to the full Parliament, the opportunity for MSPs to debate them is extremely limited, as there is only a minister and possibly one member from each party taking part. There is some very important stuff going through the Parliament—Craig Hoy has mentioned vaccination passports—yet the debate is extremely limited.

Perhaps this is a question for Ruth Fox. You mentioned that, in Westminster, MPs get a 90-minute debate, which we do not get. Is there something there for us in Scotland to look at?

Dr Fox: I would not take the Westminster model as a model for anything in relation to delegated legislation, because, even in normal times, scrutiny there is poor.

As you have alluded to, the reality for legislators is that, if members cannot amend and do not reject an instrument, the scrutiny process is difficult. It is also difficult to have an effect and be able to influence regulations. I cannot speak to the approach of members of the Scottish Parliament, but at Westminster the consequence is that members want to get the 90-minute debate over as quickly as possible. They have 90 minutes but, in reality, the average length of debate is just under half an hour; sometimes, the debate lasts just a few minutes.

There is a problem with the relationship between the power that is set out in legislation—perhaps decades ago, as with the Public Health (Control of Disease) Act 1984—and the content of the regulation that is laid today. The scrutiny process does not match up with the importance or otherwise of the regulation that is before members. At Westminster, there needs to be an overhaul of the entire system, not just in relation to made affirmatives but as part of a much bigger process of reforming how members of both houses scrutinise instruments.

I am very glad that you enjoyed our book—I can send members of the committee free copies, as we still have quite a few in our office.

The Hansard Society has recently launched a review of delegated legislation to consider the issues, precisely because processes are so inadequate. There might be things that Westminster does differently from the Scottish Parliament that might appear to be an improvement on what you feel you have available. However, there is huge dissatisfaction among many MPs, across parties and in both houses with the way in which, in general, delegated legislation is scrutinised. I would be wary of thinking that Westminster offers many lessons for the future.

Morag Ross: I think that you are looking for solutions and you are looking ahead. You will of course need to be giving thought, as I am sure that you are, to what happens when the coronavirus legislation, which is in force for a particular purpose, comes to its natural conclusion and to what you put in place for the longer term after that.

I have a word of caution, which is about how you treat the experience of legislating over the past 18 months or two years and to what extent you—as politicians collectively—come to see that experience as truly exceptional. Starting this inquiry and stepping back and saying, "Are we getting it right and how can we do it better?" is a critical part of addressing that. It will be important for the committee to consider whether the way in which you have worked is to be a change that sets you on a course for the future or whether you see it as ring fenced, time limited and only for coronavirus. Where changes have been made in response to an emergency and that emergency, however understood, continues, there is a risk that the changes become permanent. If they are going to become permanent, you have to decide that that is going to happen and not just allow it to drift into permanence by inertia. That is a real risk.

We can make an analogy with the substance of some policy matters—for example, measures that were intended to be in place, or that people thought would be in place, only for a few weeks or a couple of months. I am making no comment on the benefits or otherwise of mask wearing or school closures but, when we first started thinking about masks and school closures, we thought that we would use them perhaps for a short time. However, as time goes on, people become habituated to them. The analogy that I seek to draw is that, if provisions that are put in place as emergency measures start to become routine, as time passes the routine becomes attractive, easy and straightforward and it can be a real effort to remember how it used to be when we regarded those measures as exceptional.

The step of asking such questions in the context of the inquiry and giving advance thought now to what future legislation with enabling powers should look like is an important part of answering the question. The risk is that, if that is not done, the ground shifts under your feet and, if you do not notice that shift, two, three, four or more years down the line, it will be much harder to ask what good scrutiny looks like in a normal environment.

Graham Simpson: I realise that we are up against the clock, so I will roll two questions into one. They are also on the theme of what we do now.

I am really frustrated by the use of the made affirmative procedure. It has been overused in both Parliaments. When ministers lay such instruments before the Parliament, they should have to justify why a measure is urgent or an emergency. They should have to come to—or at least write to—a committee and make the case. Also, to pick up on the House of Lords report on the subject, it would be a good idea for every made affirmative instrument to be subject to a sunset provision.

Should the Government have to make the case that an instrument is urgent? Should that have to be subject to a vote in a committee or the Parliament? Should such instruments be subject to a sunset provision and, if so, what length should that be?

Morag Ross: It is certainly worth looking at having a sunset provision as a default. That is different from the 28-day provision that is already provided for the made affirmative procedure by the primary legislation. There may be a benefit in making it standard that a provision will fall after a certain period. At least some of the instruments that you have looked at that were made under Scottish Parliament primary legislation have had such a provision in place. Of course, you have to guard against rolling extension, or the movable feast, as I think it was described in court in the case involving churches, where the regulations were just continued.

As to whether there should have to be a justification, a level of trust must inevitably be observed. Parliament and Government have a mutual relationship of trust and it should be assumed that there is a basis for introducing something as an urgent or emergency measure. The requirement for a justification should not become just a token or a box to be ticked. Frankly, I think that it would be just a waste of time if it were reduced to that.

Whether the relationship of trust should be formalised into a requirement is probably a political matter. Would it add to clarity, visibility or accessibility? I am not sure, but it might be a helpful check in circumstances in which, as Dr Fox has said, a lot of the power lies with the Government.

11:00

Graham Simpson: What do you think, Dr Fox?

Dr Fox: I would say that there should be an obligation to explain and justify urgency. We certainly advocated that when the European Union (Withdrawal) Act 2018 was going through the Westminster Parliament in 2017-18, given the emergency provisions in that legislation.

There are some examples on the statute book of the made affirmative procedure being hemmed in a little bit. Under the Misuse of Drugs Act 1971, which contains the power to reclassify drugs, a minister has to consult an advisory council before using the procedure and has to explain the position of that council on the proposed policy decision. That is a slightly different use of the made affirmative procedure, because in that case it is not necessarily being used on grounds of urgency, but it still applies to the procedure.

Perhaps a more relevant example is the Legal Aid, Sentencing and Punishment of Offenders Act 2012, in which if the Lord Chancellor considers it desirable for regulations to come into force without delay, they have to set out an urgency statement explaining why. Moreover, the regulations cannot come into force before the instrument and the urgency statement are laid before Parliament.

For the pandemic, you might need a slightly different approach. Clearly you would not want to reduce it to a tick-box exercise, but having something that requires a minister to do more than simply say in the explanatory memorandum, “I think this is urgent” raises the bar a little with regard to the thinking in the department in question, not just at civil servant and drafter level, but at ministerial level. That might take the form of a written statement, or even an oral statement to the House. That would raise the bar even further, as it would take up valuable parliamentary time, which the business managers would not want and which would put a competing pressure on ministers in deciding whether the procedure was really necessary.

One wants to assume that, in such circumstances, there is some basis for the urgency, but the face-covering regulations that were debated by a House of Commons Delegated Legislation Committee in, I think, September 2020 are an example of what happens. The minister in question was asked about the basis for urgency, and she said, “Ah—I don’t know. I’ll have to go back and check.” You would think that such a basic point would be covered in the briefing, but it is a very good example of the made affirmative

procedure not being necessary and, given the timings, not urgent.

Morag Ross: I agree with Dr Fox. One is entitled to expect that in certain circumstances, when ministers consider such a course of action to be reasonable and to be qualified by reasonableness, they are able to make that express. The examples that have been given illustrate why that is important.

Bill Kidd (Glasgow Anniesland) (SNP): I thank both of our guests for covering just about everything that I was going to ask about—in fact, they did so just a moment ago. I would, however like to re-emphasise the rationale for this committee's role in the Parliament, because the purpose of scrutiny is to provide clarity of the message in law and to enhance that for us all.

Are there any possible transparency implications with regard to the use of the made affirmative procedure? Is there a danger that it might be used only to press home a political point of view, for example? I may be putting you on the spot, asking that. Is there a danger of that, and therefore a necessity that scrutiny should take place in committees before a made affirmative instrument is debated in the Parliament? Does that make sense?

Morag Ross: Yes. To answer that, it may be important to go right back to first principles about the public good that exists in having law that is not just clearly drafted or hanging together from a technical perspective or even meeting policy objectives in a satisfactory and useful way. You could do all that with inadequate scrutiny; it would be possible, sometimes, to get everything right without scrutiny. However, that is not what the rule of law properly means.

For society to be governed by law, that law has to be properly made. It does not just have to be well prepared and able to be justified by Government; it has to happen, and it has to come before Parliament. That might sometimes be seen as a formality, as a bit dull and, sometimes, as not very political at all. There might not be a whole lot of controversy and debate. However, it is absolutely essential—I speak as a lawyer, but it is far more important than that—that everybody has confidence that that law has been made in a way that follows proper process and that gives an opportunity, albeit one that might be limited, certainly in using negative procedure but even in using affirmative procedure, for elected representatives, who are part of a democracy, to fulfil their function and contribute to the process of making law.

You were asking about the political implications. I want to be careful as to how far I can go, but I offer an analogy as a possible way of looking at made affirmative procedure. It is a little like strong medicine. Strong medicine is valuable, in some circumstances; it can make the difference between life and death. The analogy can be seen when it comes to a life-or-death situation. Being able to change the rules immediately—overnight—might be essential.

However, like strong medicine, that process has to be handled with great care and used only when it is genuinely needed. Perhaps more importantly, to go back to a point that was made earlier—this may be where some of the political considerations come in—some strong medicine can become addictive and, if it is used too much, over time it loses its efficacy. It can become easy to use, and those who have found that it solves one problem can decide that it will solve this, that and the next problem, even though those problems do not demand that sort of treatment.

I am reluctant to stretch the analogy too far, but there are side effects. One of the negative side effects is the diminution of respect for the role of the Parliament. All politicians, whether they are in Government or are working as committee members, have to be aware of the potency of the made affirmative procedure, so that when they are looking at how it is deployed in future, they treat it with the care that it needs.

Bill Kidd: Thank you very much for that. Dr Fox, do you want to add anything?

Dr Fox: The statutory process for the laying of instruments before Parliament, and for their publication, is there for a reason. That relates to transparency and public notice, access and understanding.

When instruments are being laid 30 minutes before they come into force, as has been the case during the pandemic, and the made affirmative procedure facilitates that, it is clearly extremely difficult for parliamentarians, let alone the public, to be able to understand the legal obligations and implications of that legislation. At Westminster, for example, social distancing rules were imposed in a change that was announced on 9 September 2020, but the regulations were not actually published until 30 minutes before they came into force on 13 September.

One of the lessons of the pandemic experience concerns the difficulties that arise when there is communication at a Government level for several days beforehand about what the regulations will do, and yet no one actually has access to the legal text to enable them to know explicitly what those regulations say.

One of the difficulties that parliamentarians have to look at is that Government, in particular at Westminster, makes the case that the issues are being debated ad nauseam. It says that it provides

time for debate on Covid and different aspects of the pandemic each week, and that there are a lot of ministerial appearances before committees. However, actual legislative scrutiny—the scrutiny of the technical detail and the policy merits in the context of all the supporting information that one would ideally have available—is a very different form of scrutiny from the more generic discussion about policy direction that would be had in a general debate in the chamber on a fairly general motion. We really need to drive home that point. Parliament needs bespoke procedures to enable that type of detailed, technical scrutiny in an emergency, or when ministers want to use the urgent procedure in the future.

Bill Kidd: That is helpful—I thank you both.

The Convener: We move to questions from Paul Sweeney.

Your microphone is on mute, Paul.

Paul Sweeney (Glasgow) (Lab): [*Inaudible*.]—to understand some of the—

The Convener: Can you repeat your question, please?

Paul Sweeney: Can you hear me all right now, convener?

The Convener: We can now, yes.

Paul Sweeney: Sorry about that. The discussion has been really interesting to follow, and I thank both the witnesses for their insights.

I have a question for Ms Ross. From a historical perspective, as much as anything else, does the increasing use of the made affirmative procedure represent a general shift of legislative power away from the Parliament towards the Executive? Is that a valid observation?

Morag Ross: The numbers that were given earlier in the meeting, and which are known to you, indicate that that is the case: there has been a very definite shift. Whether it can be attributed absolutely and entirely to coronavirus, or whether it says something about other trends, is an area that the committee needs to explore. Coronavirus is the obvious explanation; whether there is something else going on, and whether that fits into a wider pattern, is another issue. It has been interesting to hear from Dr Fox about how it fits into the wider perspective at Westminster, which is something to be aware of. One cannot take it simply as the effect of coronavirus in isolation.

Paul Sweeney: That is a helpful insight. I am sure that you will have a perspective on that, Dr Fox, given the study that you did in the House of Commons in 2017. Controlling for the pandemic, what would be your general impression from a historical perspective? Is there a long-term trajectory of the erosion of parliamentary power relative to the Executive? Should that be of concern to members of the Scottish Parliament as well as members of the House of Commons?

Dr Fox: One of the features of the debate about delegated legislation in general—not just the made affirmative procedure, but how statutory instruments are laid and scrutinised—is that people were having exactly the same debates in the 1930s. Books were being published about government by diktat and the use of emergency provisions setting a precedent for the future in the aftermath of the second world war. The Donoughmore Committee on the Powers of Ministers in the early 1930s had almost exactly these same debates.

11:15

History suggests that concern about the concentration of legislative power with the Executive, the shift of influence away from Parliament and the balance of power between the institutions has been a long-running sore. The suggestion is that that has got worse, because over the past 25 to 30 years there has been greater use of skeleton bills with broad powers and, when policy is ill-defined, ministers are given considerable scope in the way that they choose to exercise those powers through regulations at a later date. The sheer breadth and volume of the powers gives ministers more power to exercise in the future.

The perspective at Westminster is that although that general trend continues, it has sharpened and got worse and the volume of powers is greater than it used to be. In recent years, that must be seen in the context of the extraordinary political developments of Brexit and the pandemic. Those two events are coupled with a Westminster Government with a significant majority that can often be used to ram what the Government wants through the House of Commons. Although there is a group of Conservative back benchers who are unhappy about scrutiny issues, generally speaking the Government has the numbers to drive regulations through, particularly if the Opposition supports the pandemic measures.

Paul Sweeney: That is an interesting insight—the perils of elective dictatorship. It is an interesting point to hold in perspective in relation to the Scottish Parliament, because the parliamentary arithmetic here is somewhat different and there is scope for us to scrutinise and to hold the Executive's feet to the fire on inadequate provision in bills and ensure that they are not just skeletons, as you put it. That is worth considering.

It was helpful to have that stated explicitly for the purposes of what we are trying to achieve, so

thank you for those non-technical takes. Is there anything further that you want to add that we have not considered about the made affirmative procedure and its scrutiny process? Both witnesses should feel free to jump in.

Morag Ross: I am happy that I have answered your questions and, if there are further questions, I would be happy to deal with them, but I do not have anything to add.

Dr Fox: I have one issue to throw in. As we have discussed, there is not a bespoke procedure at Westminster or in your Parliament in Edinburgh for urgent situations in which the made affirmative procedure under the Public Health (Control of Disease) Act 1984 or similar provisions may be used. However, at UK level, there is the Civil Contingencies Act 2004, which gives a sense of what the UK Parliament expected in an emergency in terms of scrutiny. Those provisions have not been used and there is a lot of debate about why the Government chose to bring in the Coronavirus Act 2020 and chose to use the public health act rather than the 2004 act. However, that act provides for an emergency with a considerable breadth of powers: all regulations must be laid before Parliament as soon as reasonably practicable; Parliament has to approve them within seven days and has to approve the renewal of them every 30 days; Parliament can, in some circumstances, amend the regulations; and Parliament can be recalled if it is not sitting.

It is worth comparing that, as the top end of Parliament's prior expectations for how scrutiny might work in an emergency, with where we have ended up on an on-going basis in the pandemic. We can think about how those provisions might have applied and what impact they might have had in the pandemic, if that scrutiny model had been available to members, and about whether that, too, would have needed to be tweaked into a bespoke model that could be used in urgency but not necessarily under the powers in the 2004 act.

The Convener: Before we finish the evidence session, I have a final question for our two witnesses. Would it be useful to have a procedure that was in between the affirmative procedure, which is subject to the 40-day period, and the made affirmative procedure, given the current circumstances that we face and the Covid regulations that are coming through?

Morag Ross: I am not sure what you mean by "in between". Do you mean an accelerated procedure with different time limits?

The Convener: I mean something with different time limits. Could a new procedure be created that was beneficial and enabled the committee and the Parliament to do the scrutiny work that has been discussed this morning?

Morag Ross: For future primary legislation, there is always room for testing and drawing on the experiences of what has gone on in past months and is going on. There is always room to draw the line in a slightly different place. I was struck by Dr Fox's example of the 2004 act. That is older legislation that sets out perhaps more exacting requirements of emergency legislation, as broadly expressed.

A procedure that was in between might provide different options according to the level of urgency. I will give a word of caution that comes from the observations that have been made about complexity. If grades of expedition according to urgency were introduced, they would need to be very clear. Rather than having multiple stages, it is important to be clear about what is realistic and what can be done to ensure that the expectation is for exceptional circumstances to be justified on their terms, case by case.

The Convener: I call Dr Fox.

I think that there is an issue with the sound.

Dr Fox: Can you hear me?

The Convener: We can now.

Dr Fox: I have lost all sound on the system. I did not hear what Morag Ross said, and I apologise if anything that I say duplicates what she said or if you asked a slightly different question, convener.

You asked about the possibility of a bespoke or accelerated procedure, which has two aspects to consider. The first is about democratic accountability—about wanting to look at and approve instruments as soon as possible after they come into force and not to wait as long as 28 days.

At Westminster last autumn, a commitment was made by ministers, under pressure from the Government's back benchers, who were unhappy about the time that debates were taking to be scheduled. It was agreed that debates would be scheduled as soon as possible after important national regulations were brought in. The problem is that that means that instruments are debated one or two days after publication. Instruments can of course be debated in that way, but it is quite difficult to do a full assessment and scrutinise them in detail, and the committee scrutiny process is lost. In a sense, members scrutinise and debate instruments without access to the important work of committees such as yours and those in the House of Lords.

Such scrutiny needs time, so it might be worth thinking about a bespoke procedure that has two aspects. If the Government wants to bring in regulations, they can be debated and approved fairly quickly, but a provision of doing that could be

having a form of sunset on the regulations so that members can come back to debate them again and possibly approve their continuation in force, once members have had access to the technical scrutiny work that the relevant committees have done. That would provide two bites at the cherry—democratic accountability would be dealt with early and the more detailed scrutiny could be looked at slightly later, with the advantage of time for that, if that was felt to be appropriate.

Ministers would not like such an approach, because it would create uncertainty about whether regulations were to remain in force and it would take more time. However, if the objective was to put pressure on ministers about whether they really needed to use the procedures, such an approach might be beneficial for Parliament in the balance of power between institutions.

The Convener: I thank Morag Ross QC and Dr Ruth Fox very much for their helpful evidence. The committee extends its appreciation to you both. If the committee has any additional questions, we will write to you.

11:26

Meeting suspended.

11:28

On resuming—

European Union (Withdrawal) Act 2018: Instrument Procedure and Category

The Convener: Under item 3, we will consider an instrument that has been laid under the European Union (Withdrawal) Act 2018. The committee is considering whether the appropriate scrutiny procedure and the appropriate category have been applied to the following instrument.

Animal Products (Transitional Import Conditions) (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/432)

The Convener: The instrument was laid under the negative procedure and the Scottish Government considers it to be of low significance. Is the committee content that the appropriate scrutiny procedure has been applied?

Members *indicated agreement.*

The Convener: Members will note that the instrument removes the requirement for products of animal origin and animal by-products to be accompanied by health certificates. That differs from previous instruments, which postponed the implementation of border control measures. As the approach appears to constitute a policy choice, does the committee agree that the categorisation should be of medium, rather than low, significance?

Members *indicated agreement.*

The Convener: Given the policy areas that the instrument concerns, does the committee agree that we should write to the relevant committee to highlight our thoughts?

Members *indicated agreement.*

Instruments Subject to Made Affirmative Procedure

11:29

The Convener: Item 4 is consideration of four instruments subject to the made affirmative procedure, on which no points have been raised.

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No 7) Regulations 2021 (SSI 2021/425)

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No 8) Regulations 2021 (SSI 2021/440)

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No 9) Regulations 2021 (SSI 2021/441)

Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No 10) Regulations 2021 (SSI 2021/443)

The Convener: Is the committee content with the regulations?

Members *indicated agreement.*

The Convener: On the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No 7) Regulations 2021 (SSI 2021/425), does the committee wish to highlight the Scottish Government's response to the committee's questions regarding the status of eligible vaccinated arrivals to consider from a policy perspective?

Members *indicated agreement.*

The Convener: Does the committee wish to note that those regulations address an issue that was identified by the committee at its meeting on 9 November 2021 regarding regulation 4(d) of SSI 2021/359?

Members *indicated agreement.*

Instruments Subject to Affirmative Procedure

11:30

The Convener: Item 5 is consideration of two draft instruments subject to the affirmative procedure—a set of draft regulations and a relaid draft order—on which no points have been raised.

Town and Country Planning (Short-term Let Control Areas) (Scotland) Amendment Regulations 2022 [Draft]

Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: Does the committee wish to welcome the fact that the relaid draft order addresses issues that were reported by the session 5 committee at its meeting on 12 January 2021 in respect of the draft Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2021?

Members *indicated agreement.*

Instruments Subject to Negative Procedure

11:31

The Convener: Under item 6, we are considering four instruments subject to the negative procedure.

Ethical Standards in Public Life etc (Scotland) Act 2000 (Register of Interests) Amendment (No 2) Regulations 2021 (SSI 2021/438)

The Convener: An issue has been raised on the regulations, which amend the Ethical Standards in Public Life etc (Scotland) Act 2000 (Register of Interests) Regulations 2003 in light of changes made to the code of conduct for councillors and the model code of conduct for members of devolved public bodies.

The Ethical Standards in Public Life etc (Scotland) Act 2000 (Register of Interests) Amendment Regulations 2021 (SSI 2021/397) were laid before the Parliament on 8 November 2021 and were considered by the committee at its meeting on 23 November. The committee resolved to report those regulations on reporting ground (i), due to a failure in the regulations to make provision for all registrable interests, as set out in the revised model code, contrary to the policy intention. Those regulations would have come into force on 8 December.

The regulations now before us were laid on 25 November 2021 and came into force on 7 December 2021 to rectify the errors in SSI 2021/397 and to make further provision. The regulations are in breach of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, which requires that an instrument subject to the negative procedure be laid

"at least 28 days before the instrument comes into force",

not counting recess periods of more than four days. Does the committee agree to report the instrument on reporting ground (j) for failure to lay it in accordance with laying requirements under the Interpretation and Legislative Reform (Scotland) Act 2010?

Members *indicated agreement.*

The Convener: Is the committee content with the explanation provided by the Scottish Government for breach of the requirement in section 28(2) of the 2010 act?

Members *indicated agreement.*

The Convener: Finally, does the committee wish to welcome the fact that the Scottish Government laid the instrument timeously to rectify an error that was identified by the committee at its meeting on 23 November?

Members *indicated agreement.*

The Convener: Also under this item are three more negative instruments, on which no points have been raised.

Scottish Road Works Commissioner (Imposition of Penalties) Amendment Regulations 2021 (SSI 2021/431)

Animal Products (Transitional Import Conditions) (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/432)

Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No 5 and Transitional Provisions) Regulations 2021 (SSI 2021/442 (C 31))

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instrument Not Subject to Parliamentary Procedure

11:34

The Convener: Item 7 is consideration of an instrument not subject to parliamentary procedure and on which no points have been raised.

Transport (Scotland) Act 2019 (Commencement No 4) Regulations 2021 (SSI 2021/428 (C 30))

The Convener: Is the committee content with the regulations?

Members *indicated agreement.*

11:34

Meeting continued in private until 11:51.

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