SUBORDINATE LEGISLATION COMMITTEE

Tuesday 25 January 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
3rd Meeting 2005, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Mr Adam Ingram (South of Scotland) (SNP)
Mr Stewart Maxwell (West of Scotland) (SNP)
*Christine May (Central Fife) (Lab)
*Mike Pringle (Edinburgh South) (LD)
*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Alex Johnstone (North East Scotland) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)
Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Lorna Drummond (Faculty of Advocates)
Jane McLeod (Scottish Law Commission)
Jonathan Mitchell (Faculty of Advocates)

CLERK TO THE COMMITTEE

Ruth Cooper

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 25 January 2005

[THE CONVENER *opened the meeting at 10:31*]

Regulatory Framework Inquiry

The Convener (Dr Sylvia Jackson): I welcome members to the Subordinate Legislation Committee's third meeting in 2005. We have received apologies from Stewart Maxwell and Gordon Jackson, but we expect Adam Ingram to arrive during the meeting.

Agenda item 1 is on our regulatory framework inquiry, which we begin today. I welcome our witnesses: Jane McLeod, who is the chief executive of the Scottish Law Commission, and Lorna Drummond and Jonathan Mitchell QC from the Faculty of Advocates. I hope that they will bear with us, because I am sure that we do not know as much about the subject as they do. We will perhaps go rather slowly and we will ask some questions to follow up what they say. Would the witnesses like to say a few introductory words about the submissions that they sent us, which I must say were illuminating and easy to read?

Jonathan Mitchell (Faculty of Advocates): Thank you for your comments on our submission. As you can see, we ditched a lot of the questions that the committee asked because we thought that they were very much matters of parliamentary procedure and mechanics. The issues on which we concentrated were drafting methods, consolidation, which is related to drafting methods, and the accessibility of legislation. We approach the first two issues as users, because we spend our lives working with what is produced by the Scottish Parliament and comparing Scottish subordinate legislation with what comes out of Europe and Westminster. We felt that we could comment on how drafting might be improved.

The fact that consolidation is related to drafting came across most clearly in the committee's question on the use of Keeling schedules. It seems to us that the old, undesirable custom of producing a statutory instrument that reads as a set of entirely unconnected lists of words and textual amendments—for example, to delete a semicolon or to substitute a word—has become unnecessary. Somebody somewhere is clearly working with a full consolidated draft; in the examples that we included, we can see that the drafter of the statutory instrument—or, in one case, the act of sederunt—must have had full copies of, first, what they were working on and, secondly, what was to be released to the public afterwards. Those documents ought to be made available to the public and we cannot see why they are not.

That point relates to the accessibility of legislation. With respect, we were surprised that the Scottish Parliament and the Department for Constitutional Affairs in London do not seem to have had much to say to each other on the statute law database. Recently, I had a series of e-mails from the statutory publications office and the DCA, which suggested that they do not feel that they have had much contact, either. For example, they clearly want to keep their options open on charging—they have their own agenda on getting their costs back, which is not necessarily the same as the agenda that the Parliament has or ought to have.

The primary interest of the Faculty of Advocates is as users of the material that is under discussion and as interpreters of it to others. We have a good deal of expertise on that, but Lorna Drummond comes with special expertise on drafting, because she is a former parliamentary counsel and, as some members will know, a drafter of some of the bills that have come before the Parliament.

The Convener: Thank you. Would Lorna Drummond or Jane McLeod like to add anything?

Jane McLeod (Scottish Law Commission): I do not want to add anything at this stage.

Lorna Drummond (Faculty of Advocates): I do not want to add anything at this stage, either.

The Convener: First, we will consider new regulation. One of the issues that we are concerned about is the use of plain language. We accept that, as you say in your submissions, it is not always possible to use plain language, because technical language is required. However, in relation to cases in which simple language can be used, will you elaborate a little on the experiments in Sweden, which involve using questions and answers? How useful is that approach?

Jonathan Mitchell: I do not think that there is any one magic legislative technique. There are examples of statutory instruments that could well be written in the form of questions and answers. We should bear in mind the fact that all users have a question that requires to be answered—the matter can often be dealt with best by asking questions. In the publication that we refer to in our submission, the example of legislation on postal voting systems is given. What is the job of the postman? To whom must the postman deliver envelopes? Presumably, those are matters that affect Swedish postmen.

However, as I said, there is no magic technique. The underlying merit of the approach taken in Sweden and Germany is that it uses what were in Scotland traditionally called daft-laddie or daft-lassie questions. The material is put in front of somebody and they ask daft questions, such as, "What does this mean?" The problem that we have at the moment is that nobody does that until the statutory instrument comes to us. It is then held up in court and Lorna Drummond, on one side, and I, on the other, will attempt to tease out its meaning before a judge. We feign ignorance about what the meaning might be and what the Parliament might have intended. It would be useful if someone had the job, perhaps before a statutory instrument went to a committee, of examining the instrument's language and saying, "I just don't understand that," "That doesn't make sense," or, "There is a missing proposition somewhere." Ultimately, that is not a policy task. MSPs should not be wasting their time on getting language right.

Lorna Drummond: The parliamentary procedure in Sweden is very different from that in Scotland. There does not seem to be a parliamentary counsel office of the sort that exists in Scotland and England. In Sweden, an official drafts the bill, which is referred to a department made up of linguists and legal advisers. The linguists examine the text of the bill from a purely linguistic point of view. That is different from what we do in Scotland, where the solicitor to the Scottish Executive sends bills to the Scottish parliamentary counsel, which is involved in producing a draft that implements the policy in the clearest possible manner, using concise, plain language. However, it is interesting that in Sweden linguists are involved, which does not happen in Scotland. I am not sure that parliamentary counsel would see that as necessary, but it shows that in Sweden the language of the text, rather than just policy implementation, is seen as a fundamental aspect of a bill. Bills must be submitted to language experts to ensure that they read in a simple, clear way.

The Convener: Does Jane McLeod want to add anything?

Jane McLeod: Not at this stage. I have no experience of the Swedish approach.

The Convener: Jonathan, you mentioned initiatives in Germany. Can you give further information about those or initiatives in other parts of the world that you think would be useful?

Jonathan Mitchell: I do not think so. Our starting concern is with English-language jurisdictions, but when I read a brief survey of the situation in the European jurisdictions I was struck by the fact that the issues are not very different between one language and another. English, German and other languages all have the same tendency towards bureaucratic obfuscation when the opportunity for that exists. It is also possible in all cases for language to be simple.

A comparison with the language of contracts and commercial contracts is useful, as the identical vice exists in that area. Members who have seen commercial leases will know that it is possible to draft a 100-page document with sentences that go on for more than a page without punctuation. At its worst, the standard of language in contracts is far worse than any parliamentary drafting. However, in consumer contracts there is a statutory requirement for plain language and a presumption that any ambiguity will be interpreted in favour of one party, which is interesting. That can be a powerful incentive to people not to fog dangerous issues or create hidden traps in the hope that someone will fall into them.

The Convener: My next question is about situations in which technical language must be used. In your submission, you say that tables, diagrams and so on might be useful. Can you say more about the tools that can be useful in conjunction with more technical language, when it must be used?

10:45

Lorna Drummond: Much legislation is complex and technical in nature. A good example is tax legislation. English parliamentary counsel is engaged in the process of rewriting the whole of tax legislation. Many of the techniques that it uses are designed to simplify the legislation. For example, it uses formulae where the use of words would result in a long, complex provision. Flow charts can be used to set out complex procedures. Tax legislation is probably at the forefront of novel drafting techniques. Parliamentary counsel is a bit more experimental in that area, because of the complex nature of the legislation. However, I believe that such techniques could be applied across the board. There may be room for more experimentation than currently takes place.

The English parliamentary counsel office and the office of the Scottish parliamentary counsel are two separate offices. There is also the non-Executive bills unit, which has a panel of drafters who draft members' bills for the Scottish Parliament, as I am sure the committee is aware. The various people who are carrying out drafting exercises should use the same drafting conventions and there ought to be some consistency across the board. Last November, there was a meeting of Scottish and English parliamentary counsel and representatives of NEBU at which some of the techniques were discussed. However, to my knowledge, that is the only meeting that has taken place and I am not sure whether others are planned. I would

encourage sharing of information across the board between people who draft legislation, so that the same techniques can be applied by all of them.

The Convener: We will hold on to that point as an important recommendation that we may follow. When we have considered statutory instruments in tabular form, it has sometimes been much easier to understand them. Before I move on to textual amendments, do members have any further questions about plain language?

Murray Tosh (West of Scotland) (Con): I am interested in the fact that the service of a linguist is added in the Swedish system. In its written submission, the Faculty of Advocates sounds a cautionary note about the danger that explanatory notes may differ, however subtly, from legislation. How is that difficulty avoided in Sweden, where there is both a policy and a linguistic input? What is done to ensure that the two sides agree on the meaning of all the words and expressions that are used and that the policy intentions of the legislation's promoters are summed up adequately in any changes that the linguists seek?

Lorna Drummond: I understand that the linguists and legal advisers work together as a team. What the linguists can do is tightly curtailed. They cannot alter fundamentally the structure of a clause, but they can suggest purely linguistic changes. They can suggest that a subject and verb be put together or that a sentence be made into two sentences, without altering the meaning of the language. They work in a team with the legal advisers, who can advise them whether linguistic changes to a clause will affect its legal consequences.

Murray Tosh: It is important that we understand that the linguists are part of the process and are exposed directly to the intentions of the policy makers. The exercise does not involve putting material before two parallel bodies, one of which seeks to inform the other.

Jonathan Mitchell: It would be fair to say that each seeks to inform the other, but on their different areas of expertise. I have included in a footnote to our written submission a reference to the downloadable publication "Clarity", which contains descriptions of Swedish, German, French and Italian drafting techniques.

In some ways, there is a close parallel between the Swedish and German techniques. In both Sweden and Germany, policy formation is carried out by the Executive or a similar body. After the linguists have considered issues such as sentence structure, archaic language and unintelligibility, the legislation is passed back to the policy makers.

The two sides perform essentially different tasks. At no stage do the linguists say, "This is a bad policy." That is not their job, any more than it is the job of the Executive to say, "This is good language." In this jurisdiction, we have always wrapped up both issues together. In Sweden and Germany, after linguists and policy makers have seen an instrument, it comes to the body that must consider it in a legislative sense.

Christine May (Central Fife) (Lab): The Faculty of Advocates mentions in its submission that it is concerned that to have legislation amended by virtue of changing the text but not necessarily referring back to the original text or showing at the end what the amended text looks like is not good practice. I would like to pursue that point, perhaps with each witness. I am not a professional and I have never seen what the database looks like, but many constituents come to me with issues that arise from their interpretation of legislation as amended. I get bundles of documents. If there is to be a statute law database, which I certainly think is a good idea, how could amendments be made without recourse to such a process of textual amendments?

The Convener: Before you reply, Jonathan, I should add that we know from the information that you have provided us with that the statute law database programme exists. We are thinking about how things might be in the future.

Jonathan Mitchell: As you know, a lot of questions are wrapped up in that. The position on the statute law database is slightly equivocal. For many years, the DCA and before it the Lord Chancellor's Department gave firm predictions that the database would be publicly available 12 months from whatever date they were stating that on. It was like sailing over the sea. The horizon has become closer, because, since last summer, the DCA has been fairly clear that the database ought to come out before this summer—in the first half of 2005. However, there are still problems. In particular, there is the charging problem, which would affect Christine May's constituent. It is not much good to be told that something is available, but only if one in effect pays the price of the document being made up, which is something that one could get from a private publisher.

I will address in greater depth the issues that particularly concern the committee about the accessibility of the legislation. There would be a choice of what someone would get up on screen from the statute law database. The legislation could be printed out in several different colours or someone could get before them on the screen or could print out an instrument or an act of Parliament as it is in force today. The person might not want to bother with the historical versions at all. Alternatively, someone might want to ask what the legislation was on 16 January 2003, which is when the events that they are concerned with happened, and they could print

that out. The other option is for them to print out a long document that shows in red and green, with underlining, what has been taken out or added and when and how that has been done. The technology would allow the user to choose between any of those methods. In effect, the statute law database will be a facility for the intelligent lay user who just wants to know what the law is and for somebody who, for whatever reason, wants to go into the background to see how the legislative change happened.

As for the way in which a body such as the Subordinate Legislation Committee works, let me describe what we currently have for the public. There is a problem without the statute law database, or, I should say, without access to the statute law database, because its contents are, for reasons that I cannot guess at, regarded as fairly confidential. Let us suppose that someone comes to me and asks questions in relation to the example that we have given about European lawyers' right to practise. That person says, "I am a Spanish lawyer." I ask, "What sort?" He responds, "I am a procurator and a member of the Madrid bar: what are my rights to advise somebody in Scotland?" At that stage, under the current system, I have to get a pile of pieces of paper, a pair of scissors, staples and Sellotape and put all the information together. After I have done that, I will have to photocopy what I have so that the information is on one sheet of paper and I can read it out.

As members know, such instruments are currently passed without any explanatory note at all. I continue with the example of the Spanish or Slovak lawyer. The European Communities (Lawyer's Practice) (Scotland) Amendment Regulations 2004 state:

"Regulation 1(2) … shall apply to a relevant lawyer with the following modifications … (c) for '22nd November 2000', wherever it occurs, there shall be substituted '16th March 2005'".

I do not have the faintest idea what that means and neither does anybody else. Why did anybody spend pen and ink on that? Two things are needed. First, we need the text so that we can see that, if someone is Spanish, the critical point is 2000 and, if they are Slovak, the critical point is 2005. That is the starting point. Then, somewhere, we want something that in effect says, "The point of this is that…"

I come back, by a rather long route, to Christine May's constituent who has a pile of paper in front of them. The first thing is to try to cut down that pile of paper. Christine May's constituent may come to see her because—I will give a less abstruse example—they do not know whether their house is protected under the rent acts. It is therefore necessary to try to cut through all the different acts and the amendments that have been made at different times. The probability is that somewhere the constituent may have missed something and the entire argument may be proceeding on the basis of a misunderstanding or a failure to have found a piece of amending legislation. We could cut through all that with a single document. That is the first point, before we come to the issue of making what is in the single document clear.

It seems to me that the problems of this committee are very similar to the problems of the constituent. To be frank, I do not understand how the committee copes with what it is being asked to do when such instruments are put before it. It seems to me that, in many cases, there is no explanation of what the point of the paragraphs, subparagraphs and additions might be. I sometimes wonder whether the committee might have a document that is not made available to the public.

Christine May: Do you agree that if there is to be a statute law database—you have described the ideal—textual amendments are fine and should continue but that, if not, the current practice of making textual amendments without sufficient reference existing to ensure that the person who is considering the amendment knows what the amended document should look like is not a good thing?

Jonathan Mitchell: The old argument about textual amendments on the one hand and Keeling schedules on the other is locked into the assumption that things were done by printers on paper. As soon as we moved into electronic publication, the arguments changed. It seems to me that it is unnecessary to have regulations that begin with words such as

"Regulation 1(2) … shall apply to a relevant lawyer with the following modifications".

If a proper textual amendment is made, people can see in front of them a black text with a red strike-through at one point and a green insertion of the date; that means that they can see what is happening. All the verbiage that conceals that fact is not required. We still come back to the fact that what we have at the end is a Keeling schedule.

The Convener: I will ask about the role of the explanatory notes and the Executive notes.

11:00

Lorna Drummond: Explanatory notes are helpful—

The Convener: We find them so.

Lorna Drummond: I will pick up on Jonathan Mitchell's final point before I consider explanatory notes.

It would be extremely helpful to have a statute law database that was updated as soon as bills received royal assent or textual amendments to acts were made, so that we could quickly examine legislation. There might then be less need for Keeling schedules to accompany proposed legislation. However, to assist debate in the Parliament it might be useful to have a Keeling schedule to enable members of Parliament to ascertain the effect of proposed amendments, although such information could be supplied through notes or guidance from people who work in Parliament. If a database were in place there would certainly be less need for Keeling schedules for the purposes of users, but different considerations might apply for the purposes of debates in Parliament during the passage of bills.

The explanatory notes can assist, but they cannot be a substitute for a Keeling schedule if there is heavy textual amendment. However well a matter is explained in the notes, the Keeling schedule is of the most assistance because it enables people to consider the amended legislation. Although explanatory notes are generally helpful, they tend not to say much more than do the provisions in the bill. There is a good reason for that: the addition of further glosses to a bill's provisions might produce subtle differences in meaning that could be used to argue that the purpose and meaning of the provision was different. Explanatory notes are therefore helpful to a limited extent. Jonathan Mitchell suggested that worked examples could be set out in the explanatory notes, but the danger of doing that, again, is that such examples could be used to argue that a section's purpose and meaning are different.

The current approach to the interpretation of bills is to read the bill as a whole and understand its meaning. If there is ambiguity in a provision, parties are entitled to use debates in Parliament as an aid to interpretation. The content of the notes and the level of debate in Parliament are very important. I support explanatory notes, but they must be used with caution.

The Convener: That is helpful. Debates in committee, for example, about access in the context of the Land Reform (Scotland) Bill, will be valuable in future, from what you say.

Do members want to follow up Christine May's question?

Murray Tosh: I do not want to ask further questions, but may we consider at the end of this part of the meeting how we might explore issues that the witnesses have raised about the practices of the statute law database?

The Convener: Absolutely. We have already agreed to come back to the matter. Our discussions have led us quite nicely to the points that Mike Pringle wants to make about the guidance that can usefully accompany legislation.

Mike Pringle (Edinburgh South) (LD): The witnesses talked about the need for simple language in regulations, but it might not always be possible to achieve that. I think that Lorna Drummond mentioned flow charts and formulae. If simple language cannot be used in an instrument, should there at least be a requirement for a simple explanation in the accompanying guidance? Do you have examples of that?

Jonathan Mitchell: In a way, your question almost answers itself. You ask whether, if simple language cannot be used in a regulation, a simple explanation should be provided elsewhere. I am considering the matter from a non-lawyer's point of view and I think that you raise a fundamental democratic principle. There is something wrong with legislation that the citizen cannot understand and if the legislation itself cannot use plain language—there might be many good reasons for that—there is an obligation on the legislative body to produce something, somewhere, that people can understand.

I am not necessarily recommending a lowest-common-denominator approach to the use of language. It is our job to act as interpreters for citizens and the users of legislation are not necessarily ordinary citizens; they might be professionals who use tax law, for example. However, we seek an explanation that can be understood, which does not necessarily have to be in the regulation itself. The better way of providing that will vary from regulation to regulation and a difficult, subjective choice might have to be made. I talked about the regulations for European lawyers; it would probably be pointless to provide the explanation in a regulation that had to be made to comply with a European directive. However, a parallel flow chart or set of questions and answers could be provided, which would be fairly non-controversial.

Other sorts of explanations might be provided, but we should bear in mind Lorna Drummond's point. We must not create a situation in which there is a difference in tone or meaning between the explanation and the regulation, which would do more harm than good. However, there must be something, somewhere, that people can understand.

The Convener: I take your point that guidance might not be needed if we ensured that a bill or regulation was self-explanatory. However, if you think that guidance might be used in certain circumstances, are there different ways of presenting guidance that might be useful?

Jonathan Mitchell: It would vary enormously from provision to provision and it would partly depend on who would use the legislation. In my submission I mentioned the Act of Sederunt (Rules of the Court of Session Amendment No 5) (Miscellaneous) 2004 (SSI 2004/331). The rules of the Court of Session are obviously important to practitioners, but to be honest they are not really of great direct significance to the ordinary citizen, because in the nature of the case the citizen's problem will be mediated through professionals. As long as judges, advocates and Court of Session solicitors understand the situation, that is good enough. What is sought by way of explanation and publicity is perhaps little more than merely the flagging up of the fact that changes are being made that will affect particular categories of cases. Perhaps that is more a publicity issue than a legislative issue.

For example, tucked into that bundle of miscellaneous amendments, amended sub-paragraph 17 confers new rights to secure damages from the Motor Insurers Bureau in cases of uninsured drivers. Because the provision was hidden in such a way that one had to read through the instrument very conscientiously to notice it, I came across a case last week in which a practitioner was quite unaware that people had the right to seek damages. That is a publicity problem rather than a legislative problem.

There is no magic-wand solution, but we come back to the fundamental issue that the meaning of the provision must be clear somewhere. Where that somewhere is will vary from case to case.

The Convener: You raise an interesting point about where guidance belongs between legislation and publicity. In situations in which it is important that guidance is used, what is the Parliament's role? Obviously you would say that guidance must explain the legislation accurately even if its purpose is publicity. Do you think that guidance, even guidance that has a publicity function, should be considered by Parliament?

Jonathan Mitchell: I do. The international example that I should give you is that of American practice. I will give it as an example of what, from a Scottish point of view, I would regard as bad practice.

The Americans' distinction between primary and subordinate legislation is fairly similar to ours. There is the Code of Federal Regulations, which, in effect, is the equivalent of all our statutory instruments. To put things very concisely—almost to the point of inaccuracy—it affects how American federal bodies can conduct themselves and what they can do. The problem is that the American courts have consistently said that the post-legislative process of commentary and explanation—which, typically, is done by the body that is the subject of the legislation—is a legitimate aid to interpretation. That means that we get situations in which, when a body such as the American equivalent of the Inland Revenue has before it a statutory provision, it says to itself, "Great. Now we can do this." With a straight face, it will put out a document that claims to give the correct explanation of the provision and that says what that body regards itself as being entitled to do. The court will consider that and will say that the intention of the legislature is explained by what the executive body regards as being the proper interpretation. To my mind, that is to give far too great a degree of deference to the executive body.

The cure to that is that, first, we should continue the existing practice whereby the statements of Government bodies on what they believe the meaning is of legislation that will affect them are not taken into account in the legal process. Secondly, because it can be very useful to find out what the relevant Government body thinks is the purpose of a particular provision, such explanations should be given in Parliament, so that a committee such as the Subordinate Legislation Committee could consider them and could realise that language that was superficially innocent and attractive was in fact hiding a viper as regards what the body might do with the provision. If the body says what it might do with the provision before it is agreed to and members are happy with that, that is fine. However, in some contexts, it might be helpful for the committee to get a fuller explanation than it does of the point of a provision and the problem that it is designed to strike at.

The Convener: How might such guidance or publicity—if that is how we want to describe it—change over time, given that particular practical situations that we had not thought of when an instrument was made might emerge? How might the guidance be rolled out on an on-going basis?

Christine May: I have a supplementary to that. If you are saying that, in an ideal world, such guidelines should be laid before Parliament at the same time as the regulations or the bill, are you suggesting that with subsequent amendments—for example, those that are consequential to judicial decisions or to tests in the courts—revised guidelines should come back to the Parliament in every case? I can think of some regulations on which guidelines would come back every fortnight.

Jonathan Mitchell: I hope that there are not very many examples of that; we are not all that active.

The point that you raise is difficult. There are constraints of practicality. As you say, it will not be practicable for Parliament to get more guidelines every time it is asked to approve the 17th edition of a set of regulations, for example, because

changes have been made since the issuing of the 16th edition.

Lorna Drummond spoke about the dangers of paying too much heed to the guidelines. We must follow the broad rule that one text—the text of the draft Scottish statutory instrument on which Parliament votes—is supreme. Although Parliament should have the guidelines in front of it, we do not want to get into a situation in which, in effect, debates and votes take place on two parallel texts, given that they ought to be saying the same thing. That would create a need to have a commentary on the commentary. The point has been made that we are trying to start with the assumption that the instrument itself should be clear, where possible.

Christine May: Thank you.

11:15

The Convener: As there are no further questions on guidance, we will move on to consider consultation, which is a vital aspect of the process.

Murray Tosh: We have read your submission, but we do not know what the Scottish Law Commission actually does when it sets out to update the law. Will you clarify for us the mechanics of the consultation process? Do you, as the Executive sometimes does, go through several phases of consultation or is it a case of once the consultation document has been sent out, that is it—you simply proceed on the basis of the first round of submissions?

Jane McLeod: It is fair to say that the consultation process used to be as you have described it—the document was put out, we consulted and that was the end of the process—but we are moving away from that rather rigid approach.

That said, we have a standard way of going about such matters. Each of our law reform projects begins with the production of a discussion paper in which we explain the present law, set out the defects in it and identify ways in which it could be reformed. We might make firm suggestions on how we think that the law should be reformed or we might ask more open-ended questions that seek views on the best way forward. The discussion paper will be published on our website and distributed among a range of interested organisations and individuals. Although we have core consultees that we consult on every paper that we issue—which include the legal bodies and a range of professional organisations that have an interest in our work—we also tailor our consultations to other stakeholders who have an interest in the topic that we are considering. As is the case with the Executive's consultation exercises, we have a standard consultation period of about 12 weeks, following which we examine the responses.

That is the standard approach to consultation, but we vary that according to the topic that we are investigating. Recently, we have dealt with some highly technical areas of law—for example, the registration of company charges. I confess that that topic does not have great public appeal, so our consultation will be targeted at bodies that have a professional interest in that. We have also considered a wide range of topics on family law, succession law and the rights and responsibilities of children. Those are examples of subjects on which we consult far more widely, by issuing public consultation leaflets and holding public meetings and seminars, for example. We try to be flexible in our approach to ensure that we reach the consultees whose responses we feel will contribute best to our process.

We follow up on responses when to do so will be helpful; for example, we might want to pursue particular issues that have been raised to ensure that we understand the points that have been made. In some cases, we undertake public opinion surveys. We have done that with some of our family law work, in relation to which it has been especially important to reach a wide cross-section of the public.

The establishment of advisory groups is another means by which we consult and take on views from other interests. An advisory group will be set up for each of our law reform projects and we will get expertise on board at all stages of the exercise so that we can test our provisional proposals for reform on professionals. Often they will be lawyers, but not exclusively; it will depend on the area of law that we are considering. In our recent exercise on insanity and diminished responsibility, the advisory group included lawyers, psychiatrists and psychologists to help us get the balance of our reforms right.

That is a broad picture of our consultation process but we are well aware that there is a need to be flexible in our approach to consultation exercises. We are open to doing them in whatever way we think is most appropriate for the particular topic that we are examining.

Murray Tosh: Thank you for that full answer. You anticipated the question that I was going to ask about the selection of consultees.

I would like a little bit more information about what the commission does with the information that it receives through the consultation process. Executive and local government consultation would follow the pattern of publishing the consultation responses and then publishing the evaluation of those responses, indicating whether

points made had been accepted or rejected and why. Does the commission do that—or might it work towards doing that—so that those you describe as the stakeholders might see where their submissions had gone during your deliberation process?

Jane McLeod: We are undertaking some evaluation of our consultation processes so I am not sure that I have a hard and fast answer for you. Our practice has not been to produce a published analysis of consultation responses. We have tended to deal with that at the report stage of our exercise, and to incorporate in the report a summary of the responses that we received and an analysis of those responses. Then, as we formulate the recommendations, we explain in reasonable detail why we reject some views and go with others.

At the moment, we are considering whether we should make a summary of consultation responses more widely available at an earlier stage. We have not reached a firm conclusion on that, but we are thinking about it.

Murray Tosh: I would have thought that if you did that, you would increase the likelihood of getting beyond what might be relatively narrow groups of stakeholders. The process that you described is obviously heavily dominated by input from the legal profession, plus cognate professions depending on the issue. In the political arena, we are conscious of drawing responses from people who might have views about what should be done but lack the connections, structures and points of reference where we would hit them. Of course, we use the website and repeated consultation to draw more people in.

Jane McLeod: In some ways, we have to go out and elicit responses and not just wait for them to come in. We are certainly open to considering different ways of doing things. One of our current projects is dealing with rape and other sexual offences. There is going to be wide public interest in the ideas that we come up with and people are going to be interested in contributing to the process of formulating the policy. That might well be an example of a subject on which we would go out and about more than we would do in other cases, where we are considering more technical subjects. We have not decided on the consultation process for that exercise, but we will consider a range of options.

Murray Tosh: We talk about the "usual suspects".

Jane McLeod: We have those too.

Murray Tosh: We have a mission to get beyond them. I am not sure how well we succeed in that, but we always have the aspiration and it is one that we commend to other organisations.

Jane McLeod: We share that aspiration, but it can be difficult in some exercises.

The Convener: We will move on to talk about regulatory impact assessments. We know how important they are and Adam Ingram has a few questions about them.

Mr Adam Ingram (South of Scotland) (SNP): The regulatory impact assessment is acknowledged as the main tool for informing and improving policy decisions about regulation. When the Scottish Law Commission frames proposals for reform of the law, does it conduct RIAs?

Jane McLeod: We do not conduct RIAs in any formal sense. As we are framing our proposals, we will have discussions with the Executive to identify the implications of regulatory impact in certain areas. That is a point that we will consider throughout the exercise. We often do not have the expertise to undertake that exercise ourselves and it tends to follow at the stage when the Executive conducts its consultation, following our recommendations.

Mr Ingram: It is down to a question of in-house expertise or resources. Would the commission like to go down the route of conducting RIAs, or does that automatically get passed on to the Executive as its responsibility?

Jane McLeod: If we can tap into the relevant expertise elsewhere we are happy to do that, rather than duplicating processes. There might be occasions when it is easier for us to make those assessments ourselves. The situation varies from topic to topic.

Mr Ingram: The argument might be that for RIAs to work properly, as envisaged, they have to be built into the process.

Jane McLeod: We can often seek views on the subject as part of the consultation process. We can ask the people we are consulting where they think impacts will arise and we can take that on board throughout the exercise.

Christine May: If you take consultation and regulatory impact assessment to be two elements of the same sort of thing, and you are asking users for their views, do you think it would be useful for the wider impact of the regulation on that individual or entity to be taken into account? Would it be useful for those responses to come back for you to feed to the appropriate Executive department or agency? I am interested in the views of the Faculty of Advocates on whether that sort of work would make your job of interpreting the legislation on behalf of individuals any easier.

Jane McLeod: I agree that there would be value in doing that as part of the consultation process.

Jonathan Mitchell: The Scottish Law Commission's consultation process is a Rolls Royce model; it is very good indeed. I know that that sounds as though I am just flattering someone who is here, but the commission's process is a good one. Its consultations typically take far longer, and more attention is paid to them than is often the case—to be perfectly frank—when something has been driven by a policy maker. The commission has the advantage of not being a policy maker. For example, if the commission wanted to reform family law by providing for single-sex marriages or single-sex divorces, or whatever, it would have the advantage of not having a policy position when it begins. The commission identifies something that concerns and interests other people and it can float the question and ask what people think. It can ask what people would think about how the reform might be done if it were to happen. Accordingly, the commission can afford to take the consultation process far more seriously than somebody who, from the beginning, has an agenda for what they want to do.

The commission has a second advantage. The quality of input into the manufacture of its consultation papers—which are effectively the white paper, the draft bill and the commentary—is very high. Although the commission is, I think, rather short of resources, those resources that it has are of a very high quality. If you read the commission's publications, you will find that they are pretty good by Scottish standards. Obviously, there are exceptions, but there always are.

The commission's approach is very different to that which applies when a political task has become part of a draft proposal. At that point, consultation takes a rather different form and deals with details or methods.

11:30

Christine May: Forgive me for interrupting, but my question was not about consultation on specific pieces of legislation; it was posed more in the context of the wider regulatory or legislative burden on one entity. I wanted to explore whether, like Miss McLeod, you feel that doing a wider exercise would be a good thing.

Jonathan Mitchell: You were quite right to interrupt me. I am sorry—it is the occupational disease of banging on about things for too long.

The problem is that, with much of the Scottish Law Commission material, we are not really looking for a regulatory impact assessment in the narrow sense. If there are changes to the laws of succession or divorce, that does not, in the narrow sense, have any regulatory impact on anybody anywhere. Rather, it has an impact on ordinary members of the public and on judges and members of the legal profession. I think that you are looking for something rather different there.

The Convener: That was useful. Let us now move on to discuss existing regulation.

Christine May: I would like to test each of your views on the accessibility of regulation. We discussed this when we talked about how people might look at and use existing regulation. How does the Scottish Law Commission fulfil its statutory duty in relation to consolidation under section 3(1) of the Law Commissions Act 1965? You said in your submission that you felt that it would be a good thing if we had a further programme of consolidation. Will you talk us through that? You also commented that consolidation is not as simple as just using scissors and paste. To go back to the earlier discussion, would electronic storage and alteration be helpful for consolidation?

Jane McLeod: On the general point about how we fulfil our statutory function, you will be aware that consolidation is a specific aspect of our remit. Generally, we fulfil that by preparing programmes that identify areas of the law that we think merit consolidation. Those are then approved by ministers. So far, there have been four such programmes in the commission's lifetime. The last one was published in 1982.

As you will be aware, we do not have a current programme. Although we are engaged in assisting the English Law Commission with some consolidation of United Kingdom legislation, no consolidation of Scotland-only legislation is under way at the moment. That is much to our regret, as we regard consolidation as an essential, albeit unglamorous, part of our function. Basically, it is to do with keeping the law up to date, modern and easy to understand as far as that is feasible.

Although our last consolidation programme dates from 1982, we have done consolidation work in the period since. Most recently, there was the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003. The previous piece of work was a substantial consolidation exercise in relation to planning law, in 1997. Largely, the difficulty has been a lack of drafting resources. The will is there to do more work of that sort, but the drafting resource is crucial. Without it, we would have difficulty in making much progress.

You mentioned the availability of amended text on the statute law database—the SLD. That will be of huge benefit when it is eventually made available to the public at large. It does not do away with the need for consolidation exercises, but it makes the current law a whole lot more accessible than it is at present. Consolidated texts of existing legislation in the SLD are more or less

comprehensible, depending on how old the legislation in question is. In our most recent consolidation, of salmon legislation, the current statutes dated from the mid-19th century right through to the 1960s and 1970s, and there is no way that the texts would have been comprehensible to anyone but the experts, even in an updated form. There is always a role for proper consolidation.

Consolidation is more than a paper, scissors and paste exercise, although I accept that a big element of that, and getting the sellotape and all the rest of it, is involved. The position depends on the complexity of the area of law concerned. It is about more than just pulling existing texts together; it is also about trying to update and simplify the language without changing the meaning. The salmon legislation consolidation exercise dealt with some fairly complex legislative provisions, some of which were exceedingly technical. At times, there were difficulties in discerning what the policy was in the first place, never mind trying to maintain it. Producing a satisfactory consolidation raises issues other than the need simply to stick existing texts together.

Christine May: I turn to subordinate legislation. I suspect that I know the answer to this, but would you recommend that there should be a rule on the number of times that subordinate legislation should be amended before consolidation? Would you like to set a figure on that?

Jane McLeod: I am not sure that I would like to set a figure on it. In previous jobs, I have been involved in drafting some of the stuff, so I am perhaps speaking with two hats on.

In principle, what you suggest must be right—it is the ideal that we should perhaps go for. Whether it is worth the effort that is involved in having a full-blown consolidation following, say, five, six or seven amendments depends not only on the number of amendments but partly on the extent of those amendments. The aim should be to have a rolling programme of consolidation.

The Convener: What are your views on how we should prioritise areas for consolidation and on the role of the Scottish Executive and the Parliament in agreeing any such prioritisation?

Jane McLeod: A number of basic issues are relevant in identifying areas that are suitable for consolidation. How difficult is the current law to identify and understand, especially if it is scattered through the statute books from the year dot? How difficult is it for users of the legislation—the people who have to operate, apply and advise on the legislation—who will not all be lawyers? We must also consider whether we can bring together the area of the statute book in a single statute in a satisfactory way without making substantive amendments to the existing provisions. The purpose of consolidation is to pull together all the law in a single statute without making more than minor and technical amendments to the existing law. If we go beyond minor and technical amendments, we do not have the advantage of the simplified parliamentary procedure for getting a consolidation bill through.

I suspect that we could all identify a number of areas that, on the face of it, look ripe for consolidation but which, when we consider the particular provisions, might require more substantive amendment than would be possible in a consolidation exercise. That might rule out immediate consolidation and require us to make pre-consolidation amendments before we pull together the law into a single statute.

The converse of that are areas of the statute book that look ripe for consolidation but in which we know that an Executive amendment is just around the corner. In that case, we might not want to proceed with consolidation straight away, and we might want to wait for the next lot of policy changes to be made before moving towards a consolidation exercise.

Having not been involved in drawing up a programme of consolidation, I am not speaking from experience but, over the years, the commission has received a number of suggestions of areas that would benefit from consolidation, which we have taken on board. In the past, we consulted the then Scottish Office. I hope to speak to the Executive soon to identify where we might go with a consolidation programme, whether we produce an official, published programme or simply identify two or three areas of the statute book to consider as soon as we have the resources to do so.

The Parliament in general and the Subordinate Legislation Committee and others would have an interest in the areas that we consider. We would welcome suggestions and ideas from the Parliament about which areas we should consider as a priority.

The Convener: That is helpful. We look forward to getting written information from you about what you are going to do.

In answering my question, you were talking about the criteria that you would use to prioritise areas of the law for consolidation. Christine May used the example of an area in which we have seen amendment after amendment; there comes a point at which it is difficult to follow what is happening. It would be helpful if you could tell us what criteria you have in mind for deciding which areas would be included in the programme of consolidation.

Jane McLeod: We are happy to do that.

The Convener: It would be helpful to know who could help in that exercise. Obviously, the commission is well placed in that regard, but you said that parts of the Parliament—I do not know whether you were thinking of committees—might also be involved. Information on that would be helpful to us.

I seek the thoughts of the Faculty of Advocates on the topic.

11:45

Jonathan Mitchell: In a sense, we in the faculty have an enormous advantage over the ordinary people of Scotland. The problem that most people have is that they do not have access to the legal texts to which we have access. We have the enormous advantage of seeing what are, in a sense, the already consolidated versions of statute, in the extremely expensive loose-leaf paper editions or the even more expensive online editions. In a sense we are shielded from the problem.

As Jane McLeod said, in considering whether an area of statute is a priority for consolidation, we must ask, first, whether it is hard to follow at present and, secondly, whether it is self-contained and not in need of policy amendment. The third test is whether consolidating it would be reasonably easy. Some areas of statute law are easy to pull together in a consolidation bill, but others are not. The fourth consideration, which is significant, is how important the law is to the constituency that is using it, which does not necessarily include just lawyers and accountants.

I return to a point that Christine May made about the problems that we face when someone comes to us with a big pile of paper on an area of law. An area that is crying out for consolidation, because that was last done in 1987, is public sector tenancy legislation. A body of statute law was brought together in 1987, but a number of pieces of legislation have been passed since then. The 1987 act was amended before it even came into force, which is almost unique—we never had to look at the edition that could be bought from Her Majesty's Stationery Office. Many people need to use the legislation, but they cannot do so without looking at a number of texts. There are many policy issues involved, but the policy is already in the legislation.

I use that example to illustrate the point that value to the public is important. In a sense, we are cosseted, because we can consider what, to a lawyer, are high priorities, such as civil jurisdiction legislation. That is an absolute mess of amending provisions, but at least the people who need to use it have full access to the texts.

The Convener: Do you envisage consultation to firm up a programme of consolidation? We have talked about how important the criteria for determining the priorities are. Will you consult on those as well?

Jane McLeod: I envisage some form of consultation as we move towards drawing up a programme. I would not like to say at this stage precisely what form the consultation process would take. In some ways, the main stakeholders are the Parliament, the Executive and legal interests. It might be appropriate to consult beyond that; I would not like to say at this stage. Part of the exercise is to seek views on how we identify the criteria.

The Convener: I do not want to put you on the spot. I am quite happy for you to go away and think about the matter.

Jane McLeod: I would be happy to come back with further thoughts once we have come to a considered view.

The Convener: I assure you that we are really near the end of our questioning; we are not going to exhaust you much more. I return to the question that Murray Tosh asked about electronic publishing.

Murray Tosh: Before you come to that, I want to clarify something. When I read the *Official Report*, I might find that this point was covered satisfactorily, but I want to be clear in my mind. On the question that we asked about outsourcing, the Scottish Law Commission's point was essentially negative. You said that you felt that there had to be closeness between the policy input and the drafting. However, the faculty's paper made what seemed to me to be the contrary point. It says:

"Consolidation, unlike new legislation, does not to any great extent involve policy issues."

The faculty favoured a degree of outsourcing.

The conclusions are different, and there is more than just a subtle difference in the wording; there are two sources for the words and there are different conclusions. Can we debate that briefly, so that we are clear about what is being said about outsourcing and where the outsourcing would be done, given that the papers refer to the fact that there is a limit to the available drafting resource, as we already know?

Jane McLeod: It might help if I clarify my view. We are not saying that the outsourcing of drafting would not be possible for a consolidation exercise.

Murray Tosh: I did not take it that you were saying that it would not be possible; I took it that you were not as enthusiastic about it as the Faculty of Advocates is, to say the least.

Jane McLeod: In any consolidation exercise, there is more of an issue about where the policy input comes from than about where the drafting

expertise comes from. I do not think that we would have any difficulty in engaging outside draftsmen to undertake a consolidation exercise. If we were to go down that route, there would be an issue about how the drafting resource was funded, which would be a significant issue to resolve; however, in principle, I would not see that as a difficulty. Of more concern is how we would ensure the input that is required from the Executive at the official, policy responsibility level. Some input is always required in that context to ensure that the policy is understood and that people are agreed that the policy is being maintained in the consolidation bill that is drafted.

Murray Tosh: Is there a resource that could be brought to bear if the decision was made that drafting should be outsourced?

Jane McLeod: I am sorry; I did not quite catch that.

Murray Tosh: Would the draftsmen be there if the Executive decided to consolidate and outsource the drafting? Is there a resource that it could tap into?

Jane McLeod: The resource that we have tapped into occasionally is the non-Executive bills unit.

Murray Tosh: So we are the alternative. That clarifies the matter. Thank you.

The Convener: My final questions relate to the statute law database and its accessibility to the public. First, should the public have access to the legal texts free of charge? You seem to be saying that, if historical information was required and a bit of work would be involved, you would not want the service to be free of charge. Secondly, what priority do you think should be given to making accessible what is available on the database?

Jonathan Mitchell: One of the problems that I have is that there is a large project going on in London that very few people outwith the project know much, if anything, about. Those who are running the project have not been very forward in saying what they are doing, how it will work and what its policy justifications are. As a citizen, I recognise that there is a fundamental democratic point. In a free society, it is wrong that people should have to pay to find out about the laws that bind them, which is a quite separate exercise from getting advice about how to work within the law or avoid it—which is what people come to us for.

By its nature, the material is already available electronically for internal use, and there would be no marginal cost whatever to deleting the password protection for those parts of the website that provide access to the database. What we have here is an attempt to get the public, in paying for access to the laws that govern them, in effect to pay the internal costs of the Government agencies that also require access to those laws. Because of the nature of electronic publishing, the marginal cost of making the texts publicly available would be nil.

I draw no distinction between historical texts of legislation that was passed by Parliament and later texts that are produced today or were produced at some intermediate date. The public's interest in both cases is identical: it is in the law that governs or governed them on the date that matters—it is not necessarily anything to do with the date on which the legislation was passed. I think that a lot more noise should be made against the rather confidential memos that have passed to and fro between the DCA in London and whoever about the proposition that there should be charging for the service.

The extent of confidentiality that exists about the database reaches as far as us. At the moment, there is a statute law database that is available to be seen in-house by Government solicitors, but it is not even made available to Government counsel who represent those solicitors and their departments in court. That is just barmy. It is the high point of the more general problem. Nothing should be secret or confidential in answer to the question, "What is the law?" That is not the sort of information that the state has a right to charge citizens for. Given the fact that electronic publishing has a marginal cost of zero, the Parliament is in a good position to ask at least for our material—for our part in the general picture—to be released free of charge.

We must get away from what seems to be a dance of the seven veils by the Department for Constitutional Affairs. Because it is giving out a second-rate product free to the public, it thinks that it is okay to charge for the first-rate product—the first-rate product being the comprehensible version of the legislation.

The Convener: Thank you very much. We are ending on a controversial note. We will contact the DCA and ask for clarification of what is happening.

Do you think that the Scottish Executive and the Parliament should have greater responsibility for the database as it develops?

Jonathan Mitchell: I am inclined to answer that question first, although Lorna Drummond and Jane McLeod will have views, too.

My knee-jerk response is to go back to Montesquieu's division between the legislative and executive functions. In an abstruse sense, what we are talking about is a truly legislative function, not an executive function. What the law is is nothing to do with the Executive; the Executive's job is to work the law. I would have thought that the matter should be handled within Parliament, as

a matter of basic democratic ideology. However, from a lawyer's perspective, it makes no difference at all.

The Convener: Thanks very much. Do committee members have any further questions?

Members: No.

The Convener: Does that cover everything that Murray Tosh asked about?

Murray Tosh: Yes. The latter points were especially helpful in clarifying the issue and putting it in fairly stark terms. It has been a good session—much more interesting than I expected when I read our confidential briefing paper in advance.

Jonathan Mitchell: We have found it interesting, too.

The Convener: It amazes us, but subordinate legislation is a lot more interesting than many people think. I thank our witnesses for coming along this morning. I am sorry that our discussion has taken a little longer than you perhaps thought it would.

11:58

Meeting suspended.

12:01

On resuming—

Draft Instruments Subject to Approval

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2005 (draft)

Scotland Act 1998 (Modifications of Schedule 5)(No 2) Order 2005 (draft)

The Convener: No points have been identified on the orders.

Instrument Subject to Approval

Local Government Finance (Scotland) Order 2005 (SSI 2005/19)

12:02

The Convener: No points have been identified on the order.

Instruments Subject to Annulment

Road Traffic (Permitted Parking Area and Special Parking Area) (South Lanarkshire Council) Designation Order 2005 (SSI 2005/11)

Road Traffic (Parking Adjudicators) (South Lanarkshire Council) Regulations 2005 (SSI 2005/13)

Non-Domestic Rate (Scotland) Order 2005 (SSI 2005/14)

12:03

The Convener: No points have been identified on the instruments.

Community Reparation Orders (Requirements for Consultation and Prescribed Activities) (Scotland) Regulations 2005 (SSI 2005/18)

The Convener: The legal advice has raised a few issues on the regulations, most of which are to do with the interpretation of the enabling power

and whether the regulations are ultra vires. I need the committee's views on this one.

Murray Tosh: We should just ask the Executive the question.

The Convener: Personally, I think that this is a grey area. The legal advice says that the Antisocial Behaviour etc (Scotland) Act 2004 obliges local authorities to consult

"such persons or class or classes of persons as the Scottish Ministers may by regulations prescribe."

I think that that covers what is in the regulations. However, I am happy to ask the question of the Executive, if the committee thinks that that is the way to go.

Christine May: I think that the regulations interpret the original intention in a reasonable way. However, it is the practice of the committee that if a member wishes us to put a question, we do so. If Murray Tosh particularly wants us to do that, I do not have a problem with that.

Murray Tosh: I do not have a pressing policy reason for asking the question, but it strikes me that there is a significant difference between

"persons … the Scottish Ministers may … prescribe"

and persons whom

"the local authority thinks appropriate."

If those descriptions are felt, in general terms, to be mutually compatible, that is an interesting perspective that we should explore.

The Convener: I am happy to ask the question of the Executive. Is that agreed?

Members *indicated agreement*.

The Convener: There are also some minor points on the regulations and I suggest that we put those in an informal letter.

Members *indicated agreement*.

Instrument Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (No 2) (Scotland) Order 2004 Revocation Order 2005 (SSI 2005/16)

12:05

The Convener: No points have been identified on the order.

Instruments Not Laid Before the Parliament

School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004 (Commencement No 1) Order 2005 (SSI 2005/10)

Land Reform (Scotland) Act 2003 (Commencement No 3) Order 2005 (SSI 2005/17)

Act of Sederunt (Ordinary Cause Rules) Amendment (Caution and Security) 2005 (SSI 2005/20)

12:05

The Convener: No points of substance have been identified on the instruments, but minor matters have been identified. Is it agreed that we will send an informal letter to the Executive to cover the minor points?

Members *indicated agreement*

The Convener: I thank members very much because we have had a longer meeting than we usually have.

Meeting closed at 12:06.

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