SUBORDINATE LEGISLATION COMMITTEE

Tuesday 11 June 2002
(*Morning*)

Session 1

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SUBORDINATE LEGISLATION COMMITTEE
20th Meeting 2002, Session 1

CONVENER

*Ms Margo MacDonald (Lothians) (SNP)

DEPUTY CONVENER

*Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE MEMBERS

*Bill Butler (Glasgow Anniesland) (Lab)
*Colin Campbell (West of Scotland) (SNP)
*Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE SUBSTITUTES

Mr Kenny MacAskill (Lothians) (SNP)
Mr Brian Monteith (Mid Scotland and Fife) (Con)
Mr Mike Rumbles (West Aberdeenshire and Kincardine) (LD)

*attended

WITNESSES

Paul Cackette (Office of the Solicitor to the Scottish Executive)
John Davidson (Scottish Executive Health Department)
Carolyn Ferguson (Food Standards Agency Scotland)
Charles Garland (Office of the Solicitor to the Scottish Executive)
Jo Knox (Scottish Executive Justice Department)
Steve Lindsay (Office of the Solicitor to the Scottish Executive)
Jan Marshall (Office of the Solicitor to the Scottish Executive)
Martin Morgan (Scottish Executive Environment and Rural Affairs Department)
Jane Richardson (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Alasdair Rankin

SENIOR ASSISTANT CLERK

Steve Farrell

ASSISTANT CLERKS

Joanne Clinton
Alistair Fleming

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 11 June 2002

(*Morning*)

[THE CONVENER *opened the meeting at 11:33*]

The Convener (Ms Margo MacDonald): I welcome everyone to the 20th meeting this year of the Subordinate Legislation Committee. That is 20 down and only about another three to go. Gold stars will be handed out at the end. We have a meaty agenda of serious stuff today.

Delegated Powers Scrutiny

Criminal Justice (Scotland) Bill: Stage 1

The Convener: Members will remember that we thought that the best way to deal with our questions on the bill was to invite Scottish Executive officials to give evidence to the committee. With members' permission, I shall invite the witnesses to join us now. [*Interruption.*] I am advised that the witnesses are just coming.

I welcome the Executive officials to the meeting. Make your own arrangements about taking a seat at the table when we come to your bit.

I do not think that you have nameplates, so could you first tell us who you are? I am sorry, you do have nameplates, but I cannot see them, so perhaps you could turn them round.

Jane Richardson (Scottish Executive Justice Department): Would it help if I ran through who the witnesses are?

The Convener: I was going to ask you to do that. We are thrilled to have so many visitors.

Jane Richardson: Sorry, we are a bit mob-handed. I am responsible for managing the Criminal Justice (Scotland) Bill. I have an interest in the provisions on high-risk offenders in part 1 of the bill and I know that the committee has questions on some of the order-making powers in that part of the bill.

Jo Knox deals with the provisions on victims. Jan Marshall and Charles Garland are from the solicitor's office. We will do a swap, provided that the committee has no problems with that, so that John Davidson can offer some background on the questions that the committee has asked about the criminal records provisions.

The Convener: The bill breaks new ground, so we took great interest in it. Given the pressure of time, we thought that the best thing to do was to inform you in advance of the main questions that we had for you. We have categorised the questions according to the parts of the bill and their seriousness, depending on whether they relate to what you might think of as Friday-afternoon mistakes or to substantial differences from what we might have expected. I would like you to start by addressing the points on risk management plans, of which we notified you.

Jane Richardson: Are you content for me to run through the questions with which the committee provided us?

The Convener: Yes, thank you. Is that fine with the committee?

Members *indicated agreement*.

Jane Richardson: The first question relates to section 6(1), which enables Scottish ministers to make an order prescribing new categories of offenders who might be eligible for a risk management plan. The memorandum that we sent the committee on the delegated powers in the bill explained that the bill provides that the risk management plan will be available initially only for offenders who get an order for lifelong restriction. The reason for that is that the ministers want to monitor how the risk management plan will work in practice, as it is a completely new and innovative arrangement. They want to ensure that the plan is as beneficial and effective as it is intended to be before they consider whether it should be extended to other categories of offender and what those categories should be.

The Convener: We have great sympathy with that, because we want to see flexibility, proper monitoring and a sensible assessment made. Given that the provision is so fluid, why have you chosen that it should be subject to the negative procedure rather than the affirmative procedure?

Jane Richardson: We took the view in this case that the negative procedure was appropriate. As the memorandum explains, section 6(2) provides for measures of control over the exercise of the extension. Scottish ministers would be legally obliged to consult not only the risk management authority, but other authorities that they deemed appropriate before they could exercise the order-making power and extend risk management plans to other categories of offender.

We took the view that the secondary legislation power is limited in its effect. The committee asked whether we have any plans to extend the power to other categories of offender. The answer is no, not at this stage, but if the risk management plan provisions are proven to be effective we could extend them to those who have been convicted of

murder. I stress that there is no plan to do that yet, but that is an example of a category of offender to which we might extend the power.

If ministers were to extend risk management plans to those who have been convicted of murder, that would not in any way affect the court's sentencing powers or the offender's rights. The court would still proceed to fix the punishment and the lead authorities that would be involved with the risk management authority in compiling the risk management plan would be placed under the usual responsibilities. The idea is that the risk management plan would improve the way in which the responsible agencies—such as the Scottish Prison Service and local authorities if the offender is out on licence—deal with offenders. We took the view that that amounted to a justifiable negative resolution procedure.

Gordon Jackson (Glasgow Govan) (Lab): I find the logic of that a wee bit strange. The committee might have a thing about negative procedure versus affirmative procedure, but expanding the categories of offender is quite an important decision. The justification that you seem to have for not using an affirmative procedure is that the Executive is consulting other people. I do not mean to suggest that the Parliament is the greatest body in the world, but it seems a bit odd that the justification for not placing the change before the Parliament is that the Executive is consulting other people.

Ministers will consult the risk management authority and other persons whom they, in their infinite wisdom, consider to be appropriate. The Executive might listen to those people and it might ignore them. I cannot see the logic that consulting other people means that the Executive does not have to put such an important change before the Parliament, at least by way of an affirmative instrument.

We accept that there must be flexibility and no one is asking for the change to be made by way of primary legislation. However the committee would not be overly happy about the Executive's using negative instruments to make big decisions that make substantial, rather than just administrative, changes to legislation.

The Convener: I think that the committee is unanimous about that. We have tried to be consistent. We appreciate the need for flexibility, particularly when the Executive is cutting new ground, but the Parliament should be in on such dramatic changes. We want to put that on record.

Jane Richardson: We are happy to note the committee's views and we will certainly consider the matter in the light of your helpful comments.

The Convener: Our fellow MSPs will hate us for making those comments, because we might create more work for them. On the other hand, perhaps people will better understand the bill and the reasons behind it. Although that is not the Subordinate Legislation Committee's job, we will in passing do everyone a good turn if we can.

We come to section 6(5).

Jane Richardson: The committee asked why we are not providing an order-making power in section 6(5). You considered that the requirement on the risk management authority to produce and publish the form of the risk management plan was quasi-legislative. We have taken the view that, as a public body, the risk management authority will be accountable, through its management statement, to Scottish ministers and in turn to the Scottish Parliament.

As you will have seen from the memorandum, the intention is that the risk management authority will become a centre of expertise on risk management and assessment. Within that arrangement, the bill provides for the risk management authority to have direct responsibility for discharging various statutory functions that the bill confers on it. One of those functions, under section 5, is that the authority will prepare and issue guidelines and standards that relate to the assessment and minimisation of risk.

Section 6(5) ties into that to an extent. We envisage that once the risk management authority is up and running it will liase with the lead authorities that are responsible for offenders who get orders for lifelong restriction, to draw up operating guidelines for the management of those offenders. Part of that will be the personal risk management plan.

We see the requirement on the risk management authority as being essentially an administrative arrangement that sets out the format under which the new procedure will operate. We had envisaged that what would perhaps happen would be that once the risk management authority had produced its guidelines on the operation of the risk management plan it would attach to the guidelines a pro forma, which would basically be the framework for the risk management plan. In that respect, we did not consider the requirement to be anything more than an administrative arrangement.

On the committee's points about the quasi-legislative nature of the risk management plan, we consider that the requirement is more administrative and technical. It is nothing more than a pro forma in style and form. The other point is that we took the view that the relationship of the form to the RMA's statutory functions and the expectation that the RMA should stand apart in becoming a centre for expertise means that it would not necessarily be appropriate for the Scottish ministers to be involved in the process.

11:45

Gordon Jackson: I am puzzled. It is maybe me, but I do not understand why there is a form. If the RMA has the authority to put the plan in a form and to decide on the type of form, why does the statute bother with that? If the legislation said that the risk management plan set out the measures to be taken and no more, it would have to be put in a form, because it cannot be formless. It would have to be laid out in some format. What is behind the idea of having a statutory requirement for it to be in a form? I cannot get my mind round the general idea.

Jane Richardson: Given that the risk management and risk assessment of offenders would be done in co-operation with the lead authorities, we wanted to make it clear how the process would proceed and that the risk management plan would be enshrined in statute.

The Convener: Does it matter?

Gordon Jackson: It puzzles me, but it is maybe just me.

The Convener: We are a little puzzled. We think that a risk management plan would have to be produced, which could be called a risk management form, so why does that appear in the legislation?

Gordon Jackson: I am not going to die in a ditch over it.

Jane Richardson: If anything, we have perhaps been over-prescriptive in the legislation.

The Convener: Never mind. You win one, you lose some. We have agreed that it is probably overwriting.

The committee asked another question on delegated powers, but that has been covered.

We will move on to part 2 of the bill, which is on victims' rights. This comes back to the committee's preference for the affirmative procedure when such a novel instrument is going to be introduced. Perhaps you could explain your choice of a negative instrument.

Jo Knox (Scottish Executive Justice Department): I understand that the committee is concerned because of the novelty of the scheme. Our thinking was that the primary legislation would establish the right to make a victim statement. The policy intention is to pilot victim statements in three areas initially to test the impact of and arrangements for the scheme.

The subordinate legislation designates the courts in which the pilots are to take place and thereafter allows for the scheme to be phased in. We intend to work closely with the Crown Office and Procurator Fiscal Service in establishing where the pilot sites will be. We felt that once the Parliament had approved the primary legislation in principle, there would be no need to debate where the pilots would be located. That was our thinking in seeking negative powers.

The Convener: I understand that reasoning. Perhaps some of the lawyers on the committee can tell me whether there is any need for the Parliament to be concerned about where the pilots are going to be.

Gordon Jackson: I find that hard to imagine. Brian Fitzpatrick suggests that there could be a resource issue.

The Convener: That is what I thought.

Gordon Jackson: It is a fair point, but if the Executive states that it would like to run the pilot in Edinburgh, Falkirk, or wherever, it seems unlikely that the Parliament would disagree with that.

Jo Knox: We intend to resource the pilots. We recognise that certain courts are under huge pressure. That is why we are consulting so carefully with the Crown Office on the location for the pilot sites.

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): There is a tension between a pilot and a roll-out.

Jo Knox: I accept that.

Brian Fitzpatrick: Is this a pilot or is it a roll-out?

Jo Knox: The legislation allows for both. That is why the classes of courts are to be prescribed.

Brian Fitzpatrick: What mechanism changes it from being a pilot to a roll-out? When is it decided that we are satisfied with the pilot and that everyone should have the scheme?

Jo Knox: We propose to evaluate from the outset. An extension of the scheme beyond the pilots will be subject to that evaluation, which will be published. I accept that there is a tension between establishing the pilots and rolling out the scheme.

Brian Fitzpatrick: What would happen if the evaluation of the pilots were controversial?

Jo Knox: We would have to consider the further roll-out of the scheme.

Brian Fitzpatrick: But there would be no parliamentary locus in order to inform and direct that consideration of the roll-out of the scheme. It would be in the hands of the Executive to decide whether the evaluation was a yea, a nay or a maybe.

The Convener: Or different in each area.

Jo Knox: One of the reasons for piloting the

scheme is to see which of the different arrangements works best. We might not have exactly the same arrangements in each of the pilot areas, so that we can test different administrative arrangements. We will use the evaluation of the pilots to consider the administrative arrangements and how they impact on victims and on the court process.

The Convener: I must admit that to begin with I thought that, to use Gordon Jackson's phrase, I would not die in a ditch over the matter. However, I am beginning to think that the power is a wide one and that our original query about whether an affirmative resolution would be a better idea was right.

Does anyone else want to comment?

Gordon Jackson: I am not—

The Convener: It is okay. You are dead in a ditch.

Bill Butler (Glasgow Anniesland) (Lab): As a non-lawyer—

Brian Fitzpatrick: That is the best qualification.

Bill Butler: I think that an affirmative instrument may be more appropriate. Perhaps I did not hear it, but I did not think that Ms Knox answered my colleague Brian Fitzpatrick's question about how the evaluation would be judged if it were controversial. Would it be judged administratively by the Executive or the Executive's officers, or does Parliament have a role? I think that the affirmative procedure would give Parliament a role. Is that right?

The Convener: Yes.

Jan Marshall (Office of the Solicitor to the Scottish Executive): There may be two issues. The primary legislation provides for the prescription of certain categories of court where the pilots are to take place or that will subsequently become part of the roll-out of the scheme. The way in which I envisage the powers in the bill operating is that each time ministers want to bring another class of court on stream, an order would be put before the Parliament.

As the legislation is currently drafted, there is no provision for the Executive to report to the Parliament on how effective the pilot scheme is, or how it has operated. All the provision does at present is to allow for the prescription of certain categories or classes of court in which the scheme may take place. Perhaps the committee is looking for something else.

Gordon Jackson: Does that not go back to Bill Butler's point about the reason for the provision coming under the affirmative procedure? Let us say that the pilot had been carried out in two places and the Parliament did not fancy it going any further, the mechanism for reviewing the roll-out is the review of the instruments that roll out the pilot.

The Convener: I think that I speak for the committee in saying that this is another instance where the affirmative procedure would be more suitable.

Jo Knox: I am happy to take that back for further consideration.

Gordon Jackson: Can I ask about the thinking behind the other subsection? Why is there a power to change the age of a child?

Jo Knox: I intended dealing with those separately. Section 14(2) relates to extending the list of offences and there was a query in relation to section 14(12).

The Convener: Perhaps you could address that now.

Jo Knox: It is largely part of the same thinking. We have consulted on the offences to be included in the scheme and we propose a limited scheme. That is not just for the purpose of the pilots, but for any roll-out. If the scheme covered all offences it would be too large to handle. At this stage we do not know how many people will want to opt into the scheme and what its administrative burden will be.

In response to the consultation we included non-sexual crimes of violence, crimes of indecency, domestic housebreaking and racial offences. We had proposed that those offences would be part of the pilot scheme and that thereafter, as a result of the experience of the pilot, we might extend the scheme to include other offences. However, we do not intend a wholesale expansion. We felt that if the principle of the victim statement were accepted, the inclusion of certain offences would be a technical matter.

The Convener: I am not sure about that. That is the interface of the technical side and the policy intention.

Gordon Jackson: Can you repeat that list?

Jo Knox: The list would include crimes of violence, crimes of indecency, domestic housebreaking and racial offences. We were asked to consider the inclusion of domestic violence in the pilots, but that might cause some difficulty because such cases are often breaches of the peace. We felt that there would be some difficulty managing the pilots and including domestic violence.

Murdo Fraser (Mid Scotland and Fife) (Con): I may be out of step here, but I think that once the principle of victim impact statements has been accepted by Parliament, the question of which offences would be included is comparatively

minor.

Jo Knox: That is our thinking.

Gordon Jackson: My instinct—I am just thinking as I go along—is that there are few other crimes apart from those listed that have victims.

The Convener: We have not mentioned road traffic offences.

Jo Knox: That is perhaps another for consideration.

Brian Fitzpatrick: Running people down?

Gordon Jackson: That is one area. If someone hits someone else in some way it is a crime of violence. There are not many cases outside those mentioned in which there is a victim in the sense that we use the word. The scope is fairly wide as it is, and I suspect that there will be few changes to be made.

Brian Fitzpatrick: It is the offering of an opportunity, rather than the necessity of the uptake.

Jo Knox: Absolutely.

Murdo Fraser: I would be happy with the negative procedure.

Gordon Jackson: We are no bothered.

The Convener: My colleague Mr Jackson did not mean that we are no bothered, he meant that the committee is not disturbed by the subordinate legislation being subject to the negative procedure.

12:00

Jo Knox: The committee raised a question in relation to section 14(12). We accept that we are seeking a power to amend primary legislation with regard to the age of children. That issue arose from the consultation exercise. We had intended to pilot the scheme for adults only—we felt that we did not want to subject children to a trial process. The consultation respondents made a strong case for including younger children. We decided to include children over 14 as a reasonable starting point with the intention to lower the age at which children would be included, according to the experience of the pilots. Organisations that represent children's needs have made strong arguments to lower the age at least to 12. Again, we felt that if the victim statement were accepted in principle for children over 14, and if we were responding to children's organisations' concerns about reducing it further, the Parliament would not consider that it needed to debate the issue.

The Convener: You suggest that the Parliament would not feel it necessary to debate lowering the age at which someone can give a victim statement, but I think that it might. However, that is a judgment call.

Gordon Jackson: I cannot read the bill properly. Section 14(12) allows amendment of subsection (6)(b)(ii), but subsection (6)(b)(ii) seems to deal with a person who dies as a child.

Jo Knox: No. That subsection is about the age at which a child can make a victim statement.

The Convener: It is at the top of page 11 of the bill.

Gordon Jackson: That is my fault. I was reading the wrong bit.

Do not you think that changing the age at which someone qualifies as a victim for the purposes of making a victim statement is quite a big deal? That is not a trivial matter.

The Convener: It is a very big deal. I think that the Parliament would be very interested in that.

Gordon Jackson: I agree that it does not matter which court has the pilot—it does not matter to me whether it is Falkirk or Tighnabruaich—but the age at which someone is a victim is a real issue. Despite what children's welfare people say, there is a question about whether it is appropriate to put that responsibility or pressure on a child of 12 or 14.

The Convener: That is particularly so if the parents disagree about whether that is acceptable—there could be conflict between the child and his or her parents.

Gordon Jackson: It is a serious issue. If a child of 14 gets a letter saying that he or she can write a statement for the judge to consider and the parents do not think that the child should do that, that could cause problems. It is a big step to extend the scheme to 12 and 14-year-olds. It is not an administrative matter.

The Convener: It is one of the big proposed changes to the bill.

Brian Fitzpatrick: A point that militates against that is the notion that the victim statement is an opportunity—it is not something that a victim is required to do. It could become a burden in the household environment, particularly in the sort of situations that one can imagine that opportunity would give rise to. However, it is an opportunity, rather than a requirement.

Jo Knox: Indeed.

Gordon Jackson: Often, having the opportunity is in itself the burden. That is why some victims organisations have never wanted victims even to have the right formally to take part in sentencing. Those organisations realise that even giving victims that opportunity puts an amazing

responsibility on them.

The Parliament could decide to reduce the qualifying age from 14 to 10, eight or to any age that it thinks fit. That does not seem to be as minor a matter as picking a court for the trial. The qualifying age is a big issue.

Brian Fitzpatrick: If the qualifying age were 12, for example, that would be the age at which one would be entitled to instruct a solicitor on one's behalf or to enter into contracts that one expected to be honoured. It would be the age at which one would have many of the hallmarks of adult legal capacity.

Gordon Jackson: Those are good arguments for your being happy to vote for changing the qualifying age to 12, but they are not good arguments for not having the Parliament consider the matter.

The Convener: The witnesses will realise that members have been discussing the issue with witnesses present so that we can properly explore their thinking. We will continue the discussion afterwards.

We move to consideration of section 15(1), for which we have questions that are similar to those that were asked previously.

Jo Knox: Our thinking on that section was also perhaps led by the fact that the provision does not introduce a new system. The system has been in operation administratively, but we seek through legislation to formalise the current arrangements. The offences that would be included initially are those that are subject to the current arrangements. Those offences are serious violent and sexual offences. I can read out the full list, if that would be helpful.

The justice department's action plan, which was endorsed by Parliament in January 2001, makes a commitment to extend the current system so that it would provide to all victims who want it information about release from custody and eligibility for temporary release. We agree that there are implications for both parties, but the current operation of the scheme safeguards those interests. The subordinate legislation provides a facility for phasing in the policy as the administrative arrangements come into place. It was envisaged when seeking powers that, if the scheme were approved in principle, there would be no requirement for debate as further offences were brought in and plans made to extend the scheme.

The Convener: Do members have views on whether the provision is technical or administrative or on whether its scope is being extended to the point at which members would want the Parliament to discuss it? It appears that members have no views on the matter.

The Convener: We now move to consideration of section 15(5)(a).

Jo Knox: The same arguments apply in terms of amending the length of sentence, which is currently four years and over. In seeking to extend the scheme, we would be looking, over time, to reduce that sentence.

The Convener: Do members have any questions on that?

Murdo Fraser: Could the power be used to increase the length of sentences?

Jo Knox: It could. However, ministers are committed to extending the scheme to all victims who choose to participate. Therefore, increasing the length of sentences would be totally contrary to the commitment that was given to Parliament.

Murdo Fraser: What I am getting at is this: if there is a change of policy in future, could a future Executive seek to defeat the purposes of the bill?

Jan Marshall: Power, as Mrs Knox said, could be exercised to restrict the number of victims who would be eligible under the provisions.

The Convener: We will note that and have a word about it afterwards.

We move to consideration of section 15(5)(b). That is the same one, is it not?

Gordon Jackson: No. That section raises a different point.

The Convener: Sorry?

Gordon Jackson: I thought that you said that section 15(5)(b) was the same point; it is not.

The Convener: No.

Jo Knox: I appreciate the committee's concern about section 15(5)(b). We were so focused on that section that we were not looking for any major amendment to the list. The scheme is entirely focused on giving information about the release of offenders either on completion of their sentence or on interim liberation. We included the power in section 15(5)(b) to allow for the possibility of minor tweaking of the arrangements, rather than anything major. For example, if under the current arrangements a prisoner has his sentence reduced from six years—a sentence that would bring the prisoner into the scheme—to three years, the administrator would inform the victim that the offender was no longer eligible for inclusion in the scheme.

Section 15(5)(b) was included to allow us to amend minor issues that we might have overlooked. However, I accept that the power is, on the face of it, much wider than we envisaged.

The Convener: That is what gave rise to our concern.

Gordon Jackson: Do I take it, therefore, that if we said that changes to that provision should be subject to affirmative procedure, you would agree with us?

Jo Knox: We would certainly consider that.

Gordon Jackson: The power in section 15(5)(b) is a big one. I have no doubt that it was included in good faith for tweaking purposes. However, victims could ultimately be told all kinds of things; it might be a matter of great public debate whether they should be told such things. It is, potentially, not just an administrative matter but one that is at the heart of the scheme.

The Convener: The committee recommends the use of the affirmative procedure, at the least, for amendments made according to section 15(5)(b).

Charles Garland (Office of the Solicitor to the Scottish Executive): I want to say a few words on the committee's points eight and nine on sections 30 and 31, because I think that the same point arises in relation to both sections. We note that the committee accepts the Executive's position that the exercise of the power in those sections would not in general change the law fundamentally. That is also our view. The committee went on to note that it is also possible that any change to the specified conditions would not be without effect. We also agree with that. It is, in essence, a matter of judgment as to how substantial or minor that effect will be.

The people who will be affected by the power will be those who are subject to a licence that has been granted at the end of a custodial part of a sentence. While those licences are extant, offenders may find themselves back in custody for a period. While they are in custody, they will be subject to the normal rules of prison discipline. We would also wish to retain certain conditions of the licence, but only those that it makes sense to retain. There will be conditions that it will either be impossible for the person to fulfil or inappropriate for them to fulfil.

12:15

The effect of sections 30 and 31 is simply to try to preserve the two conditions that have been identified so far as being the only two that are included in standard licences that could meaningfully apply to someone who is in prison.

The other brief point that I should make is about the range of conditions that a prisoner may have in a licence. Under the amendments to existing legislation that will be made by the bill, the Parole Board for Scotland will have the discretion to impose such conditions on all prisoners. Therefore, to an extent, Scottish ministers will not be aware of the type of conditions that the Parole Board may wish to include in licences in future. It was thought desirable—I do not think that the committee disputes the point—that ministers should have an order-making power to alter legislation to reflect conditions that the Parole Board might include. Our view is that the overall effect on a prisoner will be minimal, because it will make sense to continue only two of the standard conditions while the person is still in prison.

The Convener: Does the provision have a minimal—

Gordon Jackson: If I am being honest, I must say that the provision makes no sense to me at all. Mr Garland said that the only conditions that it makes sense to continue include the condition that the prisoner is of good behaviour and keeps the peace, but the person affected would be in the jail, so what would the penalty be if they did not keep the peace? Surely they would be subject to normal prison discipline. Someone who was out on licence would have to be of good behaviour and keep the peace. If they breached those licence conditions, they would get shoved back into the jail. However, we are talking about someone who is in the jail. I am baffled.

Charles Garland: The sanction for breach of a licence condition is recall to jail and revocation of the licence. If the condition that the person should be of good behaviour and keep the peace is kept extant, but the person is in prison, it will still be open to Scottish ministers, on the recommendation of the Parole Board, to revoke that person's licence. That would mean that the person would be in prison lawfully until the revoked licence expired. That might mean—although it might not—that the person would be in prison for much longer than they would be for the reason for which they were in prison at the time when they committed the breach of the peace. The provision gives Scottish ministers—

Gordon Jackson: A condition may not have been continued for someone who is under licence and who then gets lifted for any crime and taken into jail. He may be of bad behaviour in the jail, but are you seriously telling me that ministers could not revoke a licence because the condition was not continued?

Charles Garland: If the condition to be of good behaviour and to keep the peace were suspended, Scottish ministers would no longer have the power to revoke the licence. The reason for continuing both that condition and the no-contact condition is precisely to allow Scottish ministers to retain that power.

Gordon Jackson: The fact that the person is

back in the jail would have given Scottish ministers the power to revoke the licence anyway. I am trying to think of a situation in which ministers would not be able to revoke the licence. In my experience, ministers can revoke licences at the drop of a hat, as a general rule.

The Convener: Was the idea somehow that, if someone found themselves back in prison, but—

Gordon Jackson: A person could not end up back in prison without their licence having been revoked.

The Convener: Yes, unless the reason for the person's being put in prison was absolutely unconnected with the reason for their being on licence. In that case, one would not militate against the other. A person can serve time in prison for a relatively minor crime, but when they have served their time they will still be on licence when they come out.

Charles Garland: Yes.

Gordon Jackson: The person will be on licence unless the licence is revoked or unless the man has been in the High Court and the sheriff sends the man back to the High Court for revocation of the licence under section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. In practice, when someone behaves badly, their licence is revoked. By all means, we should keep the pardon, but the other measures seem like gobbledegook to me.

The Convener: A person would not be jailed unless they had behaved badly.

Gordon Jackson: I must declare an interest at this point.

Brian Fitzpatrick: It is an Anderson point.

The Convener: I do not understand the issue.

Gordon Jackson: People who are on licence go back to jail, for example, when they are caught in the street doing something. At that point, their licence is not revoked; they are in jail only for what they have done.

The Convener: Then they work off that sentence.

Gordon Jackson: The Executive is saying that we must keep that person on licence when he is in jail so that the person will be of good behaviour and will keep the peace. However, even without the new statute, if a man became a prison rioter, his licence could be revoked.

Charles Garland: At present, when someone who has a licence is in prison for whatever reason, all the conditions remain outstanding, which means that it is possible to revoke the licence for breach of any of the conditions of the licence. The majority of the conditions will either be inappropriate or impossible for the person to fulfil, such as reporting to a supervising officer and taking drug counselling, and to travel outside Great Britain would be impossible. However, somebody could breach the conditions of being of good behaviour and keeping the peace even in prison. Equally, there might be a condition that the person is not to contact either a named person or a certain class of people—for example, children under 16—without the consent of the supervising officer, in which case the person could contact those people by telephone or letter from within the jail. Ministers wish to retain the power to revoke the licence in such cases. The order-making power is simply to enable Scottish ministers to maintain in force appropriate conditions that it is possible to breach. Such conditions should remain in force and be capable of giving rise to revocation of a licence if they are breached.

Gordon Jackson: You say that, at present, although all the conditions remain in force, it would be unjust of a senior parole officer to revoke a licence for breach of certain conditions. Does that cause any practical difficulty? I have never heard of any practical difficulty.

The Convener: It appears to be a belt-and-braces approach.

Gordon Jackson: Is the change being made only because it is a nice idea?

Charles Garland: I am not aware of any problems. Clearly, if someone is in prison, the fact that they have not reported to their supervising officer will not cause revocation of their licence. The measure is allied to the fact that the Parole Board for Scotland, under the amendments to existing legislation that are in the bill, will be able to recommend, almost to the total exclusion of ministers, the conditions to be included in a licence. Scottish ministers recognise that it makes sense to retain certain conditions in full effect when the subject of the licence is in prison.

Gordon Jackson: Does the present system of retaining all the conditions cause any problems?

Charles Garland: I am not aware of any problems.

The Convener: I am glad that we had that discussion because I understand the issue now. Like Gordon Jackson, I do not know the reason for the measure. I am sure that there must be a good reason for it, but as it does not impinge greatly on anyone's rights or change the policy intention, we will move on.

Gordon Jackson: I was not trying to be difficult; I wanted to understand what we are doing.

The Convener: Thank you. We move to section 56 on consideration of registration for criminal records purposes.

John Davidson (Scottish Executive Health Department): The section relates to protection of national health service patients. Until recently, general practitioners, dentists, pharmacists and opticians had to be on the health board list. That meant that for minor offences they could be referred to a disciplinary committee, which has the power to warn or fine them. In serious cases, they could be referred to the NHS tribunal, which has the power to expel them from the national health service. The Community Care and Health (Scotland) Act 2002 provides powers that require doctors who assist general practitioners also to have their names entered on new lists. As part of that process, enhanced criminal record certificates should be available to the primary care trust that considers an application. Consideration is being given to the idea that dentists, pharmacists and opticians who assist members of those professions that are already on the list should also be required to join new lists. We think that negative procedure should apply to any amendment for the purposes of providing the enhanced criminal records certificate.

The Convener: I am looking to see whether Gordon Jackson is dying in a ditch. Apparently, he is not.

That seems to be a reasonable explanation for why you have opted for use of the negative procedure. The committee had a point about drafting and internal consistency of the section, but we shall discuss that among ourselves.

We have asked for the Executive to comment on whether the most suitable procedure has been chosen in relation to the transitional provisions under section 65(1).

Jan Marshall: The Executive has noted the committee's points regarding section 65. We note that the merits of the order-making power did not appear to be disputed and that the committee has been persuaded of the need for such a provision. The question is whether the powers ought to be exercised through affirmative or negative resolution. The Executive took the view that the powers are minor and subsidiary and that the exercise of the power under section 65(2) is limited and prescribed by the restrictions in section 65(1). That is why the Executive took the view that negative procedure would be appropriate.

We have noted the committee's concerns and have reflected on the committee's reference to the provisions in the Community Care and Health (Scotland) Act 2002. We have also reviewed precedents in the Housing (Scotland) Act 2001 and similar powers in the Water Industry (Scotland) Act 2002. We would like to go away and consider the matter further.

Gordon Jackson: That sounds fair.

The Convener: That seems to be entirely reasonable. Thank you for attending.

12:30

Before we take evidence from the next set of witnesses, we need to consider a couple of issues.

Section 15(5)(a) of the Criminal Justice (Scotland) Bill would grant Scottish ministers powers to amend the period of imprisonment or detention that qualifies a victim to receive information about their assailant. It is obvious that that provision could have European convention on human rights relevance for both victims and offenders. We agreed that any order to amend the qualifying period should be subject to an affirmative resolution.

Bill Butler: Did we not agree that in relation to section 15(5)(b)?

The Convener: We did not agree anything in relation to section 15(5)(b).

Murdo Fraser: I would prefer orders under section 15(5)(a) to be subject to the affirmative procedure. The point that I made—to which the witnesses responded—was that, if the Executive changed its policy, it could override the provision in the bill by introducing subordinate legislation under the negative procedure. It could extend the period of imprisonment that qualifies a victim to receive information about their assailant to exclude large numbers of prisoners.

Brian Fitzpatrick: If a Tory-dominated Scottish Executive were malicious, malign or bonkers enough to want to do that—

Murdo Fraser: A Labour Administration would be more likely to want to do it.

The Convener: The SNP could also do it. I ask Brian Fitzpatrick to continue.

Brian Fitzpatrick: I will return to reality. If an Administration were determined to override the legislation, it could find a parliamentary opportunity for doing that.

Gordon Jackson: We have often come across provisions that could be used to knacker legislation. If a Government decides to repeal legislation, it will do so. I am worried by changes that are made to legislation by negative instrument and that have a substantive impact on such legislation, even if they do not defeat its purpose. Murdo Fraser's concerns are as legitimate as those of anyone else. I do not share them, but I have other concerns that he may not have.

The Convener: The drafting of legislation is supposed to make it as watertight as possible. To say—as Brian Fitzpatrick said, and as we all automatically think—that no Government would

take a particular step is to make a political judgment, which we are not supposed to do.

Brian Fitzpatrick: I am not saying that no Government would take a particular step. However, we should not assume that it could do so without controversy. Members appear to be suggesting that orders should not be made under the negative procedure because an Administration might use those to knacker legislation. If an Administration wants to override legislation, it will find a way of doing that.

The Convener: Would that not make quite a substantial change and is that not reason enough to use affirmative procedure?

Gordon Jackson: Absolutely. I am not agreeing with Murdo Fraser on the basis that I think that the provision will be used to knacker the bill, but I agree that it is as substantive a change as some of the others that we want to be subject to affirmative procedure.

Bill Butler: I do not see why we do not go with affirmative procedure. Brian Fitzpatrick is saying that we should not be dying in a ditch. I do not want—and I employ legal terminology here—to knacker the bill, but I do not think that using affirmative procedure would be wildly excessive. We should ask the Executive to consider that.

Murdo Fraser: Well put.

The Convener: He is good. We are all content with that. We should send a note to the Executive to that effect.

We come to section 56, on registration for criminal records purposes, which inserts new section 115(6EC) into the Police Act 1997. Although the section does not make substantial changes, we might, for consistency, suggest that the powers that it confers be subject to affirmative procedure. Is that tidying up agreed?

Members *indicated agreement*.

The Convener: Excelente.

Murdo Fraser: Have we dealt with section 15(5)(b)?

The Convener: I think so. We agreed to recommend the affirmative procedure.

Murdo Fraser: That is fine.

Gordon Jackson: I got the impression that the Executive representatives—

The Convener: They do not mind.

Instruments Subject to Annulment

TSE (Scotland) Regulations 2002 (SSI 2002/255)

The Convener: We had better get the witnesses in now. I hope that some of you lawyers know what you are doing on this.

Gordon Jackson: I was going to leave at this point, because I have glazed over.

The Convener: No, no, no, you cannot glaze over for TSE. And you thought that criminal justice was bad. We will get through it, do not worry. We are talking mainly about the difference between the regulations south of the border and the regulations here. Given that there are EHCR implications—not EHCR, EC whatever it is—no, I mean European Community law—[*Laughter.*] Do not laugh, Brian. That was a simple slip of the tongue. Anyone can make those.

Brian Fitzpatrick: I was just thinking about—no, it does not matter.

The Convener: There might be ECHR implications as well, because there are differences in the regulations about who can go into whose house and whether we can kill beasts in our house.

Colin Campbell (West of Scotland) (SNP): That is putting it mildly. Is the paper that we have a summary?

The Convener: Yes. We have to ask the witnesses about this, because it is important. Does anybody want to say anything before the witnesses come in? [MEMBERS: "No."] You cannot say goodbye.

Brian Fitzpatrick: Just remember that we are on public record.

The Convener: I welcome the witnesses to the Subordinate Legislation Committee. We will try to get through the session quickly and efficiently. As you will be aware, our main interests and concerns lie with the fact that the regulations that came into play on 19 April south of the border appear to be different in some cases from the Scottish regulations. We think that the differences in the Scottish regulations might be significant. Therefore, most of our questions will be about that.

Are the differences in the Scottish regulations intentional?

Martin Morgan (Scottish Executive Environment and Rural Affairs Department): Yes. The English statutory instrument was made and laid to a rapid timetable because—well, we

were all late, but we were hosting a mission from the European Commission authorities. We made a conscious decision to take a more considered approach in Scotland. The instrument was drafted jointly with our colleagues from the Food Standards Agency Scotland. The underlying intention was to pursue the same policy.

The Convener: Right. I understand. Are you satisfied that the differences that have been created by your decision—we are not taking issue with it—will not upset anyone in the Commission?

Martin Morgan: Well, if they are upset I hope that they will be upset not with the Scottish approach but with the English one.

Colin Campbell: Do you mean that the English one is deficient in some respect?

Martin Morgan: As I said, the English statutory instrument was introduced to a rapid timetable indeed. When we saw the finished article, as it were, we noted a number of inconsistencies, spelling errors and basic mistakes. That is understandable in the context of what they were trying to achieve, but we did not want to duplicate those errors in our approach.

The Convener: Obviously, we are glad about that. We hope that the Commission agrees with you.

We move on to regulation 3 in which the definition of cutting premises is different from the English regulations. Is there a different policy?

Martin Morgan: I ask our colleagues from the Food Standards Agency Scotland to answer that, as it was their approach that suggested this way ahead.

Steve Lindsay (Office of the Solicitor to the Scottish Executive): There is no different policy. The intention is for the Scottish regulations to produce the same result as the English ones. The difference that you pointed out is that the Scottish regulations define cutting premises as being licensed under other regulations. Our understanding is that the effect in England would be exactly the same, notwithstanding that they are not making specific reference to their cutting premises being licensed.

Slaughterhouses, which were also mentioned by the committee, and cutting premises require to be licensed under the Fresh Meat (Hygiene and Inspection) Regulations (SI 1995/539) in order to deal with meat for human consumption. The expectation is that those regulations relate to the bulk of what is covered by the TSE regulations and therefore that the practical outcome will be the same in that the cutting premises and slaughterhouses referred to in England and Wales will also be licensed under the fresh meat regulations.

Brian Fitzpatrick: Is there another form of licensing that covers unlicensed premises or is it just those that are outwith any licence?

Steve Lindsay: There is a licensing requirement if one is cutting meat for human consumption, but no such requirement if the meat is not for human consumption.

Brian Fitzpatrick: I was thinking of illegal or unauthorised places.

Carolyn Ferguson (Food Standards Agency Scotland): Obviously, unauthorised premises will not have a licence and are not supposed to produce meat for human consumption. We understand that, in accordance with the law, no meat for human consumption would go through unlicensed plants.

Brian Fitzpatrick: However, if the English regulations are wider and cover unlicensed premises, I presume that they cover places where meat is not supposed to be cut.

Carolyn Ferguson: That is one interpretation. However, because any plants in England that produce meat for human consumption must be licensed by the 1995 fresh meat regulations—

Brian Fitzpatrick: Would such places be in breach of another set of regulations?

Carolyn Ferguson: Yes, so the outcome would be the same.

12:45

The Convener: The definitions of inspector are not always clear in the 2002 regulations. Are there two types of inspectors?

Paul Cackette (Office of the Solicitor to the Scottish Executive): Regulation 2 on page 7 of the regulations provides a definition of inspector. In some circumstances, inspector means an inspector who has been appointed by Scottish ministers; in other circumstances, it means one who has been appointed on behalf of the Food Standards Agency; and in others, it means a local authority inspector. The structure is intended to work in such a way that that three-pronged definition of inspector is read along with regulation 99, which deals with enforcement, so as to indicate the purposes under which each type of inspector operates.

The enforcement provisions are fairly lengthy so I shall not read them out, but they state that parts II and IV of the regulations, which deal with licensed premises, shall be enforced by inspectors of the Food Standards Agency or of the Scottish ministers. For the purpose of other parts of the regulations, the enforcement authority is the local authority. By reading the definition of inspector together with regulation 99, you can see a

structure whereby the various powers of inspectors can be identified for each purpose of the regulations.

The Convener: Is that the only way in which the regulations could have been drafted?

Paul Cackette: You could have added narration every time the word "inspector" appears to make it manifest that the inspector is exercising a function on behalf of the Food Standards Agency or Scottish ministers or on behalf of the local authority. There are obvious benefits in dealing with the definitional matters collectively, so that inspector has those meanings for the various parts of the regulations.

Probably the most important thing in this context is the exercise of powers of entry. It is clear that neither a local authority inspector nor an inspector of the Scottish ministers can exercise those functions of entry unless they can produce a document to show that they are duly authorised to take entry. Obviously, that is extremely important for the person who is affected.

Any authorisation under the regulations will provide the inspectors with a physical authorisation that can be produced to show the occupier of the premises that the inspector is allowed to take such entry. In practical terms, the structure of the regulations should give adequate and effective control over the powers of entry, so that the right people take entry in the right circumstances—although I hope that the public officials would do that anyway.

The Convener: We were simply concerned about how the right of entry was to be established when we discussed the regulations earlier.

Paul Cackette: The regulations are huge and cover a vast number of powers vested in different people, so that concern is understandable.

The Convener: I want to touch on what premises can be entered. In the definition of premises, the English regulations specifically include premises that are used as a private dwelling, but the Scottish regulations do not. What do the Scottish regulations cover?

Paul Cackette: The definition of premises in the Scottish regulations includes buildings, which means that potentially private dwellings are included. However, the Scottish regulations do not contain the words that are contained in the Department for Environment, Food and Rural Affairs regulations, which expressly state that private dwellings are included. That point was made in the letter on the notification of points.

Our view is that the question of uncertainty or lack of clarity arises only if comparisons are made with the English regulations. We make our comparisons with Scottish regulations. I make no apology for focusing on powers of entry. If members consider the Scottish regulations, references to powers of entry appear throughout the instrument. The first reference to a power of entry can be found under regulation 28, which relates to the powers of inspectors. On producing a "duly authenticated document", the power of entry is given to an inspector who shall

"have the right at all reasonable hours to enter any premises (excluding premises used only as a dwelling)".

Given that the ability to enter a dwelling is excluded, it must follow that the definition of premises includes a dwelling in respect of granting the power of entry. If that were not the case, the exclusion would not make sense. The definition of premises includes references to buildings. In my view, the Scottish regulations, when read together, are clear about what it is that they do. Any question of doubt can only arise if the Scottish regulations are compared with the DEFRA regulations. In my view, that is not the right approach when trying to work out what is meant by the Scottish regulations.

The Convener: We take your intended rebuke.

Paul Cackette: It was not intended as such.

The Convener: Thank you for the explanation. I think that you mean that the definition of slaughterhouse is different. That has been covered.

We move on to the definition of specified risk material. The definition appears to differ between the two sets of regulations and that appears to be important. It is difficult to see how there could be a difference between Scottish and English regulations in this respect.

Steve Lindsay: The definition that we have used reflects Regulation (EC) No 999/2001, which is directly applicable in our law and which defines SRM. Our definition seeks to supplement the definition that appears in the Community regulation to ensure that things that come into contact with SRM are treated in the same way. The intention was to improve the administrative function.

We have left out the first portion of the definition that appears in the English regulations because we believe that that portion is covered in the Community regulation. The Community regulation lists the things that amount to SRM and mentions things that come into contact with it. For that reason, we did not consider that it was necessary or proper to repeat the first portion of the definition that appears in the English regulations in the first part of our definition.

After that, our definition goes on to replicate the English definition. That is because the issues that are covered are supplementary. We then go a

step further, by adding something that is not in the English regulations. In effect, we add a distinction to say that something that would otherwise have been SRM is not SRM when it comes from an animal from a specific country and when the animal is of a certain age. The Community regulation allows for derogation in relation to the elements that deal with the vertebral columns of animals raised in the UK—the bone-in-beef aspect, if you like.

The English regulations have not included the fact that that material should not be treated as SRM—the implication is that it will not be treated as SRM. The Community has allowed the UK that derogation. We thought that it would be more transparent if we included the derogation.

The Convener: I think that is clear.

Steve Lindsay: We hope that it is more transparent. We do not see any fundamental difference between the Scottish and English regulations. We are simply saying that the English regulations include something that is dealt with in the Community instrument. We think that it was unnecessary to—

The Convener: On this committee, it is okay to say that you have done things better.

Steve Lindsay: We always hope so.

The Convener: We come to the definition of specified solid waste. It looks like there is a typographical error. You have used "collated" and we think you meant "collected".

Regulation 3(2) is not qualified in the same way as regulation 3(3). The provision in regulation 3(2) is not restricted to expressions that are not defined in regulation 3(1). Is there a question of conflict?

Paul Cackette: There is a possibility of conflict, because the wording that we chose was different from that in the DEFRA draft. I am not aware of any words that are used in regulation 3(1) that are also used in the Community legislation and intended to bear a different meaning. There is a possibility of conflict, but it does not arise in practice. If someone can think of a practical example of conflict arising, we will consider it. The wording of regulation 3(2) could, hypothetically, give rise to a conflict, but it does not do so in practice and that is why we drafted it in that way.

The Convener: I am pretty certain that nobody in the committee can give you a practical example off the top of their head, but if we come up with any, we will let you know.

Paul Cackette: That would be helpful. If there is an example that we have missed, we need to sort out the problem because there could be a conflict.

The Convener: Regulation 4 refers to TSE monitoring. Paragraph (2) omits sub paragraph (h) of the English equivalent, which confers a power of entry on an inspector for the purposes of issuing a movement licence. You have already explained your attitude.

Paul Cackette: I find myself talking about powers of entry for the third time. Sub paragraph (h) was omitted because of the context, which refers to a power of entry to go into someone's property forcibly. Someone could go into another person's property forcibly for the purpose of handing them a movement licence that they want, and it does not seem appropriate to award powers to make forced entry under those circumstances. If a person wants a movement licence—

Gordon Jackson: They will answer the door.

The Convener: What if they are not there?

Paul Cackette: I do not imagine that one would break in if they were not there.

The Convener: I just wondered what would happen.

Gordon Jackson: It would be a case of, "I am breaking into your house for your own good."

Paul Cackette: In short, that is the reason.

Steve Lindsay: The regulations provide many ways of ensuring that the documents are delivered.

The Convener: I am glad that we do not have to knock down the barn door.

The next points deal with similar issues, but are not particularly significant.

Regulation 10 deals with notifications. Let us consider regulations 10(2) and 10(3) together. The Scottish regulation does not deal with how the certification is made known. Is that correct?

Paul Cackette: The duty of publication exists anyway. Regulation 10(2) requires Scottish ministers to publish the fact that they have requested a monitoring notification and also whether the appointed agent requires them to publicise that, although the agent is not relevant to the case in hand. Regulation 10(3) has consequences for a person if they do not know that a monitoring notification has been requested because a minister has not published a request.

The DEFRA regulations go further than we do by saying that where certification and publication have taken place, the provisions of regulation 10(3) will apply. The duty of publication is imposed on Scottish ministers anyway. We felt that it was unnecessary to provide expressly for Scottish ministers failing to fulfil their duty to publish. That duty is imposed on Scottish ministers where a monitoring notification is required and it has been fulfilled in the past. The DEFRA regulations go further and stop regulation 10(3) being triggered

unless publication has happened. We could not conceive of a situation in which someone would be prosecuted under regulation 10(3) in circumstances where Scottish ministers had failed in that statutory duty. That seemed to be one stage too far. It would not prevent cases from arising only where those two criteria are met, but it appeared unnecessary to make a provision just in case Scottish ministers were to fail to fulfil their duty.

13:00

The Convener: There is a statutory duty and therefore, theoretically, Scottish ministers cannot fail to discharge it. What recourse to correction is there?

Paul Cackette: It is not recourse in that sense. In that scenario, somebody who failed to comply with regulation 10(3) would have done so in ignorance of the certification by Scottish ministers because the Scottish ministers had failed to publish it. If the person found themselves subject to prosecution, that would clearly be wrong. We cannot conceive that a fiscal would take such a case. If someone said that they did not know about the certification because Scottish ministers had not published it, and on investigation it was discovered that Scottish ministers had not published it, the accused person would be right.

The Convener: So you consider that the farmer or whoever would be protected?

Paul Cackette: It is a matter for the Crown to decide what cases to take. We did not perceive it likely that the Crown would pursue a case in which someone had committed an offence without being in a position to know about it because Scottish ministers had failed to fulfil their statutory duty of publication.

The Convener: You could have been generous—you could have given people as much protection as DEFRA has given them.

Paul Cackette: That would have been another way of doing it.

The Convener: Thank you for your explanation. The committee will talk about it afterwards.

Martin Morgan: The provision is a rollover of previous provisions under the BSE monitoring regulations. There were separate English and Scottish versions of that instrument, too. Monitoring, notification, writing to farmers and adverts in *The Scottish Farmer* and so on have all been done previously and it is not DEFRA's intention to repeat that process—I checked. Although the provision is included in the English TSE regulations, DEFRA will not be going through that process again. That is another reason for us deciding to take our own approach.

Ian Jenkins (Tweeddale, Ettrick and Lauderdale) (LD): Farmers are sometimes not aware of regulations. Ministers publish regulations, but there is always the possibility that they might stick them in a wee corner of one newspaper. Technically, that would be publication, but there is a duty on ministers to ensure that people know and that information has been issued properly. I would want to ensure that people did not suffer as a result of inadequate publication.

The Convener: Regulation 13 relates to mammalian meat and bone meal for use in fertilisers. There is a big difference between the English and Scottish regulations, which might be important.

Paul Cackette: I am afraid that my memory fails me on this one, although I recall the amendment. I believe that at the time it was felt that the practical effect of what we were doing was the same as the effect of what DEFRA had done, but I cannot remember the reason for the change. I will have to consult my papers and come back to the committee on that question.

The Convener: We found the change puzzling and would welcome further information on it.

We have dealt with regulation 28, on the powers of inspectors.

Part IV of the regulations relates to specified risk material. Here again there is a big difference between the Scottish regulations and their English equivalents. Did you intend there to be such a big difference?

Steve Lindsay: We did not mean there to be a difference. Our intention was simply to meet the requirements of the Community regulation, which refers to "placing on the market" and provides a detailed definition of that expression. Because that definition is directly applicable, we thought that the proper way for us to proceed was to use the language of the Community regulation.

The Convener: That is very communautaire.

Steve Lindsay: For practical purposes, I am not sure what difference exists between the English and Scottish regulations. The English have taken a different route by using the definition of sale that derives from the Food Safety Act 1990. That term is used frequently in English subordinate legislation. We suspect that exactly the same people and actions will be caught north and south of the border. We have used different language, so it is possible that there will be a different result, but we are not aware of anything that will lead to one. We believe that we have proceeded correctly.

The Convener: Thank you for your explanation.

Our comments on regulation 61 are more straightforward. The regulation refers first to "the

occupier" and then to

"the person to whom the notice is given".

Does that mean that someone other than the occupier may appeal, or may only the occupier appeal because they are the person who is licensed under the regulations?

Paul Cackette: Only the occupier may appeal. The wording of regulation 61 may suggest a slightly wider meaning, but that is not intended. It would have been better for the regulations to refer only to an occupier. In the preceding set of regulations, the only person who had a relevant interest was the occupier.

The Convener: Regulation 68(1)(b) omits weight. Why?

Martin Morgan: I do not have the specific reference, but weight is included elsewhere under people's duty to keep records. There is a reference to keeping records of volumes, which we regard as having the same effect as keeping records of weight.

The Convener: Regulation 69(1) relates to cleansing and inspection. The English regulations impose a time limit. Should not the Scottish regulations also include such a limit? I should have thought that that would be central to the policy.

Paul Cackette: Paragraph (3) of the equivalent English regulation is not included in our regulations, as the same provision is contained in regulation 73(2). A number of provisions on compliance with notices and time limits are pulled together.

The Convener: The lack of a reference to time limits in the Scottish regulations is an important point—perhaps it is a simple omission. Regulation 69(2) says that a notice may

"prohibit the movement of specified risk material into the vehicle … until such time as the required cleansing and disinfection has been satisfactorily completed."

A time limit should be included in that provision.

Martin Morgan: I am sorry, but I do not believe that a time limit should be included. The vehicle would have to be cleaned, whether within one hour, 10 hours or whatever, as a matter of good practice and bio-security, before it could be used again for that purpose.

The Convener: Are you saying that the time limit is unimportant?

Martin Morgan: Yes. We believe that the time limit is unimportant. The cleansing and disinfecting operation must be done. It would be an operational decision of the person in charge of a vehicle to leave it for longer than we had specified.

The Convener: Regulation 70(1) of the English regulations says:

"If an inspector suspects that any vehicle"—

doodah, doodah—

"he may serve a notice on the person in charge of the vehicle … or on the occupier … requiring that person to cleanse and disinfect, at his own expense and in such a manner and within such period as may be specified in the notice".

Would you like to think about that?

Martin Morgan: We shall reconsider the regulation.

The Convener: Thank you.

Could you explain the differences between the English regulations and the Scottish regulations and why regulation 70(1) of the English regulations is omitted from the Scottish regulations?

Paul Cackette: The Scottish regulations should have an equivalent paragraph. I hope that that answers your question.

The Convener: So you will include it. Thank you very much. I am glad, because that was mind nipping.

A reference to reasonable assistance is missing from regulation 70(4)(a). That is not material to the workings of the regulations, but—

Paul Cackette: The same matter was raised in an earlier question about the powers of inspectors, which appear at various points throughout the regulations. The wording of the obligations on persons to assist inspectors is different from the wording that is used in the DEFRA draft—our wording is foreshortened. We do not feel that anything is missing from the obligations in our regulations compared with those from DEFRA. It is a matter of achieving the same end through different means.

The Convener: I presume that we will find that out as the regulations are applied.

Regulation 79 is on movement restrictions. Can you explain the thinking behind the difference between the English and Scottish regulations?

13:15

Paul Cackette: The DEFRA regulations refer to powers in relation to inspectors and veterinary inspectors, whereas we refer simply to inspectors because the definition of an inspector includes a veterinary inspector. A veterinary inspector is a sub-class of inspector, and is included already, because

"'inspector' means … including a veterinary inspector".

The replication of "veterinary inspector" seemed to us to be unnecessary.

The Convener: Regulations 86(4) and 95(1) refer to powers of entry. We are quibbling with your use of the word "apprehended" rather than "expected". For the life of me—I must be honest—I do not know why. Does anybody else know?

Could you explain regulation 90(5), which refers to moneys being recoverable as a debt?

Paul Cackette: The regulations are not consistent, and I am grateful that that has been pointed out. In drafting regulations—and I realise that this is an issue that the committee has raised before—it is my preference to refer to sums being recoverable as a debt, because of my experience many years ago of debt recovery. I found that if the provision that moneys are recoverable as a debt is express rather than implied, it has a practical consequence for debt recovery. One can point out the provision and say, "You can see that it says it is recoverable as a debt." My experience is that that is more efficient in persuading persons who owe money that the money is due. The regulation states the sums that are due and that they are recoverable as a debt.

The Convener: Nice try, but.

Murdo Fraser: I do not wish to drag this out unduly because it is not a material point, but legally, the words "as a debt" are of no consequence whatever.

Paul Cackette: I do not dispute that.

Murdo Fraser: But that is hardly a material point.

The Convener: Regulation 97 refers to offences and penalties. Why do the Scottish regulations have no time limit?

Paul Cackette: Rather than looking at comparisons with the English regulations, we went our own way. One point that arose from that was the combining of the various offence provisions. Part IV of the DEFRA regulations has a self-contained offences provision in relation to that part, and there is a collective provision as well. We felt that it was better to pull all the offence provisions together. By doing so, we divorced ourselves from what the DEFRA regulations had done.

On whether we had misunderstood the English provision, we made our provisions without any reference to the English ones. We did not have regard to what had been done in England.

On whether it would have been a good idea to have followed DEFRA in putting a time limit on prosecutions, my feeling and my understanding is that the standard position—if there is such a thing—for such offences is that there is no time limit. A time limit was imposed in the DEFRA regulations, but the norm is that such offences do not have a time limit.

The choice is between bringing down the shutters at the end of three years, for example, beyond which no prosecutions can take place, and—the situation that we have chosen—having no such limitation, so that the decision whether to take a prosecution lies in the hands of the fiscal. It seems more appropriate that it is left to the fiscal to decide in the public interest whether, even though more than three years have passed, a case is serious enough that it should be taken in the public interest. In making the decision, the fiscal will have to have regard to whether it is fair that a prosecution is taken three, four or five years after the event. It seems better to leave the decision to the fiscal, who will have regard to all the circumstances, than to have a provision whereby the shutters come down after three years.

The Convener: I am inclined to agree with you on that, although it is probably at odds with everything else that we have decided on criminal justice practice.

Murdo Fraser: I do not have a problem with it.

Ian Jenkins: I accept it.

The Convener: Okay.

The next point, on regulation 101, is the difference between schedule 8 to the Scottish regulations and schedule 8 to the English regulations.

Paul Cackette: I am not aware of a difference that matters. Some of the English consequential amendments are replicated in our regulations. We do not have one of the amendments because a set of regulations is revoked in its entirety. We picked up additional amendments because we thought them helpful and sensible. I am not aware of anything that differs in effect. We took a different approach to schedule 8 in trying to ensure that we picked up all the consequential amendments. That has resulted in additional amendments over and above those in the DEFRA regulations, which reflects a different approach and an attempt to be tidier in the statute book.

The Convener: I confess that I do not feel that I have any expertise in the area. I am inclined to take you at your word. We will come back to you on that.

On part 1 of schedule 1, we thought that there might be a European dimension. We noted that the English regulations specifically provide for the cost of a valuer to be paid by the secretary of state. If the Scottish regulations do not do so, does that put the Scots at a disadvantage? Should the situation not be exactly the same under European regulations?

Paul Cackette: The issue of compensation should perhaps be dealt with collectively. It is the issue on which we were most mindful to examine what we had done and what DEFRA had done, so that we did not find ourselves in a situation in which a Scottish farmer ended up with more or less compensation than an equivalent farmer in England. That need for consistency is probably more important in relation to compensation than in any other respect. There are differences between the various provisions. We have endeavoured to ensure and are satisfied that the difference will not have the effect that people get a different level of compensation.

We had regard to the model that DEFRA had adopted. The differences in the Scottish regulations are rooted in the experience of dealing with compensation payments in relation to foot-and-mouth. Rather than looking too closely at the practical operation of arbiters, valuers and who does what, we considered the model that was used in dealing with foot-and-mouth; the regulations replicate that fairly closely. For example, subparagraph (c) in paragraph 15 of part III is included because that provision was in place during the foot-and-mouth outbreak and reflects practical experience of how well the compensation arrangements worked.

I do not know whether there is a significant risk of arbiters' costs being dealt with differently. Our provisions allow for the arbiter to determine their costs, rather than for the secretary of state to do so, as in the DEFRA regulations. That will not automatically lead to a different conclusion; it simply means that the arbiter will decide when he or she resolves the compensation question.

The Convener: Paragraph 15(c) says:

"liability for the costs of the arbiter shall be determined by the arbiter."

Paul Cackette: Yes.

Murdo Fraser: I am interested in that, because an arbiter and a valuer are not the same—an arbitration and a valuation can have substantially different outcomes. What guidance does the EU legislation give on how sums are arrived at? The English interpretation is that the valuer makes such determinations, whereas the Executive's interpretation is that that is done by an arbiter.

Paul Cackette: The approach of following the appointment of an arbiter was rooted in the foot-and-mouth experience. I accept that valuers and arbiters may approach things in different ways and that that could give rise to different results. We will have discussions about whether that is sufficiently significant that we should bring the regulations in line with the English ones. We are trying to avoid a situation in which people are treated differently north and south in relation to important issues such as compensation. If there is a concern that the difference in wording will lead to difficulties, we will reconsider the issue.

The Convener: I am aware that we are running late. I hope that we can get through the rest of our points in the next few minutes. Let us push on.

Will you let us know the outcome of your deliberations on the issue of arbiters and valuers?

Paul Cackette: Yes. We will take that on board.

The Convener: Is it correct that annexe 1 to part III of schedule 1 to the Scottish regulations refers to Great Britain but that the equivalent provision in the English regulations refers to England? I presume that that is correct.

13:30

Paul Cackette: That is interesting. We talked about compensation levels. The point about the difference is tricky. The reference relates to the identification of an indicative price, which ties in with compensation. DEFRA's regulations use as a basis a comparator with other animals in England. If we wanted to achieve the same effect, we would have to identify the indicative price by reference to English animals only. It would be wrong for Scottish farmers to be in that position.

We are in an odd position. DEFRA has made its regulations. We could have referred to England only, to Scotland only or to Great Britain. From the point of view of Scottish farmers, the unacceptable option was to replicate what DEFRA did. That gave us something of an irresolvable dilemma. The resolution that was adopted was to refer to Great Britain, because that seemed likely to give the result that was nearest to the median. That certainly is a difference.

The Convener: We have partly covered part IV of schedule 1, where there is a difference in paragraph 2 of the compensation provisions.

Schedules 3 and 4 to the English regulations give precise values for temperatures and pH. Do we need to clarify why the Scottish regulations are different?

Steve Lindsay: The reason for that might be beyond us, too. We have re-examined schedules 3 and 4 and compared them with the English versions. We thought that they were identical. They were certainly intended to be identical. If the committee wants to draw items to our attention, we will examine them.

The Convener: We will let you know about that.

Schedule 5 refers to regulation 33(4), which deals only with SRM in the slaughterhouse and does not cover material that is removed from the slaughterhouse.

Paul Cackette: There is something odd not about the schedule 5 reference, but about regulation 33(4). I have not puzzled out what is not quite right, but we must re-examine that.

The Convener: You will take that back and reconsider it.

Is there a difference between "rendered material" and "protein and tallow"?

Steve Lindsay: No.

The Convener: Oh, great.

Paragraph 4 of schedule 7 raises the compensation question that we have discussed and we have dealt with the fact that none of the amendments in schedule 8 to the English regulations has been reproduced in the Scottish regulations.

There are significant differences between schedule 9 to the English regulations and schedule 9 to the Scottish regulations. The Specified Risk Material Regulations 1997 (SI 1997/2965) were only partially revoked in England. Is there a reason for the difference?

Martin Morgan: DEFRA retained provisions, which are now largely redundant, concerning the export of whole sheep carcases to France. The French stopped that trade about two years ago, so those provisions are no longer necessary and we deleted them from the Scottish statutory instrument.

The Convener: Have the French stopped that trade for all time?

Martin Morgan: Yes, in the circumstances that the amendments to the Specified Risk Material Regulations 1997 allowed.

The Convener: Okay. We might need more clarification on the revocation of the Specified Risk Material (Inspection Charges) Regulations 1999 (SI 1999/539).

Steve Lindsay: The Specified Risk Material (Inspection Charges) Regulations 1999 gave a power to impose charges in respect of the inspections under the Specified Risk Material Regulations 1997. England has retained the hypothetical use of the 1997 regulations, so it has also retained the hypothetical part of charging in relation to it. We have completely revoked those regulations and consequently, given that the charges power in the 1999 regulations relied completely on what was done under the 1997 regulations, the 1999 regulations have been revoked completely as well.

The Convener: It appears that there are different policies.

Steve Lindsay: We do not think that there is a practical difference. We understand that colleagues in England take the view that the residual effect of the 1999 regulations is zero. They will simply be repealed by implication, because there are no statutory instruments for it to be attached to. As far as we are concerned, no charges have ever been levied under the 1999 regulations.

The Convener: So you are just formalising what the practice has been.

Steve Lindsay: Indeed. The power has never been used. There did not seem to be any intention ever to use it and so it has simply been taken away. The matter of charging needs to be revisited and it will be revisited in another instrument.

The Convener: Great. I hope that we are all here to see that. Thank you very much indeed. I am really sorry that this has been such a slog, but this was our only chance to deal with the regulations. We have noted that you will consider a number of points; we have a point to find out about as well.

You all thought that that was the hard bit. The rest will be easy-peasy. They will get to the sandwiches before us.

Executive Responses

Civil Legal Aid (Scotland) Amendment (No 2) Regulations 2002 (SSI 2002/254)

Murdo Fraser: The Executive's response is that it is working on a consolidation bill and we should refer the regulations to the eventual lead committee in the Parliament.

Instruments Subject to Annulment

Community Care (Disregard of Resources) (Scotland) Order 2002 (SSI 2002/264)

Community Care (Additional Payments) (Scotland) Regulations 2002 (SSI 2002/265)

Community Care (Deferred Payment of Accommodation Costs) (Scotland) Regulations 2002 (SSI 2002/266)

Colin Campbell: No points arise on the instruments.

Instruments Not Laid Before the Parliament

Scottish Transport Group (Dissolution) Order 2002 (SSI 2002/263)

The Convener: Sorry boys. The order is a bit unusual and we should ask for an explanation. Although the Scottish Transport Group is now dead and gone—but not forgotten—we must ask why it was not wound up properly and why repeal orders were not made first. The order does not substantially affect the status quo, but it appears to be a bit haphazard. References were not repealed in the way that they should have been before the group was dissolved. We should ask the Executive about that.

Ian Jenkins: Before you close the meeting, Margo, I want to say thank you very much. The meeting was big and busy and you chaired it very efficiently.

The Convener: Thank you. It is very kind of you to say so. I was going to thank you all for still being here.

Murdo Fraser: Before we go, those of us who are not in the SNP should wish the SNP members good luck for the weekend.

Colin Campbell: It is too late for me.

The Convener: With that kind thought, I close the meeting.

Meeting closed at 13:40.

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