EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Tuesday 27 November 2007

Session 3

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EUROPEAN AND EXTERNAL RELATIONS COMMITTEE
8th Meeting 2007, Session 3

CONVENER

*Malcolm Chisholm (Edinburgh North and Leith) (Lab)

DEPUTY CONVENER

*Alex Neil (Central Scotland) (SNP)

COMMITTEE MEMBERS

*Ted Brocklebank (Mid Scotland and Fife) (Con)
Alasdair Morgan (South of Scotland) (SNP)
*Irene Oldfather (Cunninghame South) (Lab)
*John Park (Mid Scotland and Fife) (Lab)
*Gil Paterson (West of Scotland) (SNP)
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*Keith Brown (Ochil) (SNP)
Jackson Carlaw (West of Scotland) (Con)
Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Dr Caitriona Carter (University of Edinburgh)
Michael Clancy (Law Society of Scotland)
Sarah Fleming (Law Society of Scotland)
Professor Charlie Jeffery (University of Edinburgh)
David Johnston (Faculty of Advocates)
Anna Poole (Faculty of Advocates)
Professor Drew Scott (University of Edinburgh)

CLERK TO THE COMMITTEE

Dr Jim Johnston

ASSISTANT CLERKS

Emma Berry
Lucy Scharbert

LOCATION

Committee Room 1

Scottish Parliament

European and External Relations Committee

Tuesday 27 November 2007

[THE CONVENER *opened the meeting at 10:00*]

European Union Directives Transposition Inquiry

The Convener (Malcolm Chisholm): Good morning, everyone, and welcome to the eighth meeting of the European and External Relations Committee in the third session of the Scottish Parliament. We have received apologies from Iain Smith and Alasdair Morgan.

The first agenda item is the European Union directives transposition inquiry. The committee will first take evidence from members of the Europa institute at the University of Edinburgh, after which we will take evidence from representatives of the Law Society of Scotland, and then from the Faculty of Advocates.

The representatives from the University of Edinburgh are Professor Drew Scott, Professor Charlie Jeffery and Dr Caitriona Carter. As usual, we will start with an opening statement, which I am told that the witnesses have chosen to divide among themselves. Professor Jeffery will speak first, followed by Professor Scott and Dr Carter, after which the committee will ask questions. I thank the witnesses for coming to the meeting and invite Charlie Jeffery to start the discussion.

Professor Charlie Jeffery (University of Edinburgh): I thank the committee on behalf of the Europa institute for the invitation to the meeting.

I will speak briefly about our division of labour. Dr Jim Johnston's team asked us to put transposition questions and the Scottish Parliament's role in the process into the wider context of the European legislative process and the opportunities for engagement at different levels of government. That more or less explains the approach that we will take. I will say something about the wider EU context. Professor Scott will then talk about intergovernmental structures within the United Kingdom and Dr Carter will conclude with more detailed consideration of transposition issues.

I will start with a note of realism about the history of sub-state engagement with EU decision making over the past 20 years. The dice have been—and remain—loaded in favour of member state central Governments. EU-level routes of input for sub-state Administrations are limited, especially in relation to the Committee of the Regions, and those routes have certainly had no systematic effect in bringing the sub-state perspective into EU-level decision making. Member state routes of input for sub-state Administrations have been much more effective, but those routes have also been limited by the dynamics of collective decision making and trading interests among the different sub-state Governments and/or between the sub-state and the central levels.

Sub-state institutions gain input and influence almost always through sub-state Governments, not Parliaments. In general, sub-state Parliaments have been marginalised by the practices of intergovernmental decision making and by their limited capacities. We had a quick discussion about that before the meeting, and we think that Scotland and Wales are probably the market leaders in the field across Europe. Relatively new institutions are doing rather better than some of the more established institutions.

I want to say a few words on what might change if the reform treaty and its attached protocols are introduced. The regional issue was prominent in the European convention and in the draft constitution, and regional provisions have largely been taken forward into the reform treaty. There is a general sense in the treaty and its protocols of a higher appreciation of the issues that regional and local Governments face and there are new mechanisms for monitoring the subsidiarity principle, including the early-warning system for national Parliaments. The early-warning system was one of the mechanisms that was designed to give a greater grip for citizen perspectives in EU decision making, and it was extended to

"regional parliaments with legislative power".

I think that there was a pioneering role for the UK Government in extending the principle that national Parliaments should also mean sub-state Parliaments in the process. However, that early-warning system is difficult to operationalise at the sub-state level. It has a very short timescale, and the prospect of achieving a workable consensus across the various national and regional Parliaments of the EU, which would include clear sub-state positions, is fairly limited.

There is also the problem of the co-ordination effort required both between national and sub-state levels and at the sub-state level itself between co-ordinating committees such as this committee and subject committees. Trial runs of the mechanism organised by COSAC—the Conference of Community and European Affairs Committees of Parliaments of the European Union—the national Parliaments grouping and the

Committee of the Regions have suggested that it is very difficult to make the system work. In practice, the outcome is likely to be more of an extension of intergovernmental decision making than an empowerment of sub-state legislatures.

That leaves us with a situation in which the most likely route for sub-state institutions such as the Scottish Parliament to exert real influence and achieve sub-state aims is by working through national decision-making processes. At that point, I will pass over to Professor Scott.

Professor Drew Scott (University of Edinburgh): I have just a few words about intergovernmental relations in the business of transposition. In most of the EU member countries with legislative regions, the decision is more or less determined by the assignment of competences: who does what. If the directive is within a non-reserved matter, competence and responsibility fall to the sub-national or legislative region level.

However, many directives may, by reason of their scope, require transposition activities in both national and sub-state legislatures. That can lead to transposition complications, which can be addressed only by constructing intergovernmental procedures. Complications arise not only in ensuring that the directive is properly implemented, but in avoiding what we know as double banking and gold plating. That happens when multiple legislatures overregulate and overimplement and when multiple departments are involved. If two legislatures and multiple departments are involved, co-ordination becomes rather important.

In most EU countries, the distinction between reserved and non-reserved matters is fairly clear and is constitutionally embedded. The devolution settlement in the United Kingdom is not so clear. Under section 57(1) of the Scotland Act 1998, the UK Parliament has competence to legislate in all areas to give effect to EU directives if necessary. That creates the situation in which the Scottish Administration can opt to allow UK or Great Britain instruments to transpose EU directives into domestic law. The question is then about the criteria that should be followed when the Scottish Administration determines whether it should draw on UK or GB legislation rather than transpose its own legislation. The situation arguably has both an upside and a downside—we may want to discuss those issues later—but it creates a unique situation for the UK.

There is only limited evidence from outside the UK. A recent survey—I can give the reference to the clerk—found that only a minority of legislative regions in the EU have a formal transposition strategy with arrangements between the legislative region and the member state Government to assign who does what and ensure that it is done in a timely manner. The rest of the member states, including the UK, have informal engagement between legislative regions and central Government, with varying degrees of intensity and formalism. The ultimate objective in all the situations is to ensure that EU directives are not overimplemented by engaging at two levels of government and that the legislative activities of one legislature do not impact on the legislative activities of another. They try to ensure that those problems do not arise.

The ultimate goal is to ensure that EU legislation is given legal force in a timely, effective and efficient manner. That will generally involve both levels of legislature. However, there is no suggestion in any of the evidence that legislative regions engage in some kind of competition in transposition. Rather, by ensuring the involvement of the sub-national as well as national authorities throughout the legislative cycle of a directive, member states try to ensure that EU legislation is fit for purpose across the jurisdiction as a whole.

In the UK, transposition issues fall within the ambit of the concordat on the co-ordination of European Union policy issues. That is an entirely open-ended agreement between the UK Government and the devolved Administrations to the effect that they will work closely together on all aspects of EU policy from the beginning—that is, from the drafting of the legislative proposal in Brussels—all the way through to the proposal's enactment and implementation in the UK.

The position has recently been reinforced by the publication in September by the Department for Business, Enterprise and Regulatory Reform of a transposition guide. In sections 1.7, 1.8 and 1.9—that is, in the early part of the document—the guide stresses the need for intergovernmental co-ordination at all levels of Government and at all stages in the lifecycle of EU legislation within the UK. The new document has revisited that issue. It is important that early emphasis has been given to the need to ensure that all departments in Whitehall are in close contact with the devolved Administrations on the transposition of EU legislation, so that we can avoid the kind of problems that can arise when there are multiple legislators sharing the implementation of particular directives, especially when those directives are large and complex.

Dr Caitriona Carter (University of Edinburgh): It is clear that the Scottish Parliament has an opportunity to develop its scrutiny of the transposition of EU directives. I want to consider the question of what role there is for the Parliament.

In considering that question, we note that the committee has the authority to consider and report

on the implementation of EU legislation. We also note, as my colleagues have suggested, that devolution poses a specific challenge in the exercise of that authority. That is because implementation is not an exclusive devolved competence. Devolution is therefore tested every time a directive is implemented, because in each case a jurisdictional choice is posed. Is it Scotland or the UK?

The starting point for our reflections is, therefore, first to identify the purpose of scrutiny in the context of devolution, and secondly, to consider how an appropriate system could be mounted. We can identify two purposes for scrutiny in the context of devolution, which would give rise to two different types of scrutiny—what I call a policy scrutiny, and a jurisdictional scrutiny. The two must be distinguished one from the other; each holds a different purpose.

The policy scrutiny approach would entail consolidation of existing scrutiny practice and an extension of it to the transposition phase. Under that approach, the lead committee would be the subject committee. The aim would be to identify Scottish public policy interests in relation to specific pieces of legislation, and to monitor the representation of those interests throughout the policy cycle, including the transposition phase. Scrutiny of transposition would be one element of a continuing scrutiny of intergovernmental relations throughout the policy process. Transposition issues would be identified at the start of the process and then monitored throughout. The review of the jurisdictional choice by Government under that approach would be from a policy perspective and would be aware, in advance, of Scottish interests at the prelegislative stage. Those interests would then be protected in the transposition of EU directives. The aim would be to identify policy issues—for example, gold plating.

The jurisdictional scrutiny approach would be different; it would have a different purpose and would perhaps require the development of a new set of procedures and instruments. Under that approach, the lead committee would be the European and External Relations Committee. The aim would be to consider and report on the Scottish Government's jurisdictional choices—Scotland or UK—and perhaps on the use of section 57(1) of the Scotland Act 1998. That would entail a general scrutiny of all jurisdictional choices year by year, perhaps to identify cross-cutting issues such as stakeholder engagement in the level of implementation, or to identify issues such as resources, which might hinder the choice to implement in Scotland. The overall purpose of this type of scrutiny would be to review the jurisdictional impact of devolution on UK transposition of EU legislation.

In summary, each scrutiny type must be distinguished one from the other. Given the different overall purpose, each requires different organisation and holds different consequences in terms of resources and how devolution is studied. The systematic choices that require to be made for each scrutiny type are crucial. They could form the basis for further discussion.

10:15

The Convener: Thank you. That was extremely useful. You have covered much of the territory of my first questions, which were on the extent to which the Scottish Government engages with Scottish stakeholders in the transposition process, whether the process is transparent and if the Scottish Parliament undertakes sufficient scrutiny. Obviously, you dealt with the third issue to some extent in saying how the Parliament should develop the process, which was extremely useful. Perhaps you might like to comment on the transparency of the process, particularly in terms of the jurisdictional issue. That is one of the issues on which I am reflecting, given that the Scottish Government does not report on its use of section 57(1) of the 1998 act. That said, doubtless we could find out the information by challenging the Government on the issue.

Dr Carter: A number of the questions that the committee correctly asks do not have answers. One reason is that there has been no parliamentary scrutiny of jurisdictional decisions. Such scrutiny would bring transparency to the process and provide answers to the questions.

The Convener: Do you know the extent to which section 57(1) of the 1998 act has been used?

Dr Carter: No.

Alex Neil (Central Scotland) (SNP): Given the volume of EU legislation, one issue that strikes me is how to keep the whole process manageable. It would be quite possible for us to spend all our time looking at the transposition of EU legislation and not having time to do anything else. We need to try to do that by exception and not by having to cover absolutely every nook and cranny.

I am interested in a number of issues, the first of which is the volume of transposition exercises—if I can put it that way. I refer to the new legislation that comes on board, year by year, in terms of devolved matters, hybrid matters between Edinburgh and London, and those that are reserved but which require an element of implementation by the devolved Administration.

An example of a hybrid matter is forestry, environmental responsibility for which is shared between the devolved Administration and the UK

Government. Do you have an indication of the volume in each of those categories? Has an audit trail been done of legislation under any of those categories, from the point at which the European Commission made the decision, to implementation and transposition in Scotland? If so, can you give us examples?

Professor Scott: Those are detailed questions. First, I will take the volume of legislation. Broadly speaking, EU legislation—primary legislation and directives—is diminishing in volume for a whole bunch of reasons, not least of which is that many of the EU's key objectives, which go back to the single market process, have been achieved or the legislation has been implemented. The EU is also trying to circumvent the legislative model, which it knows is difficult not only for political reasons but because of issues that you raised in the question. The transposition, implementation and enforcement of EU legislation lies at national Government level to secure, and different Governments take different approaches to the problem. The UK Government is held to be a good example, although, of course, critics suggest that it overimplements EU legislation.

I cannot give a precise answer as to the volume of legislative activity that is coming out of the European Union. I simply do not have that information. I am sure that it is obtainable, but I do not have it to hand.

You are right about the actual mechanisms for transposing European legislation into domestic law. The transposition may happen at one or two levels, or at both. However, the implementation and enforcement might depend on resource use at the sub-national level, where the appropriate regulatory agency could be devolved, although it has to take on a UK-wide responsibility for its jurisdiction. There are cost and resource implications there. That requires the devolved Administrations to be in close proximity to the Government as the legislative process develops, from the moment of formulation. That is why it is important for Parliaments and Governments to be involved from the very beginning of the legislative cycle. In the end, you might have to pick up the consequences of a legislative life for something that is actually not a devolved competence. That is where things get terribly complicated.

Alex Neil: That is why I am keen to hear your views on the idea of an audit trail. We could look at some examples in the three different categories of legislation to understand what is happening and where things are perhaps not being done well enough.

Professor Scott: As far as I know, there is no UK study on that, although the committee received a report from Jim Wallace, and there was also Lord Davidson's report for the Cabinet Office on better regulation. Both those reports throw light on the question.

Academic studies have also been done. I know of one in Belgium, where colleagues have examined the life cycle of a Community directive. They have considered what type of directives sub-national Governments try to influence and what kind of issues have determined the success or otherwise of their attempts to influence it. One of the key features there was where the burden of implementation and enforcement lay. Enforcement should not be ignored. The number of enforcement agencies and the resources that are devoted to enforcement will largely determine whether a directive is properly implemented.

I cannot say that I know of any example of tracing the history of a directive from its formulation in Brussels to the statutory instruments that are enacted at Westminster or here, such that would reveal the type of issues that we have been discussing. I do not know whether my colleagues know of any.

Dr Carter: No.

Professor Jeffery: I have a suggestion to add. This is probably not yet at fruition, but it follows some of the changes that were introduced under the better regulation agenda and that are likely to be incorporated in the reform treaty. It is for a fuller or more systematic consideration of sub-state Government and Parliament views at the pre-legislative stage through consultation procedures organised through the Committee of the Regions for the Commission, but also involving sub-state institutions acting independently, supplemented by a more systematic impact assessment process at the pre-legislative stage. Those two approaches provide foundations for starting an audit trail, at least. Rather more work will be required to carry that through, however.

Since its foundation, the Committee of the Regions has been challenged to find a convincing rationale for itself. It is moving a little way further towards that now. It has been developing a more systematic service for members in relation to subsidiarity, including a subsidiarity monitoring network, which provides an online facility for consultation on emerging EU legislation. Through that, it might be possible to achieve—I would not say that this has been achieved yet—a better understanding of good practice from the implementation stage in sub-state regions of the EU, which could be brought into pre-legislative consultation and monitored during the process of legislation in the European institutions, and then taken through to transposition. There are now more possibilities of a systematic, cyclical approach, which Dr Carter indicated. That is not there yet, but there are possibilities for an audit

trail approach to emerge through those new procedures.

Alex Neil: If the Scottish Government is implementing something, there has to be a transposition note. I should probably know the answer to this, but have we in Scotland yet had many—or any—pieces of legislation, either primary or secondary, with transposition notes?

Professor Scott: Since 2001, the UK Parliament has had transposition notes. The committee recommended transposition notes in its previous report.

Alex Neil: That recommendation was accepted but, to the best of my knowledge, I have not seen such a note. Do you know of any?

Dr Carter: I know only what the previous European and External Relations Committee reported from last session's inquiry, which was that although transposition notes had been promised, their delivery was patchy. My perspective is that this committee could take hold of the scrutiny and the volume of legislation and monitor the processes in the two ways that I set out at the start.

Using the policy approach, directives could be traced from start to finish in the way that my colleague suggested. My understanding is that transposition notes would form part of that policy approach, looking at policy content and the issues for Scotland.

That would be different from the transposition jurisdictional approach that would look at the annual volume of legislation and which would answer the committee's question about the extent to which legislation is assigned to the centre or to Scotland, and the justification for that assignment. That might require the Government to provide different information from that which it provides at present.

The Convener: The new Government has agreed to provide transposition notes, for which the previous committee asked. None of us—apart from Irene Oldfather, who will ask the next question—was a member of the previous committee. Irene Oldfather knows all about the previous report and everything else European.

Irene Oldfather (Cunninghame South) (Lab): That is quite a challenge.

The committee used to receive from the Scottish Executive regular reports on progress with transposition, which were required to say when section 57 had been used and to justify that use. A regular reporting procedure was established, but I have not seen such reports in the past few months. The committee used to examine regularly the use of section 57 and to decide whether it agreed with the rationale for that. We might want to re-examine that.

Gosh—there is so much to cover that I will not be able to do it all. I did not intend to comment on what Charlie Jeffery said about the COR, but I agree that it presents opportunities. The COR is sometimes underestimated. It insists that the Commission appears before each COR committee, each of which has the opportunity to question the Commission on its legislative intent in policy documents. That power is much underestimated. The COR is consultative and does not have enormous powers, but it can hold the Commission to account, call Commission representatives to every committee meeting and question them on policy objectives, in the same way as we take evidence in the Scottish Parliament. Tying that in with some of the suggestions that Dr Carter made might provide opportunities for the committee to examine in its report.

I take on board what Drew Scott said about formal, informal, clear, blurred, constitutional and non-constitutional arrangements, but can he highlight examples of good practice? Part of our inquiry's purpose is to examine good practice. Although you know of no process that starts pre-legislation and goes all the way through, do you have experience of legislative regions that have good practice in influencing the legislative process?

Given the asymmetric way in which implementation takes place throughout member states, which we explored with a Commission representative and an MEP at our previous meeting, does evidence exist of how enforcement decisions are taken and of how European institutions follow through on enforcement? Is enforcement really up to the member state? Do you feel that the Commission and the European Court of Justice are acting effectively where there are breaches?

10:30

Professor Scott: I cannot answer your first question. There has not been, to my knowledge, a sufficient body of evidence to say that this country has the best practice. We know what best practice looks like; indeed, the report by the European policy group in Brussels set out what good practice looks like by doing a very large survey, in which the former Executive was a partner. Quite a lot of information could probably be gleaned from the detailed work behind that report, which set out, in a series of points, the group's view of what a good transposition strategy looks like when we are dealing with national and sub-national legislatures.

The report does not imply that any one country achieves that; my reading of it is that there are bits and pieces of good practice in various parts of the EU. The UK is always held up as an extremely good citizen when it comes to the better regulation agenda. The regulatory impact assessment in which the UK Government engages is seen as the best around, as is our post-legislative scrutiny, in which we impact assess subsequently. We do not only impact assess when the legislation is given legal force; we can revisit legislation and, indeed, kill it off. The EU has a strategy for simplification or codification and for annulling legislation that is no longer fit for purpose or which has been superseded by other legislative instruments. It tries to avoid the regulatory burden that is a feature of any regulated society.

You asked about enforcement. The EU's legal system exists to police the enforcement of European law. The Commission examines cases and ensures that the law is being followed, but it also responds to complaints. The European Court of Justice responds to complaints and cases. National courts also have a role in policing and enforcing European law, because European law is UK law.

We have transposition score cards. The recently produced single market review heralds the fact that there is now a much higher rate of transposition of EU legislation, with a few exceptions. There seems to be a general sense that EU legislation is being more efficiently and timeously transposed, but there are obviously still weaknesses. The difficulty is that responsibility lies with member states, not with the Commission. Once the legislation is part of domestic law, it must be enforced as such, and legal redress is available if that does not happen.

Irene Oldfather: In several cases, complaints have been made to the Commission, which has taken the matter to the European Court of Justice. The court has then ruled, but the member state has still not acted. Such circumstances are difficult, and the point has been raised with the committee during the past eight years that some member states are very bad at implementation. People in the United Kingdom think that we are one of the member states that are very good at implementation, but that other member states do not comply. That is a general perception and I do not know whether it reflects reality. I asked the Commission about that last week and it said that it would provide further information. There is a general perception that member states do not always adequately enforce EU law and that although the Court of Justice makes a decision, it is still not followed through.

One example is that of equal pay for foreign lecturers in Italy. I do not know how many times that case went before the Court of Justice, but it took years and I do not know if it has been resolved yet. That is one of the extreme cases. Is there any evidence on that situation, or is it a matter of perception?

Professor Scott: I think that that case is with the ombudsman, so it has been taken one stage beyond the legal process and put back into the political process.

I have no comment to make on other countries with regard to implementation. The UK Government is working very hard—I assume that the Scottish Government is, too—to ensure that when implementation takes place, we avoid overimplementation and ensure that we are not adding to regulations that already exist.

There is much greater awareness in the UK that we have to strike down domestic laws that are now covered by European laws. We do not want a bunch of legislation that does the same thing and overloads the regulatee with reporting requirements. It goes back to the question of overimplementation and overbanking. I agree with Dr Carter that a policy or issue-led approach would clarify things. You could say, "Here is an area in which we legislate, so perhaps we should implement this part of European legislation", or "Hang on, this is predominantly an area of Westminster legislation, which we can't actually strike down, so maybe it makes more sense to legislate at a GB level."

Dr Carter raised the issue of what criteria one would develop to establish the appropriate, best and most effective legislature when it comes to transposition. It is not about having a jurisdictional fight, but about trying to make the policy work most effectively.

John Park (Mid Scotland and Fife) (Lab): I have a couple of connected questions, which are on stakeholder engagement and differential implementation. I am a member of the Subordinate Legislation Committee. One of the issues that arose when we were considering our procedures and those of the Parliament was that many stakeholders feel that they are not engaged soon enough to allow them to influence the process that they are going through or to prepare the ground by considering what the final legislation might look like. Do you think that the Scottish Government and the other Governments in the UK engage well enough with stakeholders in a timely fashion?

I got the impression, a couple of years ago, that the Scottish Executive did something a bit different from the UK Government in relation to the procurement directive. Is there scope in the existing arrangements for differential implementation by the Scottish Government?

Could the approach be strengthened in that area? Is there differential implementation by other member states and their regional Governments? Does that happen regularly? Can you give examples of directives for which that has happened?

Professor Jeffery: Differential implementation is quite rare in other decentralised states; in part, that reflects the constitutional division of powers in those states. In some cases, most responsibilities for implementation are left with the regional Governments, but in most cases, states operate on the assumption of uniform implementation throughout the national territory, notwithstanding the possibility of regions doing things differently, according to the domestic constitutional structures.

The situation that I know best is that of Germany, with which there are strong parallels in Austria, where a high premium is placed on uniform implementation throughout the national territory. The various regional Governments co-ordinate with each other so that they do not implement law differentially. They might end up doing so, because some are more effective than others in administration or are better resourced than others. However, in most places, the aspiration is for uniform implementation throughout the national territory to maintain a level economic playing field and/or equality of services to citizens.

We are relatively unusual in having this debate, which reflects our particular constitutional structure. That is a roundabout way of saying that we might not find too many lessons in other places.

Dr Carter: I agree. Good practice means different things in different constitutional settings. It is perhaps not helpful to compare Scotland with member states in which competence to implement legislation is exclusive to the region, because in those states the question of jurisdiction has already been settled in law. There is a specific issue here, which, as my colleague Charlie Jeffery said, raises specific questions. What amounts to good practice perhaps needs to be defined at home.

On the basis of your predecessor committee's report and one's own research, I suggest that the extent of stakeholder engagement differs significantly from sector to sector and depends on the purpose of such consultation. Under the policy scrutiny approach that I identified, the content of legislation, the policy choices and the costs would have to be monitored; as we have said, that would be better carried out at the start of the process, when there is more scope for influence.

Stakeholder consultation on jurisdictional choices is a very different form of consultation, which the committee might consider if it chose to adopt a jurisdictional scrutiny approach. The issue would be the extent to which stakeholders were consulted on whether Scotland or the UK would be the responsible body, which is a different type of consultation. Thinking about scrutiny in different ways would shed light on that issue, too.

Professor Scott: A final postscript is that how you do stakeholder engagement coming out depends on how you have done it going in, because the shape of a directive and its consequences for the appropriate domestic jurisdiction are determined by the content of the directive, which is determined by the process of building the directive from day one. We should not see those as two different issues; they are part of the same cycle.

If there is a question, it is about the extent to which public stakeholder engagement takes place. I agree that the picture is patchy. As academics, we have never really known how the Governments—the Scottish Government is a stakeholder—talk to each other and what issues are stressed within the rather opaque process of intergovernmental discussions. Those discussions are not transparent for good reasons, which are to do with negotiating strategies and all the rest of it. That is part of the same issue.

John Park: Is there a link between good stakeholder engagement and differential implementation?

Dr Carter: Not necessarily.

Professor Scott: I am still struggling with the differential implementation argument. In their submission, our colleagues from the Law Society of Scotland—who are sitting behind us in the public gallery—provided excellent examples of issues that call for different solutions, but I am still struggling to decide whether differential implementation is a strategy or a consequence.

The objective is uniform effect. To address the issue from the other side of the fence, section 57(1) exists to ensure uniform effect. Scotland is not permitted to legislate in any area in which to do so would violate the UK Government's interpretation of EU law, but the UK Government is permitted to legislate in a way that might violate EU law. That is the argument that Scotland has to be more rigorous in observing EU law, because we have two parents telling us what the rules are. To my mind, it is better to approach the issue from the perspective of uniform effect than from that of differential implementation.

The Convener: I welcome Keith Brown, who is attending as a substitute for Alasdair Morgan.

I have a follow-up question on differential implementation. Are there any obstacles to that

happening, whether from the UK Government or anyone else?

Professor Scott: Frankly, I do not know.

The Convener: I think that Dr Carter said that implementation is not exclusively a devolved competence. If there was a stand-off on implementation between the Scottish Government and the UK Government, what would be the outcome? I know that, theoretically, the UK Government can override us on anything, but in practice that would not happen in the big devolved areas for which we have responsibility. Would the same be true if there was a stand-off on a directive, or would there be a different relationship in such circumstances?

10:45

Professor Scott: The concordats are clear. If officials cannot agree on the issue, it is raised at a political level. At the end of the day, it is a reserved matter. I do not know whether there is still a joint committee of officials with responsibility for Europe, but there is certainly a network to that effect, which does the same thing. If it cannot agree because a fundamental principle has been violated, in a political sense, the matter is raised at a political level in the joint ministerial committee on Europe. We do not have any experience of that. Publicly, at least, we have never had a stand-off that has been raised for resolution at a meeting of the JMC on Europe. Even if that happened, the JMC's role is advisory and its decisions do not constitutionally bind the UK Government.

Ted Brocklebank (Mid Scotland and Fife) (Con): Even to a beginner on the committee, it seems clear that section 57 of the Scotland Act 1998 is central to the transposition issue. Is there a risk that the overuse of section 57 will undermine the devolution settlement by allowing the UK Government to legislate in areas of devolved competence?

Dr Carter: My answer is similar to the one that I gave earlier. We are not certain of the reasoning behind the use of section 57(1). By conducting a scrutiny of the choices, perhaps one might be able to answer the question.

Professor Scott: That is correct. You could have a sensible set of criteria—led by the policy issue and the objective that you were trying to achieve—to determine where legislative activity should fall. Academics say that we can map a course that would be sensible. Caitriona Carter has tried to do that. I do not know whether the default position is that we should not bother with that because the UK Government can adequately take care of the matter. I have no thoughts on that, to be honest.

Ted Brocklebank: Can you give any examples of cases in which Scotland has transposed EU directives differently from the rest of the United Kingdom?

Professor Scott: It has certainly transposed them separately. I think that my colleagues behind me will be able to fill in some of the gaps in the paper that they presented to you. In some cases, such as that of the water directive, there is different implementation of some elements because there are different starting positions, different ownership of the sector and so on. However, the extent to which that results in a non-uniform effect is questionable. We would have to examine the directive and find out whether a non-uniform effect has arisen and what the consequences are. I cannot give you any empirical evidence on that today.

Ted Brocklebank: Do you think that a Scottish version of the UK Government's transposition guide is required?

Professor Scott: The UK transposition guide is an excellent document. It might be that, implicitly, we are talking about the need for a Scottish transposition guide that sets out broad terms of engagement. That is precisely what the BERR document does—it sets out how we approach a European directive from conception to execution and what we expect. It is highly detailed. It sets out what we expect civil servants to do and what we expect Governments to do. The first point in the document, which is stressed, is that the devolved Administrations remind Whitehall of its obligations under the concordat.

A Scottish guide would be an excellent way forward, because it would map out some of the issues so that you had a handle on them.

Dr Carter: It is a mistake to assume that the option to use a UK instrument is somehow a failure of devolution. It might well be that, after great consultation and consideration, that is the best way of protecting Scottish interests. In relation to global arenas such as the World Trade Organisation, it might be for good reasons that a UK instrument is chosen. What are the reasons for that, and the criteria? That is the question.

I agree with Professor Scott that a Scottish transposition guide might be a helpful way of structuring the discussion.

Professor Jeffery: There is an analogy with the use of Sewel motions in a different context. We have some evidence, from academic analysis, of the various reasons for the use of Sewel motions. Mostly, they are used when a conscious choice is made for uniform effect throughout the UK. At times, they are used as a labour-saving device that helps to manage scarce resources effectively. In other words, does the Scottish Parliament

invest its time in a legislative procedure or is it more or less okay to let the UK Parliament deal with the issue? At other times, one or two difficult issues have been avoided in a Scottish context by using Sewel. I suspect that if you did a detailed analysis of section 57 you would find a broadly similar pattern.

The Convener: I will end where I began by asking about transparency. I do not know whether you can provide any information about the nature of the engagement between the UK Government and the Scottish Government during the transposition process—perhaps, in the nature of things, that happens behind closed doors—but I wonder whether the bit about confidentiality in the memorandum of understanding is a problem in terms of achieving transparency? Should the committee raise that point, or is it just a fact of life in intergovernmental relations?

Dr Carter: Certainly, confidentiality makes scrutiny hard. It also makes it a challenge to research the extent to which Scottish interests are represented. From my perspective, that is a given. If you cannot access the intergovernmental negotiation, perhaps you have to think of ways to work round that, for example by influencing policy content directly through inquiries, such as the one that was conducted by the Justice 1 Committee; by issuing reports; and by conferences such as the one on maritime policy. Those are good examples of ways to work round the requirement for confidentiality. One has to develop scrutiny that is tailored to the rules of devolution, unless one makes a conscious decision to attempt to change those rules.

Professor Scott: One possibility, which I have suggested previously to the committee, is what happens in countries such as Denmark. In terms of accountability, there is no reason why a parliamentary committee cannot be briefed in private. The democratic process is working in the sense that the Government is being held to account. When it comes to the beginning phase of community legislation, it is difficult because the UK Government has to have a negotiating position, which it has to formulate behind closed doors. There is no reason why this Parliament cannot put a scrutiny reserve on its own Government, and there is no reason why the Parliament cannot conduct private meetings with its Government to assure itself that these matters are being dealt with properly and handled effectively and efficiently. As Dr Carter said, devolution poses certain difficulties and challenges, but it strikes me that within the settlement—not by changing it, because that is not our job—there are ways in which greater accountability and information could be achieved.

Professor Jeffery: I add a note of caution, which is the experience in other EU member states, in which similar obligations on confidentiality do not necessarily exist but deeply non-transparent policy-making processes still exist. That is partly in the nature of the beast, which is co-ordination between departments at different levels of government, perhaps involving different ministries co-ordinating horizontally at each level and then vertically between the levels. It is extremely difficult to follow how decisions are arrived at, and whether there are confidentiality obligations.

The Convener: Thank you for your helpful comments—the session has been useful for the committee.

10:54

Meeting suspended.

10:58

On resuming—

The Convener: We will now take evidence from Michael Clancy and Sarah Fleming from the Law Society of Scotland and David Johnston and Anna Poole from the Faculty of Advocates. I thank all the witnesses for attending. As usual, we will start with an opening statement from each organisation. I understand that Michael Clancy will open for the Law Society and David Johnston will open for the Faculty of Advocates.

Michael Clancy (Law Society of Scotland): Good morning, everyone. It is a great pleasure to be here to talk about this important issue.

The Law Society of Scotland is the body that represents Scotland's 10,900-odd solicitors. We are charged by statute, under the Solicitors (Scotland) Act 1980, to promote

"the interests of the solicitors' profession in Scotland; and … the interests of the public in relation to that profession."

A crucial point under the latter provision is that dealing with matters of law reform comes high up our agenda because what makes for good law for everyone allows for the better administration of law for solicitors, who can give clearer advice to their clients with better outcomes. That is why the Law Society participates in the law reform process here in the Scottish Parliament, in interaction with the Scottish Government, in Westminster and with the European institutions in Brussels. To facilitate that, the Law Society maintains an office in Brussels—which we share jointly with the Law Society of England and Wales and the Law Society of Northern Ireland—so that we can engage with the European institutions and be involved in the process of European law making from the very beginning.

11:00

As we heard in the earlier evidence from the team from the Europa institute, key to achieving good transposition is ensuring that the provisions are good at the beginning. We view it as essential—we try desperately hard to achieve this—to influence people's thoughts about the Scottish legal system in Brussels, when the very ideas of legislation are germinating. That is a resource-intensive exercise that is sometimes successful and sometimes not successful. Sometimes, we can see the fruits of that working their way through to transposition; sometimes, the outcome must simply be put down to experience.

Ensuring that the distinctive characteristics of Scotland's legal system are known in Brussels is one way in which we can improve legislation and try to ensure that transposition into Scots law is as good as possible. That is why we participate at that level. We also participate through the Council of Bars and Law Societies of Europe, which has a strong voice in European institutions.

Of course, when matters reach this Parliament—and, indeed, the Parliament in London—we try to influence the procedures to ensure that the distinctive nature of the Scottish legal system is not forgotten about.

On that basis, I am happy to hand over to David Johnston and to await the committee's questions.

David Johnston (Faculty of Advocates): We are grateful for the invitation to give evidence to the committee. We recognise the importance of the inquiry in which the committee is engaged, given the central nature of European law to many devolved matters. I should also say that we found the predecessor committee's report—on which I understand this committee's work will build—very valuable. I will make just a few remarks at this stage.

There are rather few cases in which the legal profession is a direct stakeholder as opposed to being interested on behalf of various affected clients. An obvious current exception to that is the implementation and transposition of the services directive, on which the Department of Business, Enterprise and Regulatory Reform launched a consultation earlier this month. We are in the course of considering our response to that. I understand that the department will also consult the devolved Administrations.

As I understand it, the committee's key concern in today's proceedings is how best to address Scottish interests effectively between the adoption of a directive and the deadline for its implementation by member states. We can perhaps focus on two points. First, what are the best means for implementation? A great deal of this has already been covered in the committee's earlier discussion with the witnesses from the Europa institute, but an obvious starting point is that directives are binding as to the end to be achieved but some leave a good deal of flexibility in how to get to that end. Therefore, an early issue that perhaps ought to be scrutinised is what scope a given directive has for flexibility and differential implementation. In the case of a particular directive, can anything different be done or is it so tightly drafted that that is not an issue?

A second issue that Dr Carter touched on is identifying whether a specific Scottish, rather than a UK, interest is in need of protection. The appendix to Mr Wallace's report highlighted the public contracts directive, which, it was pointed out, were implemented under Scottish regulations made in exactly the same form. I am sure that the committee will be familiar with the fact that directives are very often implemented by copying out their text in the text of the regulations. If that is all that has to be done, one might reasonably ask whether in this case Scotland ought to be going down its own route or whether it would be more efficient in terms of resources and the committee's work load to try to consult Westminster institutions and pass such work on to them.

Our outline paper also touches on the accessibility of the law. In this respect, I highlight the importance of transposition notes; indeed, I note the comment in the predecessor committee's report that such notes are desirable and should be produced from now on. Even though no one appears to have seen any yet, it is good news that they are at least in the offing.

We have also highlighted the importance of, where possible, consolidating texts of legislation instead of having many pieces of legislation that must be read alongside each other in order to piece together what the law is at any one time. I realise that I am being very optimistic, but that is desirable, if it can be achieved.

Finally, I should mention the terms of implementation. As I have already said, implementation is sometimes carried out simply by copying out in regulations the terms of the directive. Although such an approach minimises the risk of accusations that a directive has not been implemented properly, it might, given the language in which European instruments can be drafted, make the resulting legislation impenetrable. As a result, there might be something to be said for having tailor-made drafting in this matter. It would at least make the language more accessible, even if it might at first sight be less clear whether the directive has been transposed properly.

That is all that I would like to say at this stage, convener.

The Convener: Thank you very much. I will kick off the questions and then pass over to Alex Neil.

Has the Scottish Government—or, indeed, the previous Scottish Executive—ever consulted you on the development of a directive? In your experience, is such consultation a regular feature of the transposition process?

David Johnston: I am confident that we are consulted regularly on directives and have no concerns about our involvement in that respect. Offhand, I cannot name one on which we have been consulted lately, but we have machinery that is designed to feed into consultation processes.

Michael Clancy: The Law Society of Scotland, too, is regularly consulted on a range of issues. Given our committee structure, in which we deal with issues from agricultural law to wills, we are at any one time involved with a very broad range of consultations. Sarah Fleming will be able to elaborate on some of those aspects.

Sarah Fleming (Law Society of Scotland): We are consulted on issues that relate directly to the legal profession and often have very close consultations with Government on that matter and a range of other areas. One issue that was emphasised by the witnesses from the Europa institute and has recurred in the committee's discussions in this inquiry is the importance of consultation or stakeholder engagement from the beginning of the process.

Our relationship with the Scottish Government on, for example, justice—in which, as you might expect, the Law Society of Scotland is particularly interested—is such that we are consulted from the very outset when the Commission might be thinking about a proposal on, say, cross-border succession or family law. At that point, our subject area committees are asked to put forward their views on the matter or to nominate experts to sit on an expert group in Brussels that will inform Commission policy later on.

That is not the focus of the committee's deliberations at the moment, but we would stress that it is important because once you get to transposition and a formal consultation on a directive with a text, it is much easier to be involved in that and say something coherent about it if it does not come as a complete surprise and the Government has been able to take into account the specificities of the legal system in Scotland and issues that might arise in Scotland. The Government consults widely on transposition.

Alex Neil: I have a question for the Law Society and a couple for the Faculty of Advocates.

Running through the report that Jim Wallace produced for the previous committee and the evidence that we have heard on this matter this morning and in previous sessions is the underlying suggestion that it is better to get into the process early and that it is difficult to rectify problems down the line if you are not involved at an early stage.

Law is a good example of an area in which Scotland differs from England and Wales. Can you think of any examples involving the United Kingdom Government having to implement something to deal with a problem that you were not happy with from the beginning of the process because a European Commission proposal led to a new directive or regulation that was contrary to the principles of Scots law?

To put it simply, we do not have a veto in the way that member states have a veto, but have we been successful in ensuring that, in the early stages of the consultations with the Commission and the UK Government, we have been able to influence matters to the extent that no down-the-line issues about fundamental principles being breached have arisen?

That is my question to the Law Society. I will give its representatives time to think of an answer while I am asking two questions of the Faculty of Advocates.

I am interested in the point that you make about the distinction between uniform effect—which is, as it were, the strategic objective—and uniform drafting. I think that you are saying that we should not be engaging in cut-and-paste approaches to implementation, which is what uniform drafting amounts to, and that we should be trying to make the process more user friendly in relation to how we transpose legislation into Scotland.

I am interested in the three suggestions in paragraph 9 of the submission from the Faculty of Advocates, which involve practical measures for improving transposition. Could you expand briefly on each of those?

Sarah Fleming: To be frank, off the top of my head, I cannot think of any policy process that has followed the path that you outline. The UK is only one member state and whether it has a veto depends on the area in which it is operating.

I am sorry to go back to justice issues, but that is the area in which we are most often engaged. There is a difference in that area because the Government, at a UK level, has a certain margin for manoeuvre. For example, it has a veto in relation to criminal justice issues, as there is a requirement for unanimity. If it does not like a particular proposal, it can stop it going through. That happened with a proposal on standards for procedural safeguards in criminal issues across Europe, which was proposed a number of years ago.

The UK Government has decided that it does not want to proceed with the proposal and, in effect, along with a small number of other member states, it has vetoed it. It is difficult to say what the Scottish input into that decision was. Our initial understanding was that there were no particular issues for the Scottish legal system, so it is difficult to say whether there was any Scottish influence in the matter or whether it was simply a decision taken—

11:15

Alex Neil: I will give a potential future example. A divergence is emerging in the response to the Competition Commission's report on the deregulation of the legal profession. The clear feeling in Scotland—supported by the Government—is that we should not go down the route that is outlined in that report, whereas it seems as though the Government down south is more inclined to go down that route. I totally support the Scottish Government's position, but I would have thought that the Westminster Government's position on that subject might be closer to the European direction of trying to get more competition and more of a free market in legal services. Supposing we dig in our heels and say that we are not going down that route, are we likely to be overruled?

Sarah Fleming: Michael Clancy will elaborate on that because he is more involved in the issue, but the first thing to note is that the process that we are going through is not primarily Europe driven. You are right that the issue is being considered at Europe level and has been for some years. You are also right that, broadly speaking, the stance of the Office of Fair Trading and Whitehall on the issue is more in line with the European Commission's position than that of other member states is. However, it is also fair to say—speaking only for the legal professions throughout Europe—that the decisions that are being taken and the process that is being gone through in England and Wales are probably in advance of what is happening elsewhere in Europe. The process is seen as radical in that context, and other parts of Europe are following in the wake somewhat. My suspicion—this is only a guess—is that if it came to a European decision on the issue, other member states would be much more opposed to the sort of proposals that are being produced from the Government in London than we in Scotland would be.

Alex Neil: So we will have to threaten a veto.

Sarah Fleming: To the extent that that is possible. We have a relatively liberal regulatory structure in Scotland and in England and Wales compared with that of many legal professions elsewhere in Europe. I suspect that we would not be the voice that would cause a decision one way or another.

Michael Clancy: I am glad that Alex Neil asked those questions of Sarah Fleming and the earlier witnesses, because that has given me time to marshal my thoughts—as you know, time is what I need.

On the first point, I cannot recollect any example of legislation on which the European institutions set off on one trail and we were able to divert them. However, I recollect the green paper on notaries public by the then Commissioner Marín in 1994 or 1995.

Alex Neil: I must admit that I missed that one.

Michael Clancy: It was the sort of thing that is sponsored by Nytol—you would have to have a specialist interest in notaries public to read it, so I am not shocked that you did not have it to hand. In the report, Commissioner Marín looked at the situation and made the bald statement that there were no such things as notaries public in the United Kingdom. Of course, we were able to correct his impression and when the final revision of the report came out, it reflected the fact that there is a profession of notary public in Scotland, in England and Wales—which, incidentally, is regulated by the Archbishop of Canterbury—and in Northern Ireland. That kind of information provision to the commissioner was useful.

More pertinently, I will address the issue of competition in the legal profession. Commissioner Monti, who was the competition commissioner a few years ago, examined the issue throughout Europe and came to the conclusion that some countries have several restrictions that militate against competition, whereas others have fewer restrictions. If my recollection serves me right, he identified countries such as Greece, Italy and France as having more restrictions and countries such as the United Kingdom and Ireland as having fewer restrictions. We agree with that perception.

As Sarah Fleming said, compared with other European jurisdictions, the British Isles are, generally speaking, relatively liberal on the regulation issue. Distinctions have to be made between the type of legal profession we have in Scotland, England, Wales and Northern Ireland and those in many other European jurisdictions where the distinction between l'advocat et le notaire—the lawyer and the notary—is an integral part of the constitutional and legal structure.

In Scotland—I say this with all due respect to my colleagues at the Faculty of Advocates—the relationship is more amorphous; the distinction has to be reinforced continually. There are different perceptions of the legal profession in Europe and Scotland.

The Law Society of Scotland was one of the few law societies to examine its rules and test them against the proposals in the Monti review of competition in the legal profession. As a direct result, we got rid of things such as our recommended fee rates. That kind of reaction to European competition analysis is something that the Law Society of Scotland is very open to doing. We are mindful of the fact that these issues are important for our clients right across Europe and that the administration of justice is an important value that needs to be protected and upheld.

Another example, albeit that our process in Scotland is different, is the process that is under way in England and Wales as a result of the Clementi report and the Legal Services Act 2007. Openness to change is the signal feature that differentiates the legal systems in the United Kingdom from those in our partner countries in Europe. History will judge whether such differentiation is a good thing.

David Johnston: Perhaps it would be helpful for me to say something on the question that was put to the Law Society of Scotland. Off the top of our heads, we, too, cannot think of an example of a European directive cutting across a fundamental principle or rule of Scots law. Obviously, if we think of one, we will let the committee know.

In my opening statement, I made a plea for more user-friendly drafting. As the committee is well aware, European legislation is the result of compromise between many different interests. Legislation is often extremely hard to follow, particularly as it has to be read in light of a number of recitals of each directive, which—supposedly—identify the purpose to which the, at times slightly obscure, language is heading.

In terms of ordinary members of the Scottish public and their access to justice, it would be helpful if different language were used in the implementing regulations, if at all possible. People would thus be given a better chance of understanding the meaning of the regulations. It would also make it more likely that if people take a case to court—as they are entitled to do, instead of being represented by a lawyer—they will have a clearer understanding of the intention of the legislation.

Alex Neil: They could well save money by that, too.

David Johnston: That could be the case.

Anna Poole will address the second question.

Anna Poole (Faculty of Advocates): In paragraph 9 of our report, we suggest three possible practical measures that could be taken to improve the accessibility of the law for members of the public. Based on our experience and practice of trying to advise people on rights that derive from Europe and of representing people in court, we made the point that one of the big problems is the accessibility of the law on which everything is based.

We have made three practical suggestions that we think might help. The first is to do with guidance notes—the committee has already touched on that today. It is true that some legislation—and subordinate legislation, such as regulations—is already accompanied by explanatory notes, but they rarely add anything to the text of the regulation, and tend just to restate it. They might be made slightly more helpful. For example, they could refer to legislation and guidance at Europe and UK level. I am not sure how arduous that would be in practice, as I do not have first-hand knowledge, but I understand that within the Government such things might already exist on an informal basis—it might just be a question of making them more accessible.

The second point concerns the fact that, when it comes to implementation, it seems that multiple statutory instruments are enacted to give effect to the European obligation. That is sometimes in response to the European obligation itself being amended, but what has typically happened is that there has been one basic regulation and a series of amending ones. From the point of view of accessing the law, that means that you have to go through every one.

It is also difficult and extremely time consuming to get your hands on regulations. For example, I had a look this morning at regulations concerning the identification and registration of animals that have had to be implemented in Scotland. There was a directive in 1992, and the area is now dealt with by regulations because there has been harmonisation. I had a look at the archive database, which goes back prior to devolution; it listed 28 regulations for implementing that directive in the UK. There will be far more regulations now that we have devolution and, for reasons that we have set out in our paper, it might not be enough to stop at the Scottish regulations.

We have had something similar in court pleadings over the years: when there has been an amendment or an adjustment to a case, it has typically been done on a separate document and then consolidated at the end. In recent years—because we now have word processors—we have started making amendments or adjustments on the original pleading, so the changes can be seen. We suggest that that could be adopted for regulations, where possible, so that instead of having multiple amendments, the regulation with the amendment in it is just re-enacted.

The third point also concerns accessibility. If, in every case, regulations were implemented in

consolidated form, the need for our third suggestion would diminish. The third suggestion is that consolidated versions of legislation that implements directives should be available to the public online and free of charge.

In recent years, a database has been started up—the UK Statute Law Database website—that contains versions of UK and Scottish statutes and statutory instruments, which the public can access free of charge. The problem with that database is that the statutes are not updated particularly frequently, and I believe that there has not been any attempt to update the statutory instruments. If someone wants to access consolidated versions of regulations, they have to take out an expensive subscription to some of the subscription services such as Westlaw or Legislation Direct, to which we have referred. Those bodies have costs relating to consolidating and updating legislation that they pass on to the consumer. Although it is understandable that they charge subscriptions, subscriptions put access to those consolidated versions beyond the reach of many people. Those are our three practical suggestions.

11:30

Gil Paterson (West of Scotland) (SNP): One of the concerns that existed before devolution came into being was the backstaging of Scots law. The complaint was made that not enough time was being spent on updating and renewing Scots law. What is your view on the use of section 57 and the adoption of a method that might save money but would in effect mean passing the ball back to Westminster for it to take care of Scotland's needs? It concerns me that that would send the wrong message, especially given the play that was made at the start of your presentation about what has to be done in Europe and through Westminster to remind people that we are here. Scots law puts us in a unique situation, as the other devolved authorities in Europe do not have laws that are separate from those of their member states. How do you feel about that?

David Johnston: We are fighting for the honour of going second.

There are only two points that I would make. First, I thought that the way in which Dr Carter put it this morning was helpful in analysing—as far as we can up to now—the section 57 issue and pointing out that it is perhaps for the committee to evolve criteria on when it will be appropriate for you to retain a matter within your jurisdiction and when you might wish to pass it on to the UK Government.

Secondly, Jim Wallace's paper places a lot of emphasis on the importance of liaison with Westminster authorities. It seems to me that, albeit that we do not really have access to information about how these institutional arrangements work, good liaison between here and Westminster surely must be the best way of trying to maximise the resources that are available so that they can be used on the things that affect genuinely Scottish concerns rather than things that affect concerns that are uniform throughout the United Kingdom.

We agree that one does not want to end up returning all power to Westminster by the back door. In a situation in which resources are finite, it comes down to having a means of identifying and retaining matters of specific Scottish interest while other things, in which you have not identified such a strong interest, are sent by a different route and given more attention through liaison or through Westminster alone seeking to transpose them appropriately.

Sarah Fleming: We make the point in our paper that there may be situations in which it is more appropriate for the implementation of a directive that affects an area of devolved competence in Scotland to be legislated for at Westminster. However, that would have to be done only after careful consideration—it takes us back to the need for engagement early in the process, so that issues that relate specifically to the Scottish legal system are raised and can be dealt with, even if it is through a UK instrument. It is not the case that a UK instrument cannot properly deal with issues that are specific to Scots law, but that would have to be brought to the attention of the relevant departments at Whitehall. Early engagement is an important part of the process, not just the fact of regulations being made in Scotland rather than at Westminster.

Gil Paterson: The revolution starts here.

The grand plan in the European scheme that we are involved in at present is to reduce the number of directives and regulations by 25 per cent. That being the case, it will be a busy time for people who are involved in law. I wonder whether, eight years into devolution, the structures that we have in the United Kingdom allow people to engage with Europe. That is a fundamental question. The answer that I got from the Commission is that it is entirely within the gift of the United Kingdom to decide how far or how slowly it goes in this. Do we need to move on from where we are?

It seems that in every session that we have on this matter, someone says that people have to tug sleeves and lobby. I am concerned. In particular, I do not like third parties being left to lobby on behalf of Scots law; I do not like a process in which we lobby the United Kingdom Government on issues that it will then raise in Europe. Should we be considering how we do business within the United Kingdom, particularly given the 25 per cent reduction in directives and regulations that has

been mooted, so that the process becomes much more formal than it is?

Michael Clancy: Many people would subscribe to the aim of making the process more formal, because it is not formal at the moment; rather, it is based on influence. However, we must consider what is happening in the round and remember that the European reform treaty, which provides for greater participation by national Parliaments and provides encouragement to regional Parliaments and Assemblies, is on its way. That said, with respect to greater engagement with national Parliaments, the reform treaty proposes an eight-week consultation period. Imagine there being an eight-week consultation period for the still water directive, which will be introduced in 2012. Imagine the UK Parliament receiving the draft of that directive, taking the views of the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales on that draft, constructing a view and then sending it back to Europe, all within eight weeks. It does not seem that those formal arrangements will work terribly well; if they are to do so, everyone in the devolved Administrations and at the national parliamentary level will have to be very fleet of foot. People may perceive Gil Paterson's quest for formal arrangements as the way forward, but the question is whether the formal arrangements that are proposed will be effective in dealing with the issues.

Gil Paterson mentioned tugging sleeves and lobbying. I am not sure that such an approach is particularly ineffective. A lot of good work is done to raise the profile of Scots law and ensure that people are aware of the distinctive nature of certain aspects of it and the different court structure here. Therefore, I would not entirely dismiss the engagement of people to raise the profile of Scots law as mere lobbying. Such engagement is an important facet of what many Scottish national institutions—not only the Law Society of Scotland and the Faculty of Advocates—get involved in, and the Scottish Parliament could also get involved in it.

Gil Paterson: I want to put on the public record that you are right to make the point that you have just made. Since I became a member of the committee, I have spoken in the Parliament about the amount of work that is done by, and the dedication of, the big Scottish lobby out there, which I have seen. I acknowledge its work rate and effectiveness and do not want to be dismissive of its great efforts and achievements. I simply want to help people on the road to succeeding for Scotland. That is why I have commented on the matter.

Michael Clancy: I am sure that everyone who tries to promote Scots law, the distinctive nature of the Scottish legal system and the distinctive nature of life in Scotland will look for better ways to improve the profile of those things with the European institutions. That quest will go on for a long time.

Irene Oldfather: My first point follows on from what has just been said. Earlier you discussed how you have engaged with the Scottish Executive. We all agree that it is important to input to the process as early as possible, during the pre-legislative phase, instead of waiting for the eight-week window that will be created if the reform treaty comes into force. Mr Neil highlighted an area in which your views may be different from those of the UK Government. Have you had any engagement at that level? Do you engage with the European Commission? If so, do you do so at an early stage?

My second point relates to differential implementation. In its submission, the Law Society makes a persuasive point about the downside of differential implementation, which may lead to

"individuals making a choice to carry out business, raise a court action or take some other action in one jurisdiction in the UK rather than another".

That is relevant to the question of how we develop criteria for determining whether measures should be implemented at UK level or at devolved level. I invite you to comment on that point.

Sarah Fleming: I will say a few words about our engagement with the UK Government and the European institutions. I take as an example the services directive, which is mentioned in our submission and is in the course of being implemented. We were involved in discussions with the European Commission right from the point at which the directive was proposed. At the outset, it was not clear that the legal profession would be involved; there was a certain amount of lobbying—not by us but by the Council of Bars and Law Societies of Europe—to have lawyers removed from the directive, because we are covered by other European legislation. When the directive came before the European Parliament, we engaged with MEPs to promote a specific amendment to it, as the directive would have affected—needlessly, we thought—our guarantee fund, which provides consumer protection for clients of solicitors in Scotland.

During the process, we also tried to influence the negotiating position of the Department of Trade and Industry, which was the lead department on the matter for the UK. We had some success on a number of issues but no success on others. The directive is now being transposed. The lead department is BERR, which is the successor department of the DTI. We have had a number of meetings and direct contact with BERR. However, transposition of the directive as it

affects the legal profession will be largely devolved to Scotland, so we must also deal with the Scottish Government. Because the services directive is so big and covers so many different areas of service provision, thus far BERR has been more actively engaged in the implementation process than the Scottish Administration has, but the process still has two years to run.

We see ourselves as involved in the EU legislative process right from the outset, once we have identified an issue that is of sufficient importance either for Scots law or for the legal profession. The services directive is an example of a measure that affected the legal profession specifically. Michael Clancy may be able to offer the committee other examples.

Michael Clancy: Other examples include the proposed directive on succession, on which we engaged with the European Commission at a very early stage. I met the relevant Commission official in Brussels and we were involved in the Justice 1 Committee inquiry into the draft directive. When the directive was proposed, we also spoke to a range of officials and MEPs about it. It is important to be at the table. At the same time, there was a similar directive related to matrimonial proceedings. Exactly the same process was followed. On those two occasions, it was not the UK Government but the Scottish Executive that was involved, and we had meetings with the relevant Scottish Executive officials.

11:45

The examples emphasise that, when we get involved in the issues, we really have to multitask. It is not good enough simply to send off a letter to the Berlaymont and expect that people will shudder when they read it. We have to work continuously. That is resource intensive, but if we do not participate, there is no point in saying that it is a shame when a directive is eventually implemented in a certain way. Participation is the key.

You talked about creating criteria for differential implementation and highlighted the issue of forum shopping, which can come out of differential implementation. It can work both ways: a measure could be differentially implemented in such a way as to make it more rather than less attractive to come to Scotland. One has to be careful about simply tagging that as a criterion. It is an important and probably unavoidable issue, given the distinctive nature of the English and Scots legal systems. We have to think very hard about what the criteria should be.

Ted Brocklebank: It is hugely heartening to hear the representatives from the Faculty of Advocates coming up with proposals to make the law more accessible and affordable in Scotland—congratulations.

The Faculty of Advocates briefing paper gives two examples on that point. The first is about a farmer wanting to take up an issue to do with subsidies and being subject to Scottish, UK and European law. The second is about animal feed manufacturers operating throughout the UK having to seek remedies in all the different jurisdictions and how inaccessible justice can be in those circumstances. Would your three solutions resolve those difficulties? Would they make things easier for the farmer and the feed manufacturer?

Anna Poole: The three solutions that we suggested were more to do with the accessibility of law—enabling people to look it up, for example. The solution that we have suggested to the difficulty of animal feed manufacturers is to go down the section 57(1) route when there are no specifically Scottish issues and liaise with Whitehall committees.

David Johnston and I were on opposite sides on the case in question. The animal feed manufacturers succeeded in Europe in showing that a directive was disproportionate, but even just to reach that point, they had to go to court in all the different jurisdictions in the UK. Even if there had been a UK measure, it might still have been necessary to go to the different courts—it depends on various jurisdictional issues—but it would have been less necessary if there had just been one UK instrument. It did not seem to either of us that there was any pressing need to have four different sets of regulation.

The issue of the poor farmers trying to assert their rights under the common agricultural policy is a bit of a minefield. I have represented the Government most frequently in the Scottish Land Court. My impression is that it has been difficult for farmers or their representatives to access the law. The three measures that I mentioned earlier could help to some degree although, even if they were introduced, some complex underlying issues with the CAP would still exist.

Ted Brocklebank: Making it financially possible, and simpler, for the farmer to go to law would not be unhelpful to the Faculty of Advocates.

Anna Poole: Well, I cannot comment on that. Most people who practise in the system are keen on access to justice. There is no point in giving people rights under statutory instruments or delegated legislation if those rights cannot be enforced in practice.

Ted Brocklebank: I have another question for the Law Society representatives. In your submission, you talk about terrorism and the need for cross-border agreements to deal with terrorists. Are there particular aspects of the reform treaty

that impact on such agreements? Given the nature of the treaty, will resolving the matter be even more urgent? You seem to suggest that in your paper.

Sarah Fleming: As I understand it—although I am by no means an expert on the reform treaty—criminal justice and policing will move from one part of the present treaty structure to another, so that criminal justice will become more like other areas of European legislation. As a consequence, there will no longer be a national veto. On the other hand, it is proposed to introduce a system—such as one that we have in civil justice at the moment—whereby the UK Government can decide whether to opt in or opt out of measures in relation to criminal justice.

We do not have a particular view on cross-border action on terrorism, but we raised the issue in our submission because it seems to be a driver for further action at EU level to assist in what is seen as the fight against terrorism. In the past, we have seen the creation of a European arrest warrant procedure, which in essence replaced extradition between member states. Various other proposals have also come up on issues such as bail. If somebody from one member state is charged with a crime in another, the question arises of whether bail should be required in the state in which they are charged, or whether they should be sent home. Such issues will continue to come up.

It is difficult to guess what effect the new system under the reform treaty, if implemented, will have in practice. That will depend on political decisions on whether to opt into criminal justice issues. Provisions in the treaty would allow smaller groups of member states to go further forward on particular issues that they consider important, without necessarily involving everybody else. The extent to which the UK would want to be involved in that kind of process is anybody's guess. Those are political issues.

Although the Parliament has not in the recent past seen a framework decision that had to be implemented in the area of criminal law, that kind of thing will eventually come to this forum and will have to be considered. It will be useful to see the whole process, right from the beginning to whenever you might have to implement measures.

Keith Brown (Ochil) (SNP): You have said that early engagement in the formulation of directives is extremely important, all the better to ensure that the eventual transposition is as efficient as possible. You mentioned talking to the European Commission and the European Parliament but not to the Committee of the Regions. Do you talk to that committee? This Parliament is represented there.

I want to pick up on earlier comments from Gil Paterson and Michael Clancy. The Law Society's submission makes clear the possible negative effects of differential transposition. I apologise for having arrived late, but I think that you mentioned—and it was the first time that I had heard this—that there may be benefits to differential transposition. Can we be reassured that there are people with the imagination and initiative to consider directives to see whether there could be a benefit from differential transposition for communities of interest in Scotland—for your clients or for others. Without such initiative, there is an idea that we would automatically look to Westminster to resolve things, with the safest option being uniform transposition.

Sarah Fleming: I have not been at the Law Society for ever but I am afraid that, as far as I am aware, we have not had direct contact with the Committee of the Regions. We would be delighted to speak to the Scottish representation on that body. I was interested in what Irene Oldfather was saying earlier regarding the European Commission attending meetings of Committee of the Regions commissions. That sort of access to information—as much as anything else—is the first step. We cannot put forward our position and point out that something is different under Scots law or that we have a particular issue regarding how something will work in Scotland until we know what the proposal is and what impact it will have. The information-gathering part of that is extremely important. We have not had such contact in the past, but we would be delighted to have some in the future.

Michael Clancy: I am trying hard to think of an example of differential implementation that has been of benefit. If I think of one soon, I will let you know.

There is an example from international rather than European law: the United Nations Commission on International Trade Law—UNCITRAL—model law on arbitration. That was brought into Scots law in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, but it was not brought into English law at the same time. That was a form of differential implementation of a treaty into Scots law. Did that result in more arbitrations taking place in Scotland, as opposed to in England, or in a growth in arbitration in Scotland, as opposed to in England? I am not entirely convinced that it did, but it certainly gave people imagination about creating more in the way of arbitration and I think that we may see the fruits of that in the years to come.

Is there the imagination to use differential implementation here? We only have to look at the talent in the Faculty of Advocates and in the

solicitors' profession, as well as among people in other walks of life. They can perceive a way in which the implementation of such laws can work to Scotland's benefit. I believe that there is imagination in Scotland, that people are optimistic about the survival of Scots law and that they are anxious to ensure that, when something develops in this area, it can be used to the advantage of the people of Scotland. Therefore, I have hope.

The Convener: We have talked a lot about section 57 of the Scotland Act 1998, the use of which your organisations agree can often be quite a good idea. The Faculty of Advocates said that something like a Sewel motion should perhaps be used in such situations. Why is that necessary? Perhaps it is simply in the interests of transparency.

In its comments on parliamentary scrutiny, the Law Society stated:

"Formal processes which assist such scrutiny are already in place … This is a process that can be built on".

Could the Law Society give us any suggestions about how that could be built on?

First, however, could the faculty answer the point about the Sewel motion idea?

David Johnston: We had in mind nothing much more than restating the terms of section 57(1): it is possible for Holyrood, by agreement with Westminster, to decide that Westminster should take the lead on certain matters. We were not thinking in terms of a formal motion, but the outcome would be much as if there was a motion of that sort.

Michael Clancy: You might remember that the Europa institute witnesses spoke about the transposition guide that BERR had published. That transposition guide is an excellent document. Having taken a look at it, Sarah Fleming and I agreed that it was one of the best documents from BERR that we had ever read. It shows a way forward. Perhaps the Scottish Government could think about producing a transposition guide, not just for the use of civil servants and the Government but for MSPs, members of the public and members of the professions. That could provide a clear statement on how best to transpose legislation.

BERR's guide also describes transposition plans. It recommends that, when a civil servant is setting off down the transposition route, he or she should construct a transposition plan. It would be a very good idea if the committee could see such transposition plans. That would provide a view of the roadmap and would encourage more transparency and a clearer view of where we are going.

Sarah Fleming: In the paragraph of our paper to which you referred, I was principally thinking about the mechanism to which Irene Oldfather referred, whereby the Executive reported—perhaps every two months or every quarter—on the transposition process, on what was being transposed and on how legislation was proposed to be transposed. With that basic level of information, the Parliament could take the mechanism somewhere. However, it would then have to go into the sort of processes that Dr Carter discussed earlier regarding the greater detail on the policy issues, the use of section 57 or whatever. Without that basic level of information, the process could not be taken anywhere. However, as Michael Clancy has indicated, more information could be added to achieve a more in-depth process in those areas where the Parliament thinks that it is worth doing. Potentially, that is very resource intensive.

The Convener: Thank you all very much for taking the time to come to the meeting and for your evidence, which was extremely useful.

12:01

Meeting suspended.

12:03

On resuming—

Regional and International Bodies (Scottish Parliament Representation)

The Convener: Item 2 is to consider a paper by the clerk on Scottish Parliament representation on regional and international bodies. I am told that this subject was considered at the committee's away day and that the committee agreed as part of its work programme to commission the Scottish Parliament information centre to undertake an exercise mapping the bodies—that information appears as annex A to the paper by the clerk. The paper makes several proposals on reporting mechanisms. I invite comments on the proposals that are set out in paragraph 10.

Alex Neil: I would like to short-circuit this discussion, given that it is nearly lunch time. I suggest that we agree in principle to seek a written report from our representatives on each of the bodies and ask for an oral report only if something in the written report justifies such a request. Before we do that, we should write to the Parliamentary Bureau and the Commonwealth Parliamentary Association to say that we are minded to do that and to seek their views. I suggest that we ask the Parliament website people to post, and keep updated, a list of the Scottish Parliament's representatives on all the external bodies, so that we know who is doing what.

Ted Brocklebank: That seems like a sensible way forward.

Irene Oldfather: Paragraph 10 invites us to consider whether we want to receive an oral or written update from the Committee of the Regions members following each meeting. The COR tends to have plenary meetings and committee meetings. Members, like MSPs, are assigned one of the six committees. I do not know whether we would be seeking an update after every plenary meeting. If members were not on a particular committee, it would be difficult for them to submit written reports and follow through on them.

The Convener: With that proviso, are we content with Alex Neil's helpful recommendation?

Members *indicated agreement*.

Scottish Government's International Strategy

12:05

The Convener: Item 3 is consideration of a paper by the clerk on the Scottish Government's international strategy. Members will recall that, when the Minister for Europe, External Affairs and Culture gave evidence on the Scottish Government's external affairs policies on 30 October, she agreed to return to the committee when the new international strategy is agreed in the new year. The paper proposes that, in advance of that, the committee should take evidence from stakeholders who are involved in the existing strategy to hear their views on the aims, outcomes and methods of delivering and measuring the success of the new strategy. It is hoped that the evidence will inform the committee ahead of the session with the minister. I invite comments on the paper.

Irene Oldfather: I have a long-standing interest in the bilateral co-operation agreements, but I have completely lost track of where we are at on some of them—I am sure that I am not the only one. It would be helpful if we could get a short paper outlining the present co-operation agreements that the Executive has entered into. I notice that Catalonia, Bavaria, Tuscany and North Rhone Westphalia are mentioned in the paper by the clerk. At one point there was co-operation with Poland and the Czech Republic; I do not know whether that took the form of one-off initiatives or whether there are on-going actions. There were exchanges and secondments of staff with other regions in Europe. It would be helpful to get an update, so that we can question people appropriately.

The paper suggests that we should have an evidence session with stakeholders on 22 January. I am not sure whether that will present an opportunity to undertake questioning on co-operation agreements. I have thought for a long time that we should have clear criteria for co-operation agreements, but in eight years we have never been able to formalise such criteria. I raised that issue at the away day, which is probably part of the reason why the clerks have included it in the paper. I would like the schedule that is set out in paragraph 9 of the paper to accommodate an analysis of that.

The Convener: The Scottish Government is looking at that as part of its strategy, but you are asking for basic information about the status quo.

Irene Oldfather: Yes.

The Convener: I imagine that that could be provided and that members could take account of it before they ask questions.

Alex Neil: Paragraph 10 of the paper suggests that we might want to talk to our representative in Beijing. That is key because, given the market opportunities in China, our relationship with China is going to be a key part of our international strategy. I am happy to go.

John Park: They might not be happy to see you.

Ted Brocklebank: You are going to all the sun-kissed bits of the Mediterranean.

Alex Neil: You have already been, Ted.

The Convener: Does anybody have any other relevant comments?

Alex Neil: I note the emphasis on the word "relevant".

The Convener: Are members happy with the approach that is set out in the paper?

Members *indicated agreement*.

Meeting closed at 12:08.

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