SUBORDINATE LEGISLATION COMMITTEE

Tuesday 1 February 2005

Session 2

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CONTENTS

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SUBORDINATE LEGISLATION COMMITTEE

4th 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:

Michael Clancy (Law Society of Scotland)
Dr Aileen McHarg (University of Glasgow)

CLERK TO THE COMMITTEE

Ruth Cooper

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 1 February 2005

[THE CONVENER *opened the meeting at 10:34*]

Regulatory Framework Inquiry

The Convener (Dr Sylvia Jackson): I welcome colleagues to the Subordinate Legislation Committee's fourth meeting in 2005. I give apologies from Gordon Jackson, Stewart Maxwell and Mike Pringle.

I welcome the witnesses. We have Michael Clancy, who is the director of parliamentary liaison at the Law Society of Scotland, and Dr Aileen McHarg, who is the senior lecturer in public law and convener of the centre for regulatory studies at the University of Glasgow. We thank you very much for your concise papers, which made interesting reading. As you will know, we are taking evidence as part of our on-going review. Would you like to make a few introductory remarks? After that, we will ask questions. I do not know whether Michael Clancy or Aileen McHarg would like to speak first.

Michael Clancy (Law Society of Scotland): We have not divided the labour. Will I kick off?

Dr Aileen McHarg (University of Glasgow): Yes.

Michael Clancy: I have no opening remarks, save for saying that I must abase myself. In my response to question 26 in the committee's consultation paper, which is on page 4 of my submission, I must have had an accent lapse, which my secretary interpreted almost in a cockney fashion. Instead of referring to a comprehensive programme, the answer says "compressive programme". That is highly ironic. I have no other comments; I will take questions when members are ready.

The Convener: Lovely. Would Aileen McHarg like to say anything?

Dr McHarg: I have nothing to say other than to thank the committee for inviting me to give evidence.

The Convener: It is a pleasure.

We will discuss first improving the quality of new regulation. As the witnesses know, regulatory impact assessments are seen as an important part of that. Christine May will begin with a few questions on that topic.

Christine May (Central Fife) (Lab): Good morning. I am interested in the preamble to Dr McHarg's submission, which was refreshing and gave another view of better regulation, which is that regulation is necessary, Governments should do it and those who whinge should be specific or very quiet—I paraphrase. I will test you a little on how far you take that view and whether you accept the case for ensuring that new or amended regulation does not duplicate, work against or make more onerous existing regulation.

Dr McHarg: We should not duplicate—of course not. Why have two rules if we can have one? Whether regulation should not be made more onerous depends on the circumstances—why regulation is being made more onerous and the benefits of doing that. A presumption against regulation per se cannot be made. That is my objection to much of the better regulation agenda. Despite the terminology of better regulation, much of what motivates that is a deregulation agenda: the notion that Government intervention is suspect from the outset and is justified only in narrow circumstances.

Christine May: In that case, should better regulation take the form of streamlining and avoiding duplication, overlap or conflict but otherwise go no further?

Dr McHarg: Calling that better regulation does not add anything. I would call that good government or good policy making. No conscientious policy maker would want the outcome that you described, but sometimes that will happen inadvertently. Finding ways to avoid that outcome that do not have other costs that outweigh the benefits is a valuable objective.

As the preamble says, much of what we are discussing has a motherhood-and-apple-pie quality. How could anyone object to good regulation? Can we imagine someone having a worse regulation agenda? Of course not.

Christine May: You concede that, whatever we call it, examining regulation is necessary to ensure that it remains relevant and appropriate and does not impose undue burdens.

Dr McHarg: Yes.

Christine May: Do you have a problem with the term "regulatory impact assessment"?

Dr McHarg: I have no problem at all with the notion that one should consider a policy's effects. Of course one should. However, I suppose that I object to the formalisation and rationalisation of the process and the assumption that there are right answers to the questions, that the way to achieve ends is always the same and that the answers can be provided by experts.

Christine May: Thank you. That is helpful.

The Convener: We will now consider various aspects of consultation, such as timing.

Stewart Stevenson (Banff and Buchan) (SNP): I would like to explore the subordinate legislation consultation process. Should there always be consultation? Should draft instruments that are being consulted on always be published in a way that makes them available to the general public? Perhaps we could start with those two questions.

Michael Clancy: Whether there should be consultation depends on the nature of the proposal for change. A minor typographical change is probably not the sort of thing that should be consulted on, but more substantive and far-reaching reforms certainly should be.

I do not see any reason why draft instruments should not be made available in such a way that the general public can have access to them. After all, they will, generally speaking, have some impact on the general public. If a person is so minded, they can always go to the Executive's website and track something down anyway, if they are able to. I am certainly in favour of having that element.

That takes us back to the consultative steering group's deliberations on the establishment of the Parliament. An environment of power sharing and open consultation was discussed in those dim and distant days. I remember the key principles, which were to ensure that the Parliament would respond in an open, accessible and responsive way to legislation and would interact with people who would be affected by legislation. In principle, therefore, and as the Parliament is based on those founding principles, I do not see any reason why there should not be such consultation.

Stewart Stevenson: You stopped short of saying that there should be a requirement to consult—you said that consultation is a good idea and that it should certainly be considered. Are there any particular types of subordinate legislation for which a consultative process should be required? I have in mind any type of subordinate legislation that changes the criminal law.

Michael Clancy: A value judgment on the nature of the legislation is really involved. I can see that the criminal law and reforming it may affect quantitatively more people than, say, an amendment to the milk quota regulations, but the milk quota regulations could have a substantial impact on a whole industry. Between 1999 and the end of 2004, the Scottish Parliament approved 2,914 Scottish statutory instruments, which is an awful lot of legislation. Consequently, an awful lot of consultation would have been needed. I am sure that some of those regulations or orders could have been passed over without too much consultation, although I have not deconstructed them enough. Some would be technically difficult for the general public—let alone specialist interests—to deal with. The milk quota regulations, for example, or the amnesic shellfish poisoning regulations—which members will know better than I do, and which litter the committee's foreshore—might have a tinge of that difficulty. Perhaps such things would be beyond the interest of most people, although criminal law would certainly be of exceeding interest to many people.

10:45

Stewart Stevenson: The shellfish industry in Scotland, which is worth £12 million a year, might have something to say about that.

I have another question before Dr McHarg addresses the same points. Under some circumstances, would it be reasonable to incorporate a legislative requirement in a bill that forces consultation on certain kinds of subordinate legislation?

Michael Clancy: Yes. The Law Society of Scotland frequently promotes amendments to the effect that there should be consultation with relevant interests when something is being proposed. Recently, there was a proposal to that effect in relation to the Constitutional Reform Bill, which is not Scottish legislation but United Kingdom legislation and is therefore being considered at Westminster. The proposal related to the rules that may govern procedure before the supreme court under part 2 of that bill. There was certainly some resistance to the proposal to have a broader consultation than with only the higher judiciary. However, in the latter stages of the bill's passage in the House of Lords, amendments that extended the range of consultation, which the society had promoted, were accepted by the Government. The Charities and Trustee Investment (Scotland) Bill is currently before the Scottish Parliament. In a memorandum to the Communities Committee, the society suggested that there should be consultation on the broad range of issues that Scottish ministers have power over under that bill.

There should be a statutory obligation. There may be resistance because people may ask whether there should be a statutory obligation to consult on a consequential amendment that is caused by another piece of legislation or in circumstances in which there is no question but that a change has to come through. However, by and large, it is appropriate that there should be such an obligation when examining legislation.

Stewart Stevenson: Does Dr McHarg wish to add to that, to differ or to amplify?

Dr McHarg: For a number of reasons, my view is that there should be a general statutory duty to consult on subordinate legislation. As my submission says, there are many situations anyway in which there are enforceable obligations either under specific statutory provisions or in common law. In a sense, having a general duty to consult would not be a big step.

There is also something of an anomaly. The situation with making subordinate legislation can be contrasted with the position under the Deregulation and Contracting Out Act 1994, which applies to the removal of regulatory provisions, whether in subordinate or primary legislation. In that situation, consultation is mandatory. There is a rather odd situation in which there must be consultation when a rule is taken away but not when one is put in.

I accept Michael Clancy's point that certain things seem so trivial that there does not seem much point in consulting, but it depends on what is meant by consultation. If all we mean is that proposals should be published in some form of public register or on a website somewhere and that there should be a short period in which anyone who wants to can make a submission or a response before any further steps are taken, that does not seem to me an unduly burdensome requirement. We are not necessarily talking about sending out an elaborate consultation paper to different organisations, organising public meetings and other things that we would want to do for something that is more general. I do not think that there can be a strong objection to a routine requirement.

Stewart Stevenson: Would you therefore accept that the 40-day period within which negative instruments can be annulled by Parliament would be an appropriate period during which any consultation could take place?

Dr McHarg: It could be, but the only trouble is that if the consultation period is exactly the same as the negative resolution period, you could receive a response on day 40 from someone with a strong objection but have no time to do anything with it.

Christine May: Do either of you have any view on the value of having a statement on consultation and regulatory impact such as the one that e-mails carry, which says "This e-mail has been swept for viruses"? I think that Dr McHarg talked about paying lip service in her submission. Would a statement such as "We do not see a requirement to consult or to conduct a regulatory impact assessment with regard to this document" simply be lip service?

Dr McHarg: What would be the significance of such a statement? What consequences would flow from it? Would it enable a parliamentary committee such as this one to ask why that view had been taken or would it enable someone to go to court and ask why?

Michael Clancy: Sometimes statements such as "We are not going to consult" are made but never reach anyone's ears. If the civil service informs a minister that they have the power to press ahead without consulting or conducting a regulatory impact assessment and the minister decides to do that, that should be okay. However, why would you make a statement to that effect?

If you are basing your philosophy of legislation on factors such as the consultative steering group's principles, there would have to be a particular balance of convenience in order for you to say that you were not going to consult. The arguments would have to be quite considered. In the event that you decided not to consult, simply publishing or making the instrument would be equivalent to making the statement that Christine May outlined.

The Convener: Dr McHarg answered my earlier question on the role and usefulness of regulatory impact assessments but I did not give Mr Clancy a chance to answer.

Michael Clancy: I thought that you did not ask me because you thought that the Law Society had no comments to make on regulatory impact assessments. Ah, well. Needs must.

The regulatory impact unit in the Cabinet Office specifies what regulatory impact assessments are all about. The process is meant to help policy makers think about the impact of their proposals, identify and assess alternative options, ensure that the consultation exercises are meaningful and reach the widest range of stakeholders, conduct negotiations with the European Union and other supranational law makers and consider whether the costs of a proposal balance with the benefits. Who could gainsay any of that? That sounds like a thoroughly good idea and it is almost impossible to say that such a thoroughly good idea is a bad one.

The proof is in the pudding, however. What happens as a result of the assessment? Does it mean that no piece of legislation that has emanated since 1998, when the Prime Minister issued his determination that RIAs should be issued, is without fault? Does it mean that all policies have been fully thought through? Does it mean that there can be no scintilla of doubt that some legislation might not have hit its target? Of course, ultimately, that leads us to the courts, which will be the ultimate test of whether some aspects of a regulatory impact assessment have been complied with.

The Convener: Do you think that regulatory impact assessments should be done as a matter

of course? What has been the usefulness and worth of regulatory impact assessments so far? You can answer that in a personal capacity or from the point of view of the Law Society.

Michael Clancy: I have to preface all my remarks by saying that they are personal because the Law Society took no view on part 1 of the consultation paper.

The question whether regulatory impact assessments should be done as a matter of course depends on certain factors. There might be some legislation that has no regulatory impact on business, charities, voluntary bodies or whatever. Although a piece of legislation might be a public act, it might affect only a few people, and there might be circumstances in which it would be inappropriate for an RIA to be carried out. For example, the first act of the Scottish Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, was an emergency piece of legislation. One would hardly expect RIAs to be conducted of emergency pieces of legislation. If there were to be an RIA of such a bill, it would have to be a quick one that assessed the need for the legislation as against the disbenefit of not having it. My broad answer is "It depends." In giving you that answer, I realise that I cannot remember the second branch of your question.

The Convener: Do you think that the regulatory impact assessments that have been conducted have been worth while? You said that the courts will be the ultimate test of whether aspects of a regulatory impact assessment have been complied with and I expect that you have a better feel than we have for how such matters have been progressing.

Michael Clancy: Having seen some regulatory impact assessments, I cannot say, hand on heart, that anything has ultimately led to litigation or that there have been any gaps in the thinking; I would have to make a speculative proposition.

By and large, if regulatory impact assessments meet all the requirements of the regulatory impact unit's checklist, they will have served some purpose and, generally speaking, that purpose is worth while. They allow people to flag up issues about consultation, for example, and enable them to ask whether consultation on a certain issue should run along the old green-paper and white-paper track or whether there should be a wider process that involves public meetings, internet chatroom discussions and so on. Pinning down people's thinking on such issues can be beneficial. Dr McHarg might have a different view, of course.

The Convener: Yes—I could not help but notice that Aileen McHarg seems to have a different view.

11:00

Dr McHarg: Michael Clancy was talking about listing the costs and the benefits and ensuring that the benefits outweigh the costs. Of course that should be done—in an ideal world. However, the problem is that the way in which costs and benefits are calculated using a cost-benefit analysis is highly problematic. It is very difficult to quantify certain types of cost and benefit and therefore it is sometimes difficult to work out where the balance lies. The way in which costs and benefits are portrayed can skew the final decisions.

I would like to give the committee a concrete example of an issue that was of interest to MSPs at the time: the withdrawal of the hydroelectric benefit—the cross-subsidy scheme in the north of Scotland for electricity consumers—and its replacement with an alternative subsidy scheme under the Energy Act 2004. The regulatory impact assessment that accompanied that legislation started by portraying a choice of two policy options: policy option 1 was to do nothing and to have no cross-subsidy scheme; and policy option 2 was to provide for a cross-subsidy scheme under the Energy Bill. The scheme would operate at the same levels as the hydro benefit, albeit in a slightly different way. The regulatory impact assessment said—ignoring all distributional concerns—that the welfare-maximising outcome would be to do nothing, because a cross-subsidy would be an interference in the market and would mean that electricity was being overconsumed in the north of Scotland relative to economically efficient levels. Assuming that the benefits to the suppliers equalled the costs to consumers, there would be a net welfare gain from doing nothing. However, if we took account of social objectives, such as fuel poverty targets in particular, the measure could be justified.

There are many objections to that approach. First, those were not the only two policy options. If we had started with a blank sheet of paper, we would almost certainly not have put in place a subsidy scheme at the same level as the hydro benefit. Once the rationale of the hydro benefit was taken away, there was no longer any rationale for continuing with the same level of subsidy. For political reasons, however, that was clearly the only option on the table.

Secondly, there was a financial welfare cost from introducing the cross-subsidy, but it was small and, taking account of social objectives, the balance was a net benefit. How could those two things be weighed up, however? On the one hand, there was a financial benefit; on the other hand, there was a social objective. If the financial benefit had been much greater, would the social objective no longer have outweighed it? Who knows?

Thirdly, the social justification that was advanced, which was to do with meeting fuel poverty targets, was not the only possible justification for the measure. Indeed, it was probably not the best justification for it. The best justification was probably to do with regional equity. The way in which measures are justified matters. The hydro benefit was withdrawn because of the argument that it was contrary to European law. There was also a question whether the new subsidy scheme complied with European law, and the way in which the measure was justified was crucial to determining whether it complied.

Finally, I turn to what was, to my mind, the strongest objection. Distributional concerns were treated as some sort of add-on and were regarded as somehow suspect and a temporary justification, because fuel poverty would one day be eradicated, so at some point there would no longer be any justification for intervening in the market. That presented a picture of false rationality and did not help in any decision-making process. It also skewed the political understanding of the issues at stake.

The Convener: Thank you very much for that concrete example—that was very good. The committee has no further questions on RIAs or consultation, so we will leave those subjects and turn to the question of easily understood regulation. I will ask you first about the advantages, as you see them, of plain language and a structure that is simple to use and understand.

Dr McHarg: If only that were achievable under all circumstances.

The Convener: I know that you have some concerns in this regard; perhaps you could outline them to us.

Dr McHarg: My concern is how such a requirement could be policed. If that is an aspiration, it is a laudable one. I cannot imagine that any parliamentary draftsperson sets out to be obscure. Presumably, they try their best to draft in a comprehensible way. That is not always achievable, however, perhaps because of the complexity of the subject matter and perhaps because of the technical language that must be used in the context.

In any case, many of the interpretation problems that arise do not stem primarily from obscurity or unnecessary complexity in the drafting of legislation. That kind of thing is annoying and it might not be straightforward, but with a bit of work we can usually work out what provisions mean. The more intractable problems with interpretation arise simply because we do not know whether a particular fact or situation falls under the terms of the provision. The provision might be simply constructed and perfectly clear in terms of the language used in it, but people might still argue that it means one thing rather than another, because that is in their interests.

The final problem, which has arisen in recent years in particular, is that we must increasingly read texts in the light of other texts. For example, we must read Scottish parliamentary legislation in the light of the limits on the Scottish Parliament's competencies. Do provisions encroach on reserved matters, for example? If we interpret a provision in a certain way, does it then encroach on a reserved matter? Does it conflict with the European convention on human rights? Does it conflict with European Community law? I do not think that such problems of interpretation are avoidable by having the objective of using simple language. However, the objective in itself is perfectly laudable and desirable.

The Convener: While we are on this topic—I will ask for the Law Society of Scotland's view in a moment—we spoke last week about the difficulties involved here. It can sometimes be difficult when technical language is used. In such cases, there might be a role for guidance material, although that can bring difficulties, too. Could you outline some of your reservations about guidance?

Dr McHarg: I do not have strong reservations about guidance. My view is that the growth in explanatory notes and so on has been enormously helpful in trying to work out what legislation means. It depends on the status that is given to the guidance material. Is it in some way a rival text to the text of the instrument, or is it merely guidance?

The Convener: Do you think that it would be useful if the Executive notes that accompany draft affirmative instruments were also produced for negative instruments, and if such notes for both types of instrument were published on the website of Her Majesty's Stationery Office, so that they were available to the public, as I gather they are in England?

Dr McHarg: I cannot see why not. I see no objection to that.

The Convener: I now ask for the Law Society of Scotland's views on those questions, starting with the matter of trying to put things in as plain and simple language as possible. One of the issues that came up last week with respect to guidance was that we need to be careful not to interpret an instrument in a different way to that in which it was intended to be interpreted. We are aware of that issue.

Michael Clancy: I agree with Aileen McHarg that plain language and simple text are ideals to which we should aspire. Whenever I read a bill or

a statutory instrument I am looking for something that I can understand. On the basis that I can understand it, that is a win.

We know that legislation must frequently deal with some very technical issues. For example, I recently saw a set of regulations from the Health and Safety Executive on genetically modified organisms that—I have to say—defeated me. That was not just because I can sometimes be that way, but because of the technical nature of the language.

Context is very important. People might think that it would be impossible to make an area such as tax law any better, given its convoluted nature. Each year's finance bill seeks to get round the avoidance techniques that were concocted the year before. However, the tax law rewrite project, which the Inland Revenue has been running for some time to make direct tax legislation clearer and easier to use, has produced some startling results. I cannot claim any deep knowledge of these matters, because my tax affairs are extremely simple, but part 1 of the Income Tax (Trading and Other Income) Bill, which is currently going through Westminster, consists of an overview of the legislation. That is a fantastic idea. As the bill itself has 886 clauses, an overview that tells us what we should expect in the bill provides a fantastic aid to clarity and guides us towards some understanding of the measures. I realise that the Scottish Parliament has not yet got to grips with an 886-section bill, but it has come close, with some pretty weighty bills on certain measures. Overviews might be useful in that respect.

The text-to-text issue, in which a provision in a bill or statutory instrument seeks to amend another piece of legislation, is perhaps one of the most problematic, because we have to watch how everything works very closely. Moreover, the provision might also implement legislation that has already been made, for example, in Europe. Again, one would have to be careful that in seeking some holy grail of clarity one did not lose the sense of the directive, regulation or decision that formed the basis of the text.

On guidance, I agree that explanatory notes are extremely useful in allowing people to get to grips with a bill's meaning. Indeed, of all the innovations of recent years, I would hold that one up as a cardinal virtue. Having been involved in the creation of guidance notes for a bill that was introduced in the previous session, I can tell the committee that formulating and working out such notes makes one think about the bill itself.

Care certainly has to be taken with the status of guidance, as it should not in any way controvert a Parliament's sovereignty or a devolved Parliament's competence. I recently saw the guidance that was issued for the Vulnerable Witnesses (Scotland) Act 2004, which assists in the examination of children in court. Stakeholders have put that guidance together very satisfactorily; it takes account of the issues and tries to show how the bill should work in practice.

At one point or another, all of us will have picked up "The Highway Code", which provides guidance on road traffic legislation. No one would go into court and say, "In fact, paragraph 23 of the Highway Code controverts section 298 of the Road Traffic Act 1988" or whatever. We need to be sure that guidance is guidance, not surrogate law, and that people know that. That said, people are sensible about this kind of thing, and no one will seek to argue that the guidance somehow replaces the law. As a result, where it is appropriate or necessary, guidance is a good thing to have.

11:15

The Convener: Would it be useful to provide Executive notes for negative instruments and to publish them on the HMSO website?

Michael Clancy: Do you mean the Stationery Office website? I think that the HMSO is different.

The Convener: Well, I am told that it is the HMSO website.

Michael Clancy: I am fully in favour of publishing such material on the website.

The Convener: Lovely. I want to thank you for using concrete examples to illustrate your points.

Murray Tosh (West of Scotland) (Con): I have a supplementary about the overview to the Income Tax (Trading and Other Income) Bill that Mr Clancy mentioned. What would such a measure achieve that the explanatory notes do not achieve already?

Michael Clancy: The explanatory notes go into much greater detail, either clause by clause or section by section, and help to flesh out the text of the provisions. When there is an overview in gremio of the bill, it will be there for as long as that legislation, if passed, remains on the statute book. "In gremio of" is clear language, is it not—that was ex facie a mistake. [*Laughter.*] As a result, the overview will provide guidance to anyone who wanders into the Stationery Office and picks up a copy of what might become the Income Tax (Trading and Other Income) Act 2005.

On the other hand, the explanatory notes might not be available or might be missing. The overview guides people to what to look for and tells them what the act comprises. For example, clause 1 of the Income Tax (Trading and Other Income) Bill says:

"This Act imposes charges to income tax under … trading income … property income … savings and investment income … and … miscellaneous income."

As a result, people who have a problem with savings and investment income will know to go to part 4 of the bill. That provides a helpful guide to those who will use the statute and, indeed, might lead them to ask where the explanatory notes are. After all, they might turn to part 4, and not understand a word of it.

The Convener: Obviously, it is all helpful. Murray Tosh will now ask some questions on enforcement.

Murray Tosh: Although both submissions clearly express the respondents' views, I want to press Mr Clancy a bit more on his response to question 18. He states:

"Scottish Ministers should have a power to establish a statutory code of good enforcement practice in relation to devolved matters in the same way as UK Ministers have under section 9 of the Regulatory Reform Act 2001."

Will you expand on your reasons for holding that opinion, so that we have a clear idea of why Scottish ministers should have such a power?

Michael Clancy: It will simply put them on an equal footing with UK ministers. They might or might not wish to exercise it.

Murray Tosh: So your response contains no suggestion that they should exercise it.

Michael Clancy: Having a power is different from exercising it. I presume that the Scottish ministers would decide—in that still, quiet moment that they have to decide such matters—whether to exercise the power. Having the power would put them on an equal footing with UK ministers and there is no good reason why the Scottish ministers should not be on an equal footing with UK ministers.

Murray Tosh: I understood the philosophical argument, but in terms of practical working, what does that allow UK ministers to do that the Scottish ministers cannot do? As the convener said, we like examples, in addition to the broad general point. We would like to know the limitations on how the system operates here.

Michael Clancy: I will have to write to the committee about that, because I have no such example with me.

The Convener: That would be welcome.

We move on to the importance of periodic review, on which Adam Ingram has a few questions.

Mr Adam Ingram (South of Scotland) (SNP): The topic is interesting because our witnesses have almost diametrically opposite views on it—perhaps not for the first time this morning. The Law Society's evidence says that it supports a systematic approach to the review of new legislation. It would like a statutory requirement for new legislation to be reviewed after, say, five years. It also approves the use of sunset or review clauses, albeit in the limited way that is proposed in the Mandelkern report.

Aileen McHarg's view differs on the ground that building in a review process could create hurdles to reforming poor legislation sooner rather than later. She also disapproves of sunset clauses and points out the embarrassment over the Erskine bridge tolls, which Murray Tosh and I remember. Can the witnesses reconcile those views?

Michael Clancy: We will have to publish an explanatory memorandum.

Christine May: Can we have an overview?

Dr McHarg: The committee's consultation paper refers to the blanket use of sunset or review clauses. In my submission, I do not oppose review, but I say that it should not be statutory. Sunset clauses are on the increase. They used to be rare in this country and the clearest example of them came from anti-terrorism legislation, which gave the signal that that legislation was unusual and of limited legitimacy and needed periodic reaffirmation of its necessity. I have no objection to that.

However, sunset clauses seem to be leaking out of that constitutional and human rights sphere into the regulatory sphere. A couple of months ago, I saw a newspaper report that ministers at Westminster had rejected a proposal to introduce a sunset clause in the Civil Contingencies Bill. Sunset clauses might be expected in such emergency-type legislation, but they were not used, whereas they are increasingly being used for other statutory provisions.

Sometimes, the reasons for using such clauses are understandable, because having a sunset or mandatory review clause is a way to show awareness of proportionality considerations. That applies in a human rights context and might also apply when working against the background of European Community regulation, when proportionality is a general principle of law.

I return to my earlier comments. Why should we assume that legislation routinely needs special justification?

Michael Clancy: My experience of sunset clauses is pretty limited. Aileen McHarg is quite correct in terms of the broader issues about constitutional interference with human rights. Clearly, that is an issue in relation to which a sunset clause would be appropriate.

The Mandelkern report talks about using sunset clauses in cases such as those about which there

is controversy, those that involve conferring rights on the state, those concerning changeable markets or technology conditions, those relating to pilot projects and so on. I can give you a concrete example in that regard. The Crime and Punishment (Scotland) Act 1997 established the Public Defence Solicitors Office and included a provision that it should subsist for a period of five years from the implementation of the act and that a research programme should be carried out in those five years to determine whether the proposal worked. That struck me as being a valid use of a sunset clause.

When a sunset clause is used, there is no assumption that something is not going to work; rather, there is an acknowledgment that, when one is trying out a new departure in policy, there might be a need to back it up. What appears to be a good idea might be shown, in the light of experience, not to be.

Experience is important when considering law reform, because it is a process that operates in the light of experience. It might be that there are changing circumstances in society, that there are new technological advances or that there are influences from other jurisdictions, such as Europe. There is a host of circumstances that would cause one to consider whether our law needs to be reformed. One piece of legislation that comes to mind in terms of the need for post-legislative assessment or scrutiny is the Protection from Abuse (Scotland) Act 2001, follow-up work on which is being done by the Justice 1 Committee. Obviously, as a committee bill, that was groundbreaking legislation. It was created to deal with a need and the committee wants to make sure that that need is being met and that the legislation is working. Having that kind of post-legislative scrutiny is valuable. A systematic approach to that is something that might be undertaken from time to time in certain areas under the auspices of the Scottish Law Commission or the Law Commission for England and Wales.

If we start thinking about our law as a more systematic entity, we might want to build a system that ensures that we ask ourselves what we want the law of Scotland to look like in 25 years' time, how we want it to be shaped, what influences we want to develop and what issues we want to anticipate. As we were saying just before this meeting began, in 1990, even the most prescient draftsman would have been unable to conceive of the word, "internet," yet there is legislation before this Parliament at the moment that deals with internet grooming.

Mr Ingram: Obviously, you are in favour of a systematic approach but, according to Dr McHarg, a situation might arise in which the Scottish Executive or some other body might use a proposed review that might be due in three or four years' time as an excuse to not change a law that needs to be changed urgently. We also have the situation where, presumably, resources are not infinite in terms of keeping up to speed or keeping the review on track. It comes down to the art of the possible, as Aileen McHarg suggested. We should always be on our toes, and not depend on a bureaucratic system to solve the problems. I think that that was your view.

11:30

Dr McHarg: It is partly that. It is partly about bureaucratisation. Some of the objections to mandatory review depend on the content of the review. The Australian review procedure requires you to show that legislation has no impact on competition or, if it does, that it is no more than necessary. It is not about saying, "Let's have a look at this and see if it's working." It embodies a substantive presumption against regulation, and every few years that has to be re-demonstrated.

That is a different kettle of fish from a parliamentary committee deciding after a few years to see how a controversial or innovative piece of legislation is working. That is a good idea, and it seems to be happening more often, which is a good thing. The issue is routinisation, along with presumptions against regulation, which sunset clauses embody, because you have to rejustify the legislation, not just determine whether it is working or needs amendment. If our theft law was on a statutory basis, would we want it to have to be renewed every 10 years? Would we want our divorce legislation to have to be renewed every 10 years?

Michael Clancy: Of course, one problem is that once you put it on a statutory basis, you possibly do need to review it. Theft law in this country is common law, whereas in England and Wales it is statutory. That statutory law is reviewed, not every day, but periodically and regularly. I am pretty sure that the Theft Act 1968 has been examined by the Law Commission for England and Wales.

A review might be a barrier to reform. On the other hand, it might be an invitation to a sunset provision: "Let's have this up until the time we have a review", and at the time of the review the sunset provision could take effect. Aileen McHarg and I are not far apart. In certain circumstances reviews will be laudable, and in other circumstances reviews will be negligibly useable.

Christine May: I would like to promote witness harmony by asking Mr Clancy whether he agrees with Dr McHarg's comment on page 6 of her submission, which states:

"On balance, therefore, I would support a general requirement to review new legislation, perhaps within 5 - 10

years of enactment. However, this should remain a matter of good administrative practice, rather than a statutory duty".

Michael Clancy: That is not inconsistent with the answer that I gave, which was that there should be a general requirement that the specified review period be five years.

Christine May: I think that that is a yes. I am delighted to have promoted such harmony.

The Convener: Our next questions are on improving the quality and accessibility of existing regulation.

Murray Tosh: I would like to ask Mr Clancy about his answers to questions 29 and 32. On the latter, you indicated that you approve of creating consolidated legal texts that the public could access. However, in the answer to question 29 you made no comment on whether users encounter difficulties in accessing regulations. I want to press you on that and ask whether the answer to question 32 is a philosophical rationalisation, or whether the Law Society of Scotland's answer to the question is formed by knowledge of or a belief that, in practice, users—whether it is the legal profession or the "regulatees", as Dr McHarg calls them—find it difficult to establish what the law actually says.

Michael Clancy: In that instance, the response had to be philosophical because I did not have time to take a poll of users and had no empirical evidence to put to the committee.

Murray Tosh: We can allow anecdotal evidence based on your extensive knowledge of the field.

Michael Clancy: Regulations are not that bad, so long as one knows the SSI number or one can search within the general frame. However, draft regulations are sometimes rather more difficult to get hold of, even when the committee is considering them. From my experience, I know that there can be difficulties in accessing the information; that is why it is a good idea for the Stationery Office website to have such facilities. The information should be freely available and free of charge.

Murray Tosh: I think that Dr McHarg took the same view, but I would like to press her on her answers to questions 29 and 32. She stresses the importance of having on that database not simply the current law but the original law and, I presume, any intermediate changes that have been made. Although I accept the point about academic research purposes—I am not unsympathetic to that—will you expand on why you think that lawyers and judges need the previous law to be able adequately to understand the current law?

Dr McHarg: Disputes about interpretation of statutory provisions usually get to court several years after the events in question, so what is applied is the law as it was at that time, not the law as it is currently. That is a practical reason why lawyers need to know what the law was previously.

Additionally, in trying to understand what provisions mean currently, it is sometimes helpful to understand how a statutory provision has evolved. What was it before? Is the change simply a semantic or grammatical change as a result of something else having been changed, or is it a substantial change? In answering such questions, information about the previous provision is one of the recognised aids in statutory interpretation.

Murray Tosh: Mr Clancy is nodding, so I take it that he agrees that all levels of subordinate legislation should be kept on the database.

Michael Clancy: Indeed.

Murray Tosh: Let us move on to Mr Clancy's answer to question 33, which relates to a programme of reform and simplification of all the existing legislation. Do you think that the Scottish Law Commission should be responsible for identifying priorities for consolidation? What criteria should whoever is given that responsibility have for determining priorities for consolidation?

Michael Clancy: The Scottish Law Commission has a statutory objective of proposing consolidation and codification. Given last week's evidence, it might not have been the highest priority for the commission to make consolidation proposals, but it has done so in certain circumstances—most recently in respect of the salmon legislation. The issue of criteria for assisting in assessment of priorities is highlighted by that example. Would it be more appropriate for us to have yet another consolidation of our criminal procedure, which affects many people, or to have consolidation of the salmon legislation, which, although it affects only a few people, governs a substantial industry? The criteria for assessing the priority of legislation might include its impact on the population at large, its impact on industry and the effect on the population at large or on industry of failure to consolidate.

I am pretty certain that accessibility should be one of the main areas that we should consider because, ideally, we should reach a position where the average citizen would know what law affects them in any particular area. There is even a maxim about that: "ignorantia juris neminem excusat", or "ignorance of the law is no excuse". If we can say that, how can we keep people from knowing the law that affects them? Those criteria might be applied.

Murray Tosh: Is there a role for Parliament in influencing the criteria, or should we be merely the recipients of the work that other people have done?

Michael Clancy: Members know better than most people the time and resources that parliamentarians have at their disposal to embark upon such projects. The CSG's philosophy was about inclusive government and power sharing; Parliament must have a role in that. Of course, Parliament has had a role in consolidating and reforming the law, an example being the Abolition of Feudal Tenure etc (Scotland) Act 2000. Although one might say that that is a stand-alone act, when it is taken together with the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004, it is part of a substantial code of land law. That process began as far back as 1963 with the Halliday commission's report, which looked forward to the day when feudal tenure would be abolished.

Those processes have to begin somewhere, but it might be the case that they do not have to stay there—many agencies and stakeholders could have a role. Parliament would certainly be one of those agencies.

Murray Tosh: I have one final question for Dr McHarg. In his answer to question 28, Mr Clancy indicated that he thought that acts of the Scottish Parliament could contain Keeling schedules. Do you agree with that?

Dr McHarg: As this is the first time I have ever heard of Keeling schedules—

Murray Tosh: That makes two of us.

Dr McHarg: I have to say no. I do not want to add anything to that.

Christine May: In her answers to question 34 and 35, Dr McHarg refers to Henry VIII clauses, which have exercised the committee on many occasions. You pose two questions to us; perhaps you would like to give your view on what our answers might be?

Dr McHarg: You want the answer to the question of whether the Scottish Parliament really has so much business that it needs to offload further legislative powers to ministers. I do not know the answer to that. You will know that because you know what your business is.

However, I would have thought that in principle, one of the advantages of the Scottish Parliament is that it can remedy problems. In Westminster, Scottish legislation used to be a second cousin and there was not much time for it. Here we have a whole Parliament that has time to devote to Scottish legislation, so the situation has vastly improved compared with the situation in the past, although I do not know whether it has improved enough. I suspect that there is not a huge need for the powers, but the committee might know better.

The constitutional objection to Henry VIII clauses is the fact that they create a rival legislature. The Executive, or whoever it is to whom powers are granted, is created as a rival legislature to Parliament. That is not necessarily a bad thing. It has been suggested—although we might query the suggestion—that the Scotland Act 1998 implicitly contains a Henry VIII clause in that it allows the Scottish Parliament to amend primary legislation from the UK Parliament both retrospectively and prospectively through a process of delegated legislation. We would not regard that as being illegitimate, which suggests that the issue depends on who exercises the powers and what procedures they use to exercise them. Do ministers need such powers, even if they are subject to the super-affirmative procedures that apply to the Regulatory Reform Act 2001? Is that enough? That is the question that the committee needs to answer.

Christine May: Thank you. I am grateful for your views because the issue has exercised us. We have another matter coming up today on which we might be asking some questions.

11:45

The Convener: As the witnesses have no further points to make on those topics, we will move on to consideration of the committee's role.

I have two questions for the Law Society. First, should the committee's remit be extended such that we should consider whether a new regulation that is contained in subordinate legislation be accompanied by a regulatory impact assessment and whether the RIA appears to have been properly prepared? Secondly, should we assess whether any new regulation that is contained in subordinate legislation meets the standards of good regulation?

Michael Clancy: In my submission, I agreed that the committee's role should be extended, but it would depend on the resources that were available to it to embark on such work. There is no reason why that should not happen, provided that the committee is satisfied about its ability to do the work.

I have to say that it struck me as being brave of the committee to set out the aim of

"considering any programmes and timetables drawn up by the Scottish Law Commission or the Scottish Executive for the consolidation of existing regulation",

which appears in the third bullet point under question 43, because that could be a substantial job.

The Convener: I turn to Aileen McHarg, who said in her submission that she thought that an extension of the committee's role would have constitutional implications. Will you expand on that?

Dr McHarg: The suggestion that has a constitutional implication is that the committee's role be extended to cover primary as well as secondary legislation.

On secondary legislation, in effect you are proposing that the committee should have a more substantive role in certifying the merits of subordinate legislation. In principle, there can be no objection to that. To the extent that questions such as whether a regulation is proportionate, accountable or transparent are controversial, much of the objection to the proposal is removed if the people who make the ultimate judgments are elected parliamentarians rather than bodies such as the better regulation task force or the improving regulation in Scotland unit. I do not think that that is a problem, although it could be argued that expertise is an issue and that the committee that is best placed to judge whether a regulation is proportionate is the relevant subject committee, not the Subordinate Legislation Committee. However, that is not necessarily an objection in principle.

There is more of a question about whether the committee's remit should be extended to cover bills, such that bills would have to be certified in some way to say that they met the standards of good regulation. My concern about that is that I do not think that those are objective criteria and I worry about imposing additional hurdles or restrictions on the Scottish Parliament's legislative capacity, which is already limited. Why put more restrictions on Parliament's powers?

The Convener: Will you elaborate on why you think that checking whether legislation met such standards would amount to imposition of more restrictions?

Dr McHarg: As I said at the outset, if we are not very careful with the better legislation agenda, it embodies a presumption in favour of markets and against Government intervention. That is a valid political perspective, but having such a perspective is not the same as having a neutral set of criteria that are valid in all contexts at all times and to which all regulation must adhere.

The Convener: Thank you very much. Do members have any further questions?

Christine May: I have no further questions, but I hope that members agree that this morning's evidence session has been stimulating and interesting. I am very grateful to both witnesses.

The Convener: I thank the witnesses for their submissions and for coming along today. I hope that they will not mind if we write to them to ask more questions. The Law Society indicated that it could provide more information in reply to Murray Tosh's question. That would be helpful.

11:50

Meeting suspended.

11:56

On resuming—

Delegated Powers Scrutiny

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 1

The Convener: I welcome the committee back for agenda item 2, which is delegated powers scrutiny relating to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill at stage 1. The bill gives ministers the power to make subordinate legislation for two purposes. The first relates to sexual offences that an adult might intend to commit against a child as part of the grooming offence in section 1(5); the second relates to commencement orders, including transitional, transitory and saving provisions, which are dealt with in section 11.

Section 1(5) pertains to the relevant sexual offences. When offences are specified in legislation, the list of offences may need to be amended from time to time to take account of changes. I think that we would agree with that. Such changes are to be made by statutory instruments and will not appear in the bill. The question is whether we are content for those statutory instruments to be subject to the negative procedure rather than the affirmative procedure. Our legal advice points out that the power is a Henry VIII power, the use of which could affect the way in which the bill operates. We need to decide whether we want to write to the Executive on that point.

Christine May: We should do so for two reasons. First, I agree with Stewart Stevenson, who was here earlier, that, because the bill creates criminal offences, the statutory instruments should certainly be subject to the affirmative procedure. Secondly, it is the habit of the committee in such cases to recommend that the affirmative procedure be followed—at the very least. I think that we should make that recommendation on both those grounds.

Murray Tosh: It is not just a habit of the committee—it is a practice based on the clear understanding that we intrinsically dislike Henry VIII powers. Just a few moments ago, we heard evidence of why we should maintain that position. In practical terms, I would not want any extension of the legislation to be delayed because of the necessity for changes to go through the primary legislation process, so I am prepared to accept the use of subordinate legislation to amend the bill. However, the Executive would be surprised if we did not ask for the affirmative procedure to be followed.

The Convener: Adam, are you in agreement with that?

Mr Ingram: I am, indeed.

The Convener: Okay. We will write to the Executive on that point.

There seems to be no further comment on the power in section 11(2), which relates to commencement. Are we agreed?

Members *indicated agreement.*

Charities and Trustee Investment (Scotland) Bill: Stage 1

12:00

The Convener: We move now to item 3 on our agenda, which is delegated powers scrutiny relating to the Charities and Trustee Investment (Scotland) Bill at stage 1. The bill introduces a new regulatory regime for charities in Scotland and sets up a new charity regulator and a public register of charities. It contains a huge number of powers, as members can see. I hope that there will not be too much to say about many of them.

Section 3(3)(f) is on the Scottish charity register. Our legal brief does not raise any particular issues. Are we happy with the suggestions in the brief?

Members *indicated agreement*.

The Convener: Section 6(1) is on applications and further procedure. Are members content with the legal advice on this power? It is suggested that the drafting of section 6(2)(a) be clarified in relation to section 4(d)(i). A similar issue arises with section 54(2)(d)(i). It is suggested that we should write to the Executive on those points. Do members wish to raise anything else?

Members *indicated disagreement.*

The Convener: It looks as if no points arise in relation to section 9 and section 15(1). Do we agree that they should go as they are?

Members *indicated agreement*.

The Convener: Section 19(4) and section 19(8) are on removal from the register and protection of assets. It has been pointed out that the power in section 19(8) allows ministers, by order, to oust the jurisdiction of the court. Members have quite a bit more information about that in the brief. It is suggested that the subsection could be drafted differently and that we could write to the Executive to ask for further clarification on the use of the delegated power.

Members *indicated agreement*.

The Convener: As we continue through the brief, we come to a list of subsections for which no issues appear to arise in relation to the powers. Section 23(2) is on entitlement to information about charities; section 25(3) is on the removal of restrictions on disclosure of certain information; section 35(1) is on transfer schemes; section 40(2) is on applications by a charity to reorganise; section 45(4) is on accounts; and section 48(1) is on procedure and interpretation in relation to dormant accounts of charities. Do we agree that no points arise?

Members *indicated agreement*.

The Convener: Section 50(3) is on the constitution and powers of Scottish charitable incorporated organisations. Page 9 of the legal brief raises a few points. We are asked to consider whether section 50 provides a sufficient framework and whether there are "bones"—as the legal advice puts it—on which to put the flesh. It is probably okay, but I would like to hear members' views.

Christine May: I think that we should be content with it as it is.

The Convener: On balance, the legal advice is that it is okay.

Members *indicated agreement*.

The Convener: Section 52(1) is on the name and status of SCIOs. It seems to be fine.

Members *indicated agreement*.

The Convener: Section 63(33) is on regulations relating to SCIOs. Again, it seems fine.

Members *indicated agreement*.

The Convener: Section 82(1) is on regulations about fundraising. The legal advice is that we should write to the Executive on two issues. Our brief asks us to consider

"whether although it seems appropriate that the regulations in the main should be subject only to annulment, regulations under section 82(2)(h) and 82(3) are of such importance that the regulations ought to be subject to … affirmative procedure"

and

"whether with regard to the power to create criminal offences in subsection (5), sanctions for breaches of the regulations should appear as a substantive provision on the face of the bill rather than provided for in the regulations."

Do members agree that we should write to the Executive on those issues?

Members *indicated agreement*.

The Convener: Sections 85(5)(d) and 85(10) are on local authority consents. The brief suggests that there are so many powers that this particular one might have been dealt with in a circular rather than in the bill. That is simply a point to be raised, rather than a recommendation to be made to the Executive.

Murray Tosh: It might be appropriate to put a line in asking the Executive about that point.

The Convener: We could do that to make the general point and to say that that could have been a possibility for that section.

Murray Tosh: That would show the Executive that our legal advisers are as alert as ever.

The Convener: Absolutely. The next few sections seem to be okay. Section 89(1) concerns regulations in relation to public benevolent collections. Section 90(1) concerns the collection of goods. Section 94(1) concerns the power to amend enactments. Are we agreed that those sections are acceptable?

Members *indicated agreement*.

The Convener: We now move on to section 97(2), on transitional arrangements. Section 97(3) seems to be fairly sweeping and would appear to allow ministers to disapply any provision of the act in relation to any body or charity without limit of time. It is suggested not only that we might write to the Executive about that but that we might ask why it is not thinking of a cut-off date. Is that agreed?

Members *indicated agreement*.

The Convener: Section 100, on ancillary provision, seems okay.

Members *indicated agreement*.

The Convener: Section 104(2) is on the short title and commencement. If you look at your briefing paper, you will see the suggestion that, in order to be consistent with section 97, which is commenced on royal assent, section 103 ought also to be commenced on royal assent. If the bill does not also commence section 103 on royal assent, there ought not to be a reference to section 103 in section 97. It is a point of consistency. Is it agreed that we should write to the Executive about that?

Members *indicated agreement*.

The Convener: All the other delegated powers seem to be okay, but I shall list them for the record. They are paragraph 1(3)(e) of schedule 1, and paragraphs 1(3)(d) and 4(1) of schedule 2. Do they seem okay?

Members *indicated agreement*.

Water Services etc (Scotland) Bill: Stage 2

The Convener: We now move on to the Water Services etc (Scotland) Bill, as amended at stage 2. You will recall that there were a number of

areas about which we had quite considerable reservations. We reported them to the relevant committee, which also had concerns. Considerable changes have been made as a result, you will be glad to hear. The first of those changes affects sections 4(7) and 5(7). The Executive added new subsection (8A) to section 4 at stage 2. As explained in the subordinate legislation memorandum, that new subsection qualifies the regulation-making powers that are provided for at sections 4(7) and 5(7), to address the issues that we and the lead committee raised at stage 1. Are members happy with that?

Members *indicated agreement*.

The Convener: The second change is the introduction of section 12(3A), on the undertaking of water and sewerage services. The Executive indicated in its response to the committee's stage 1 report that it was considering ways of addressing our concerns. The new subsection can be seen to fulfil that undertaking and our legal advisers certainly seem happy with it. Is that agreed?

Members *indicated agreement*.

The Convener: Subsections (1), (2) and (6) of new section 12A concern financing, borrowing and guarantees. The Executive cites flexibility as the principal justification for the delegated powers in that instance. It considers that the scrutiny that is available under the negative procedure, together with the additional safeguards in subsections (3) and (7), provides sufficient control over the exercise of power. However, there could be an argument as to whether the power under section 12A—particularly as it concerns financial matters—should be affirmative or not. On balance, our legal advice is that the current position is okay. Do members agree?

Members *indicated agreement*.

The Convener: We shall leave that as it is. We now move on to section 17A(8), on continuation and discontinuation of sewerage services. New section 17A provides for the circumstances in which trade effluent services may be continued or discontinued. The power is similar to the power in section 16(3), regarding the notice of discontinuance of water services. Are members happy with that change?

Members *indicated agreement*.

The Convener: We move on to subsection (1) of new section 19B, which seeks to give Scottish ministers the power to make an order that contains a code of practice on the assessment, control and minimisation of sewage nuisance. If I remember correctly, our legal advice is that no points of substance arise on this matter and that we should simply draw the Executive's attention to certain drafting points through an informal letter. Are members agreed?

Members *indicated agreement*.

The Convener: We move on to section 20(3). Members will recall that we raised a point about the definition of "dwelling". However, of all the points that we brought to the Executive's attention, it was the one that we were least worried about. Our legal advice suggests that the Executive's approach is okay and that the point is perhaps not worth pursuing, but I want to ensure that members agree with that course of action. Are members agreed?

Members *indicated agreement*.

Murray Tosh: It shows what reasonable people we are.

The Convener: As ever.

Executive Response

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

12:11

The Convener: We move on to consideration of an Executive response. When the committee considered the regulations—last week, I think it was—we asked the Executive to explain its use of the word "prescribe" with regard to the reference to "class … of persons". We wanted to ensure that it was interpreting the matter correctly. The legal advice suggests that the response to this question is okay. Are members agreed?

Members *indicated agreement*.

Draft Instrument Subject to Approval

Budget (Scotland) Act 2004 Amendment Order 2005 (draft)

12:11

The Convener: No points of substance arise on the draft amendment order.

Instrument Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (Scotland) Order 2005 (SSI 2005/34)

12:11

The Convener: No points arise on the order.

Instruments Subject to Annulment

Conservation of Salmon (Esk Salmon Fishery District) Regulations 2005 (SSI 2005/24)

Parking Attendants (Wearing of Uniforms) (South Lanarkshire Council Parking Area) (No 2) Regulations 2005 (SSI 2005/35)

Conservation of Salmon (River Annan Salmon Fishery District) Regulations 2005 (SSI 2005/37)

Potatoes Originating in Egypt (Scotland) Amendment Regulations 2005 (SSI 2005/39)

Valuation for Rating (Decapitalisation Rate) (Scotland) Regulations 2005 (SSI 2005/41)

12:11

The Convener: No points of substance arise on the regulations.

Draft Guidance Subject to Annulment

Part 1 Land Reform (Scotland) Act 2003: Draft Guidance for Local Authorities and National Park Authorities (SE/2005/14)

12:12

The Convener: No points of substance have been identified on the draft guidance.

Instruments Not Laid Before the Parliament

Higher Education Act 2004 (Commencement No 1) (Scotland) Order 2005 (SSI 2005/33)

12:12

The Convener: No points of substance have been identified on the order, but there is a drafting point that we might raise by informal letter.

Electronic Fingerprinting etc Device Approval (Scotland) Order 2005 (SSI 2005/36)

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

I thank committee members for attending the meeting, which has been much longer than normal.

Meeting closed at 12:13.

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