SUBORDINATE LEGISLATION COMMITTEE

Tuesday 8 February 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
5th 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 ALSO ATTENDED:

Margaret Macdonald (Legal Adviser)
Professor Alan Page (Adviser)

THE FOLLOWING GAVE EVIDENCE:

Brian Jamieson (Scottish Enterprise)
David Lonsdale (Scottish Chambers of Commerce)
Susan Love (Federation of Small Businesses in Scotland)
Alan Mitchell (Confederation of British Industry Scotland)

CLERK TO THE COMMITTEE

Ruth Cooper

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 8 February 2005

[THE CONVENER *opened the meeting at 10:41*]

Regulatory Framework Inquiry

The Convener (Dr Sylvia Jackson): I welcome members to the committee's fifth meeting in 2004—I mean 2005; our papers obviously have the wrong date on them. I have not received any apologies, so we have a full house today, which is good. Professor Page is a little late this morning. We will change round the first two agenda items to start with item 2, which is also on our review of the regulatory framework in Scotland, if that is acceptable.

Members *indicated agreement.*

The Convener: I welcome all our witnesses. Alan Mitchell is head of policy at the Confederation of British Industry Scotland; Susan Love is the policy development officer for the Federation of Small Businesses in Scotland; David Lonsdale is the policy officer for the Scottish Chambers of Commerce; and Brian Jamieson is Scottish Enterprise's company secretary.

I invite the witnesses to begin by saying a few words about their papers, for which I thank them. They were very good, very simple to read and contained a lot of points. We have a lot of questions to ask you as a result.

David Lonsdale (Scottish Chambers of Commerce): I express the thanks of the Scottish Chambers of Commerce to the committee for this opportunity. Our members recognise that regulation can fulfil various purposes, not least that of helping policy makers to reflect public concern over the actual or perceived risks of a given activity. Our members are keen to ensure that the policy makers' responses are proportionate and are as straightforward as possible. We have consistently advocated a simpler, lighter and improved regulatory burden on Scots firms, as that would contribute directly to the broader policy objectives of growing the economy, improved competitiveness and good governance.

Before new regulations are introduced, every effort ought to be made to determine whether they are absolutely necessary and whether their objectives could be achieved by other means. The final financial cost of regulations is only one aspect of compliance for firms. The time spent on compliance is ultimately diverted from that spent on the operation of the business.

Our members believe that the debate about regulation has moved on since the Executive created its improving regulation in Scotland—IRIS—unit six years ago. The real issue goes much wider than just regulation. There are other burdens on business that fall outwith the scope of the IRIS unit, but which are very much within the Executive's remit. That is why we put forward a constructive proposal in our written submission that would result in a beefed-up IRIS unit that had more clout and a wider role and which could more effectively monitor and check all the regulatory burdens on business.

10:45

Our members believe that the key to improving, and indeed reducing, the flow of regulation lies in the willingness and commitment of legislators and policy makers. That was reflected in a recent speech by the First Minister on the European Union, when he said, "Good regulation needs restraint." The Scottish chambers detect a more receptive and growing audience for our message. Not only is this committee conducting its current investigation, but the Executive's small business consultative group has formed a sub-committee on regulation. Encouraging noises are also being made at the United Kingdom and European levels. The challenge is to turn them into action and improvements.

Brian Jamieson (Scottish Enterprise): My role in Scottish Enterprise includes scrutinising legislative proposals, and that is the perspective that I bring. I suppose that Scottish Enterprise's interest in all public sector activity is in activities that enable economic development rather than in anything that would hinder it. Unlike fellow members of the panel, I represent a public body that does not have a role in public lobbying for specific Government action, which might explain why our submission reads a little more blandly than those of the other organisations represented on the panel. I am happy, however, to participate to the extent that I can in this discussion of the issues.

Alan Mitchell (Confederation of British Industry Scotland): The CBI is delighted to be here to participate in the debate and, I hope, to move it on. I would like to mirror David Lonsdale's comments. There is of course a role for regulation, but it must be balanced. Our main focus at the CBI is on what we need to do to grow the economy. We very much view the debate on the position and level of regulation in that context and we are looking forward to a constructive debate this morning.

Susan Love (Federation of Small Businesses in Scotland): I have a couple of points to make, but I will not go over everything in our written submission. There is a huge range of issues, which we have all picked up on in our submissions.

The FSB would like to highlight two main things to the committee. The first is the need for a change of culture in how we approach better regulation. We strongly feel that it will take a serious change of culture to bring about any benefits. There is, for example, no reward for civil servants in carrying out good regulatory impact assessments and we would like to examine that issue. There must be a better buy-in. Economic impacts must be combined with environmental and social impacts if we are to carry out impact assessments in the broadest sense. We need a strong central co-ordinating body with strong political backing and real resources.

The other issue that we think needs to be worked on is that of effective impact assessments—I refer to assessments that are prepared on the basis of accurate and robust data, which we think have been sadly lacking. We should seriously consider how we get the people who prepare regulatory impact assessments out on the ground to work with businesses so that they understand the real impact that their proposals will have.

The Convener: Our first questions are of a general nature and seek to develop an overview.

Christine May (Central Fife) (Lab): In her evidence last week, Dr McHarg raised an interesting point: put simply and crudely, it was whether regulation is a good or bad thing. I think that I understood what you said in your opening statements but, for the record, I ask each of you to confirm, from your organisations' points of view, whether you think regulation is a good or bad thing and whether you think that it is Government's role to regulate. I also ask you to say how that sits with some of the comments that you have made about a lighter touch and so on.

Alan Mitchell: I do not think that anyone from the business community would pretend that there will not be occasions when public policy, on whatever subject, is best dealt with through regulation. However, there is an issue around how to select when regulation represents the best way forward. Beyond that, we often examine an individual bit of regulation and think that there is nothing intrinsically wrong with what it is or with what it is trying to achieve, but we must bear in mind the cumulative effect of hundreds or thousands of bits of legislation, however individually sound they might be. There is a role for legislation, and one of the roles of the Executive and the Parliament is to legislate, but that is not their only role. For example, if the Executive's priority is to grow the economy, issues about regulation and where that sits need to be put into that context.

Susan Love: Whether regulation is a good thing depends entirely on the objective that the Government wants to achieve and whether regulation is the appropriate vehicle for achieving that objective. If the Government chooses to regulate, it is important to ensure that the regulation is as effective as possible. The regulation must be enforceable and transparent and the Executive must be accountable for it.

I do not want to get into an argument over whether or not Government should regulate on everything, because that is what Governments do. We simply want to ensure that all the other options are considered. For example, the Executive has just closed its consultation on butcher shop licensing in Scotland. Forgive me for not knowing the full details of the issue, but I understand that, broadly speaking, the regulations were introduced after the public health problems that arose in Wishaw a few years ago. They were intended to be temporary until the introduction of a new European environmental health directive that would apply to all catering and food businesses. The directive is now in force, but the consultation asked whether we should carry on with the butcher regulations anyway, even though they duplicate other legislation. We see that as a no-brainer. That is pointless regulation. That is the kind of debate that we want to have.

David Lonsdale: I jotted down a couple of examples. Obviously, regulation that frees up markets, creates more choice and breaks down cartels and monopolies is a great thing.

Further to Susan Love's example, a couple of years ago the consultation document "Sunday Working in Scotland" said that the voluntary arrangements on Sunday working had "operated well"—that is a direct quote—but the Government nonetheless went on to introduce regulation. Yes, regulation can be good and necessary but, as I said in my opening remarks, it must be proportionate. When the Executive admits that something is working well, it should give the matter a lot of thought before introducing regulation. In that instance, the regulatory impact assessment was not produced until much later and did not accompany the consultation document.

Brian Jamieson: David Lonsdale has stolen the word that I jotted down, which is "proportionate". There is a range of regulation available. Regulation can be bad or good, but it is sometimes necessary. If a voluntary code is not working, we might need to consider regulation or statutory intervention. The difficulty is that, as we

go up that scale, things become more set in concrete and the civil servants or officials who are tasked with enforcing the regulation tend to take a more inflexible attitude. We need to decide how inflexible or flexible we can be when setting regulation in place.

Christine May: I want to test three other points. I realise that I may be asking people to repeat what they have said, so if people have already dealt with some aspects of my questions, perhaps they could summarise. What are the key principles of better regulation? Does better regulation necessarily mean less regulation? What could we do in Scotland to improve the quality of regulation?

Brian Jamieson: Less and better are not necessarily equivalent. The real issue is the extent to which flexibility is left in the system.

To improve the quality of regulation, proper use must be made of the regulatory impact assessment. As we have found when embedding risk assessment into the business, it is no good if the assessment is done by someone else in a separate room. The RIA must be part of the process so that it does not appear to be a hindrance to those who are trying to act sensibly.

Given the need for flexibility, is it necessary to make RIAs statutory? I do not think so. In many instances, we can have informal regulation. For example, Scottish Enterprise is governed by a lot of informal regulation through our management statement. Where such regulation has been converted into statute for other public bodies, I have seen no particular benefit, and sometimes disadvantage results. Building in scrutiny as part of the process would be the best method of improving regulation.

David Lonsdale: As I said in my opening remarks, our members are certainly in favour of a lighter regulatory burden in principle, where that is practical and appropriate.

We submitted a response to the "Sunday Working in Scotland" consultation. I know that members of a number of chambers of commerce are concerned about Karen Whitefield's proposed member's bill on Christmas and new year's day trading in Scotland. As might be expected, as a business representative organisation we are in favour of a lighter regulatory burden.

To improve the quality of regulation, our submission makes several proposals on RIAs and on how the existing structures might be improved. However, as I pointed out at the end of my opening remarks, although we need good processes, the fundamental issue comes down to policy and political will. That is the perspective of our members.

Alan Mitchell: As a general rule, less regulation is desirable. One of the business community's key measuring sticks is whether it needs to implement fewer regulations.

To improve the quality of regulation, the IRIS unit must be given the resources and political authority to bring about change, RIAs must take a fuller perspective on the proper cost of implementing the regulation and the enforcement of regulations needs to be considered. One of the biggest sources of complaints from our members is not regulation per se but the consistency with which it is enforced and the uncertainty surrounding how the regulatory body might interpret regulation in practice. That is like a double whammy: people who are not sure what a regulation means also need to second-guess how it will be interpreted in the field by the inspector or regulator when it comes into force. We need fundamental change, which will require a culture change. However, we could do a lot more to improve the situation. Fundamentally, my answer is that we would like fewer regulations.

Susan Love: I do not think that any of us would disagree with anything that has been written about how regulation could be improved. The better regulation task force listed the five principles of good regulation as proportionality, accountability, consistency, transparency and targeting. We do not disagree with any of those.

The small business vision of better regulation is that assessments of benefits and costs should take on board the particular difficulties and expenses that small businesses experience in dealing with regulation. Issues surrounding competitiveness, the need for growth and cumulative burdens also need to be considered as well as small business confidence. I should add that the important enforcement issues that Alan Mitchell has outlined need to be taken into account.

David Lonsdale: Having had the benefit of listening to my two colleagues, I recall that my associates in the British Chambers of Commerce produce a burdens barometer that is based on 35 key pieces of United Kingdom regulation. The barometer measures the impact and financial cost of regulation by taking its figures—they are not simply made up—from the regulatory impact assessments for a whole gamut of regulations each year. As my submission mentions, last year the burden came to £30 billion, but I am advised that the figure has increased substantially in the 2005 edition of the barometer, which will be published later this month.

The barometer provides a measurement of the burden of those 35 individual regulations, but it does not include the minimum wage or other burdens in the 150 RIAs that were produced down south last year. I am not 100 per cent sure that it would be appropriate to apportion a share of that

£30 billion to Scotland, but the figure at least gives an indication of the financial costs to business. However, that figure is not the whole story, as it does not include other regulations that are prepared in Scotland.

11:00

Christine May: I apologise to my committee colleagues, but I want to pursue that. As a result of that work, did your organisation think that it was part of its representative role to suggest to Government how those individual regulations might be combined, adapted or otherwise modified in such a way as to reduce the burden while maintaining proper control of environmental issues and so on?

David Lonsdale: The approach that my UK colleagues have taken is to realise that what is done is done. If improvements can be made, that is great, but they want to assess how they can improve the flow of regulations in the future and to learn from that.

Christine May: I am sorry, but that was my question. Did they make practical suggestions on how some regulations that are already in force could be amended, combined or—if appropriate—dropped?

David Lonsdale: I would have to look back to find out on which regulations they made representations. I would be happy to check that and to come back to the committee, if that would be appropriate.

Christine May: I would be interested to find that out.

The Convener: Any such material would be helpful, especially if there was a Scottish perspective to it. You said that you were a little uncertain about that.

We now turn to improving the quality of new regulation. In your submissions, you all mentioned RIAs and related issues. Adam Ingram has a few questions on that subject.

Mr Adam Ingram (South of Scotland) (SNP): Your submissions indicate that there is general agreement that although RIAs can improve the quality of regulation when they are used properly, in practice they are either not used or not prepared properly. What steps can be taken to ensure that RIAs are integrated into the policy-making process and that they influence policy decisions? Who would like to take that on?

The Convener: Fire away, Susan.

Susan Love: In describing our experience of working with officials in developing regulatory impact assessments, it is difficult to get away from discussing the culture that exists around RIAs. Although a lot of progress has been made on getting the Executive to come to business organisations at an early stage to indicate what it is thinking of doing, that connection gets lost somewhere along the way when the officials get down to the nitty-gritty of drawing up an RIA.

We agree with the idea that RIAs should still be carried out by the policy department that comes up with a proposal. However, part of the problem is that it seems that the principal driver for that department is to come up with a super-duper proposal on an issue on which the minister has asked the civil servants to produce a proposal. The RIA is just something that has to be done once the department has come up with its proposal. No one enforces the RIA. Once the department has done the RIA and has signed it off, we just do not think that a civil servant will then go to their boss in the department to say, "We've done this RIA and we really think that the proposal isn't a goer because it'll result in a bum deal," especially given that by the time the final RIA has been produced, the bill will have been published. It is usually the case that when an initial proposal is made, only a partial RIA is carried out.

One of our principal suggestions is that once a department has done an RIA, the RIA should go to the IRIS unit for approval. That would mean that there was some kind of check in the system to ensure that the RIA was robust and had been carried out effectively and that, if it was not based on proper data, it would be sent back.

I can give the committee two examples of inadequate RIAs. I have a copy of the partial RIA on this year's order on the fees charged by the Scottish Commission for the Regulation of Care. Each year an order is produced in which ministers set the maximum fees. The RIA contains a section that is entitled "Unintended consequences", which says:

> "It is possible that some smaller providers may have to close. That risk must be balanced against the expected benefits of the new regulatory regime for users."

How many businesses will be affected? How many businesses closed the last time that prices went up and how many will close this time? What will the impact be on the small business sector? I do not think that those two sentences are adequate.

Just before the draft version of the Fire (Scotland) Bill was published, I spoke to the officials who were putting it together. They had already produced their proposals and had called us in to speak about them. They said that they would start the RIA soon, but at that stage they had no idea how many businesses there were in Scotland, let alone how many of them used the existing regulations and therefore how many of them would be affected by the new regulations. From our perspective, it is clear that RIAs are not

being worked on during the early stages of policy development. The production of an RIA is an exercise that is carried out by officials because it has to be carried out. That is not a reflection on individuals; it is simply a result of the culture that exists in the civil service.

Alan Mitchell: In our submission, we suggest that the production of RIAs should be statutory. That would not necessarily improve the quality of RIAs, but it would ensure that they were always done. On quality, we agree that independent scrutiny is required. We suggest that a better-resourced, beefed-up and more powerful IRIS unit would be best placed to undertake that work.

The issue is partly about how early the officials who carry out RIAs talk to the business community and its representative organisations about proposed legislation. We are involved in work on the implementation in Scotland of the water framework directive. A fairly extensive consultation process is going on with the affected industries to get the regulations in shape. It is inevitable that that will result in much better regulations. Although it is highly time consuming for everyone to go through such a process, it would be good to do that more often.

It would also be good to investigate ways in which we could get people with business experience involved in conducting RIAs. It might make sense for the IRIS unit to be headed by someone from business rather than a civil servant, because they might have a better understanding of the impact on business of regulation and the hidden costs—the things that are very difficult to measure—that are a by-product of having to manage regulation. Anything that could be done to build that into the system would be helpful. We certainly think that the carrying out of RIAs should be statutory and that there should be much more powerful independent scrutiny of the RIAs that are done.

David Lonsdale: I will sound what is probably the first note of discord of the morning. We are not convinced that the conducting of RIAs should be made statutory. In our submission, we suggest that ministers should perhaps certify that an RIA meets the guidelines. That would provide a level of accountability and transparency that is missing at the moment.

We also suggest that when consultees provide estimates on the costs and benefits of proposed regulations, they should be listed in a sentence or two in the RIA. That would provide an extra level of accountability down the line. During the recent consultation on the rights of appeal in planning, there has been some debate about the perceived costs and benefits of that proposal. It will be interesting to find out what happens with that down the line.

There is a provision for regulations to have a regulatory MOT or review after they have been in place for 10 years. We suggest that every five years would be a much more realistic timescale. In November, the First Minister made a speech in which he spoke about having a review of EU regulation after five years. We think that the same frequency of review should apply to devolved regulation.

My colleague from the CBI spoke about having RIAs independently verified. In England, the better regulation task force refers RIAs to the National Audit Office, and a similar measure might be appropriate in Scotland. We also support sunset clauses. The committee has thought about doing some work on what is done in Australia. That area is of key interest to us and we think that such work would be useful.

The Convener: Do you have anything to add, Brian?

Brian Jamieson: I have just a quick comment. Although I have no direct practical experience of conducting RIAs, I can draw an analogy with the way in which Scottish Enterprise develops policies and programmes. Independent challenges are the key element of the Government-approved review process. I would not like to be prescriptive as to whether such challenges should be built in from the IRIS unit or—as happens in Scottish Enterprise—from a non-operational part of the business. However, once an independent challenge is documented, the senior project owner—in this case, the civil servant tasked with drafting the regulations—would have to document how they have answered that challenge so that the fact that that has been done is auditable in the future. Such a policy line would mean that people would have to document how they had gone through that process instead of, as is perhaps being suggested, paying lip service to it in a couple of lines.

David Lonsdale: I am sorry to butt in again, but I would like to comment on the idea of having a statutory RIA. One of the issues that we outline in our submission concerns the way in which the IRIS unit currently defines regulations. For example, it came back to me on section 52 of the Local Government in Scotland Act 2003. The Executive published statutory guidance about private and voluntary sector bidders for local authority contracts for services. When the Executive published that, I asked whether we could get hold of the RIA for it, but I was told by the IRIS unit that as it was not a regulation, as such, but statutory guidance, the statutory aspect would not necessarily apply. In a bizarre, roundabout sense, IRIS was hampered by its own red tape. That is why we argue in our submission that the issue is broader than just regulation. In

fairness to the Executive, in its improving regulation annual report, it has begun to map out the fact that the whole agenda is about more than just pure regulation.

The Convener: That is a good point.

Mr Ingram: I am interested in Alan Mitchell's point about importing business expertise into the IRIS unit and Susan Love's point about having a routine aspect to the RIA process. What are your views on how the assessments that are made in the RIA process—concerning the necessity for the proposal, the alternative options and the cost-benefit analysis—can be evaluated?

Alan Mitchell: That requires as much factual data as can be gathered about the potential impacts—the number of businesses that will be affected, the way in which regulation will affect those businesses and the impact that regulation will have on how those businesses do what they do.

I suppose that some guesswork has to be involved in these things. We would rather that the policy makers assumed the worst about the legislation than, as often seems to be the case—at least, it is the perception that I pick up—that they worked on the assumption that the legislation would have the best effect and minimal impact on business. A few months down the road, we might find that it has not had the best effect and has had more impact than was expected. As much detailed number crunching as possible needs to be done, although that is a time-consuming exercise.

That relates to the point that I made earlier. Mentally, we need to shift towards a system in which there is less regulation. We do not want to create a hugely expensive, bureaucratic and time-consuming structure in order to have better regulation. That would cost our members more, as those kinds of costs are, ultimately, put on to business.

We need to find a balance. For us, the starting point has to be having less regulation to begin with. Dealing with the current amount of regulation requires fairly extensive number crunching and talking to a lot of business folk. I get a sense that having people with business experience at the heart of IRIS will help to guide the unit better on what it needs to do and whom it needs to talk to. That would give it a better perspective on how it needs to go about improving the regulatory process.

11:15

Susan Love: As Alan Mitchell has outlined, things start to go wrong at an early stage in developing the RIA. The RIAs are not always based on accurate data or assumptions. If we could solve things at that point in the proceedings, we might reap a lot of rewards. Instead of having people from a business background higher up in IRIS, we would like the people who are coming up with policy proposals to spend a bit more time out in the fields.

I am sure that, if the committee has appointed a rapporteur or conducted visits during an investigation, members will have found that very useful. We strongly feel—although we are probably doing ourselves out of a job—that nothing is better than going out and spending a day with a business in the sector for which a proposal is being designed. We might seem to be suggesting that civil servants should be off on jollies all over the place, but, considering the amount of time that officials spend in preparing consultations and going through all the paperwork, we think that that would be time well spent.

My time in the federation has taught me the importance of understanding how businesses think. They do not think like politicians or officials; they live in a different sector and, in order to assess the impacts, it is necessary to understand the various things that they are going through. We would, therefore, like more concentrated effort to be made at an early stage to create effective impact assessments. I think that that would be worth while.

Mr Ingram: Does David Lonsdale have anything to add to that?

David Lonsdale: On business involvement, one question that has emerged is whether we should have a Scottish version of the better regulation task force. It occurs to me that the small business consultative group could fulfil the role of, in effect, a board of directors of the IRIS unit. It might be slightly more difficult for the business representative organisations to be detached from what was going on in IRIS—there is a bit of a gap at the moment. Nevertheless, we would be much more in there, overseeing what was happening, and that might be useful. Whether the board would comprise business representative organisations or businesses per se would be entirely for somebody else to decide.

Susan Love: On evaluating RIAs, we can learn much from Europe, despite the fact that we criticise a lot of the regulation that comes from there. The First Minister, in the speech to which David Lonsdale referred, set some high aspirations for Europe to live up to. We have been over to Brussels to speak to people from the regulatory impact assessment unit there. They could offer a lot of advice and we could learn a lot from them, but I am not sure that that has been picked up on in Scotland.

Mr Ingram: That might be something that we can follow up.

Let us move on to the question of a micro-business test. The FSB, in particular, has expressed concern about the practical steps that can be taken to ensure that the micro-business test works. What steps can be taken to ensure that the data and feedback that are collected when a test is conducted are adequate?

Susan Love: Our principal comment is that the majority of businesses in Scotland are micro-businesses. Any RIA should be carried out on that basis, perhaps with a large business test at the end. We think that the current process looks at things in the wrong way. The whole regulatory impact assessment should be based on the small business. However, as I have highlighted, we think that the RIAs are missing the cumulative burdens and hidden costs on small businesses and the extra time that it takes them to comply. The RIA could be better informed about those matters by the creation of better links between the policy makers and businesses on the ground.

David Lonsdale: I agree with what Susan Love has said. The fundamental question is whether the RIA is meeting the guidelines. The other day, I was having a look at micro-business tests. Some of them quite often do not appear in an RIA. The consultation on planning rights of appeal was good—it explicitly mentioned the impact on small developers that are building, say, 10, 15 or 20 homes. However, many other aspects, such as the landfill waste regulations and non-domestic rates and the revaluation transitional arrangements—saying some of the titles is confusing enough, at times—make little mention of micro-businesses or say nothing substantive. The consultation on the transitional arrangements was supposed to mention micro-firms, but it referred to macro-businesses; there was no suggestion that any attempt had been made to garner the views of micro-businesses.

That is a weakness. The better regulation task force down south is looking to pick up on that, which is why it has farmed out some of its independent research to the National Audit Office. The committee might find it worth while to examine that matter, to see whether there is anything that we can pick up on to ensure consistency and to ensure that best practice becomes common practice throughout the system.

The Convener: From your papers, we picked up that you feel that there is not enough good-quality consultation and that, at the other end, there is consultation fatigue. That is an interesting area, about which Gordon Jackson has a couple of questions.

Gordon Jackson (Glasgow Govan) (Lab): The FSB paper states that subordinate legislation, which is hugely important to you,

"tends to receive little attention and can easily 'slip by' unnoticed."

We have some sympathy with that view because, although we, as a committee, give subordinate legislation lots of attention, it tends to slip by unnoticed in the rest of the Parliament. Will you expand on your comment?

Susan Love: The difficulty is that a lot of subordinate legislation is so technical and specific that it is not picked up by organisations such as ours. By and large, we focus on issues that will affect a broad range of small businesses. A business in a particular sector might say, "This is causing us problems," but we might not have noticed the issue or received any coverage. We often find from reading about our members' experiences that their problems go back to a piece of subordinate legislation that passed under our radar.

Gordon Jackson: How could we improve the process? To put it bluntly, instruments may go unnoticed by you. Clearly, there is a limit to how much publicity an instrument will ever get. There are masses of instruments every week that will not make the 6 o'clock news because—to use the buzz phrase—they are not on sexy subjects. Is there anything that we should be doing? Perhaps you have to do more to notice them, but are we missing out on something?

Susan Love: The important thing is to ensure that subordinate legislation is considered along the lines that we have outlined, so that there has been proper contact between the affected sectors or businesses and the policy makers. We are trying to ensure that, before an instrument is passed, it has been thought out effectively at an early stage.

Gordon Jackson: Let me open out the discussion to everyone. What can we or others do to improve consultation with businesses on regulation? Should we be doing more? Are we doing nothing? What is being done to ensure that you are aware of the on-going consultations, bearing in mind the other side of the coin, which is the dreaded consultation fatigue? How do we balance those issues?

Alan Mitchell: We all recognise the difficulty. The pile of documents on my desk in any given week is huge and it gets bigger. There is a limit to the extent to which representative organisations such as ours can monitor things. The challenge is how to deal with individual businesses, which, frankly, have their heads down running their businesses. I am not sure how we should create effective links. I was about to suggest a role for the local enterprise companies, but that would take

them completely away from where we want them to be, so it is not a way forward. I am not sure how you should build those links. Organisations such as ours can try to monitor things better, but there is a physical—

Gordon Jackson: But what else can we do? We cannot go to individual small businesses. We can only do what we already do, which is to publish everything on the web. The only way in which we can go to small or big businesses is through the business representative organisations, from which information has to cascade. We will not go to every small business in Scotland. Is there something that we could be doing better, or is the issue simply that the sheer volume of regulations is impossible?

Alan Mitchell: That comes back to my point that the first and most important thing that we should do to improve the regulatory framework is to have less regulation. Everything flows from that. I wish that I could offer you proactive suggestions or solutions, but at the moment I am at a loss on how to proceed. Perhaps we can come back to that.

Susan Love: Our businesses want to know that you, as the Subordinate Legislation Committee, are satisfied that the regulations that you are considering have gone through a robust process and that the RIAs that accompany them have been thoroughly investigated and are based on robust data. We want to ensure that the committee does that. For example, there are forthcoming instruments on mineral water and egg marketing, which we are not in a position to deal with.

Gordon Jackson: We need to think about that. I am not defending the committee, but we are the only committee that meets every week and each week we consider dozens of instruments. You are right that there are a lot of instruments. You raise an interesting point.

What about consultation in general? What are your views on a general requirement to consult? Should that be a statutory requirement for every proposal for or draft of subordinate legislation that might impact on business? In a sense, everything has an impact on business. Should the need to consult be formalised or would that be overkill?

Brian Jamieson: I agree with Susan Love that the onus should be on the people who draft the regulations and develop the policies to ensure that they consult an appropriate industry group. That might be a specialised industry group. For example, if the regulations are on pig farming, the assessment could state explicitly that an appropriate group had been consulted. The committee would not necessarily have to consult publicly on everything if consultation had been documented at an earlier stage.

David Lonsdale: I return to my comment on the political will of policy makers and legislators and link it to my comment on the First Minister's suggestion that policy makers need to show restraint on regulation. Alan Mitchell made a good point about the volume of documents. One of my colleagues printed off the consultations and regulations from the Food Standards Agency. I would have brought them with me, but the documentation consisted of three reams of paper, which is a bit heavy to take on the train and lug up from Waverley. It is difficult to square the issue, because one of the benefits of the Parliament is that there is greater transparency, access and consultation. We would not like to feel that we did not have the opportunity to get involved.

Gordon Jackson: I have another question, which you may have answered when I was not here. Do your organisations have, or should you have, people who do nothing else but monitor regulations? Alternatively, is monitoring done on an ad hoc basis when you have half an hour?

David Lonsdale: We have 21 local chambers in Scotland, which I consulted ahead of today's visit. This may not be tremendously informative, but it might interest Christine May to know that one of the Fife chamber members said, "What we need from the enterprise company and from the chambers is a compliance-with-legislation assistant." That would be the most helpful assistance that could be given. The issue is difficult.

Gordon Jackson: Do Susan Love and Alan Mitchell have someone who does nothing else but examine regulation?

Susan Love: Alan Mitchell, David Lonsdale and I are the policy officers for our respective organisations and our job is to deal with all the consultations from the Parliament, the Executive and the various executive agencies.

Gordon Jackson: I am thinking of the legislation as it goes through.

11:30

Susan Love: Yes, we look at that, too. We have a responsibility to cover issues that will affect a range of members, but, rather than just reacting to whatever is coming from Edinburgh, we also have a responsibility to be proactive and to raise issues that our members want us to raise. It is quite plain to everyone that we are on a consultation hamster wheel. Consultations are coming out from everyone all the time; everyone always wants to consult. Although we are happy to help out as much as we can, and although we want to make sure that we can put policy makers in touch with the right people, there is a point at which the Executive, if it is committed to making better

regulation, has to get out to the people and not rely on organisations such as ours. If the Executive wants to achieve better regulation and is serious about getting information in at an early stage, it has to devote time to going out and finding people who are affected.

Gordon Jackson: Is that practical? I am not saying that the Executive should be lazy, but how would it make sense for it to go out to people rather than go through your organisation? After all, that would be to take on the role that you claim to carry out, and rightly so, because you have the expertise to represent all your members.

Susan Love: If the regulation is on a particular issue that we have not already responded on or for which we do not have the information, and if we are saying that policy makers should devote their time to getting the regulation right at an early stage, that would be effort, cost and time well spent; it would be better than sending out lots of consultation documents and getting six replies back.

The Convener: You mentioned making sure that businesses, particularly small businesses, understand regulation and what it means. We will now talk about easily understood regulation.

Mike Pringle (Edinburgh South) (LD): Susan Love, Alan Mitchell and Brian Jamieson all referred in their submissions to the importance of plain language. The FSB said:

"Much of the text uses specialist terms and it is often hard to understand a) what is being proposed b) why it is being proposed and c) who will it effect and how".

I do not think that there was anything about that in the Scottish Chambers of Commerce submission, so could David Lonsdale lead off and tell us what he thinks about having things written in plain English and making them easier for businesses to understand?

David Lonsdale: Thank you for that. I am impressed with your research.

At last week's meeting, Dr McHarg said that there was a "motherhood-and-apple-pie quality" about certain aspects of the issue. If I might be so bold, I will add that that could also apply to the plain English agenda. As an individual who is always receiving consultations and regulations, I would love it if they were in a simple and digestible format so that we could easily understand them and then consult our members.

I appreciate that, at times, particular words and types of words might have to be used—I know that there are lawyers in the room. However, communities with different interests, such as the business community, can interpret things in a different way. Alan Mitchell and I said in our opening remarks that we favour the principle of a lighter regulatory touch, so we are always going to interpret regulations in that context regardless of whether the language is plain. I do not know whether that answers the question.

Susan Love: Although we have highlighted the fact that many regulations are difficult to understand because of the language that is used, we do not believe that that is a priority, because most businesses do not read the regulations. If we were to make a plea to the committee, we would ask you to focus on getting the regulation right in the first place. The Executive must decide whether there is a need for the regulation and it must ensure that any subsequent advice leaflets or pamphlets that are sent out to business are easily understood.

David Lonsdale: I am sure that, like me, my colleagues have a panel of people involved in business who are, in effect, voluntary advisers to whom we can go to ask for explanations. We have done that with issues such as climate change and emissions trading—I am the first to admit that. In the short time that I have been working for the chambers, not too many regulations have crossed my desk that I cannot understand. However, if I had to, I would go to an adviser and say, "This regulation is coming out. What do you know about it?" They might have a good understanding of what is happening because they have contacts and networks in the industry.

Mike Pringle: Susan Love referred to businesses reading, or not reading, the regulations. Most regulations come out with guidance notes. Are those notes read more by businesses and are they more easily understood?

David Lonsdale: I would be surprised if many firms read the guidance notes that come out with the legislation. One of the witnesses at last week's committee meeting said that the guidance was a bit like an RIA, in the sense that drafting guidance and explanatory notes probably helps the Executive to think through what it is trying to achieve and how that might impact on the wider community.

Brian Jamieson: The plain English test should form part of the independent challenge stage. As a lawyer, I would never accept any excuse from lawyers that regulation has to be in obscure language. I challenge my economic development colleagues all the time by saying, "The board members will never understand this; it is written in jargon." There is really no excuse for obscure language; regulation can be written in plain English.

Alan Mitchell: Many of our members are medium-sized and larger companies, which will have technical specialists who can take the time and who have the expertise to understand the

regulations and to put them in the context of other similar regulations. I suspect that it is slightly different in smaller firms, which might be more likely to ask legal advisers what the legislation meant for their business and what they needed to do. Smaller businesses take a different approach to regulation and the management of regulation.

Susan Love: Plain language is important when the legislation is passed and it has to filter down to the people who have to enforce it. That is where things can fall down. If they are busy people and that is the first they have seen of the legislation, they may find it difficult to enforce. I am thinking of the Scottish Environment Protection Agency or local authorities, for example. Sometimes, those organisations will be the ones who are knocking on the doors of businesses and trying to explain to them the ABC of what is required. If those agencies are not clear—and they often are not—the business will be even less clear.

In our submission, we refer to an animal by-products regulation that was brought in at the end of 2003. I am not too sure, but I think that, because we in Scotland did not have the necessary facilities available when the regulation came into force, the Executive advised the local authorities to take a proportionate approach to enforcement. That could mean something very different to each environmental health officer in all 32 councils, so what do we advise our businesses to do? It is important for that middle stage of enforcement that the explanatory notes or guidance that accompany the regulation are very clear.

Mike Pringle: It was interesting that you should refer to butchers. I was approached by a number of butchers in my constituency after I was elected who were unclear about some sort of regulation. The regulation had come from the council and I do not think that the council was very clear about it either, so I take your point.

You suggested that guidance notes were not always read. Can any of you suggest how they could be improved so that they are easier to read and understand?

Susan Love: When dealing with regulations, I have generally found the accompanying notes to be reasonably easy to understand. However, it is unlikely that businesses would ever be reading such notes. People are more likely to receive documents that have been produced specifically for businesses, the voluntary sector or local authorities.

Alan Mitchell: The idea of a single commencement date has been suggested for regulations. A challenge for business people is the sheer flow of regulations and legislation. We could spend a huge chunk of every week reading guidance notes or regulations. If there were a single commencement date for regulations, that might condense things and allow a specific period during which people could take more time to read the documents, without being distracted from the day-to-day and week-to-week task of running their businesses.

Ultimately, businesses have to take responsibility for informing themselves of what will impact on them. We are not suggesting for a second that they should not take that responsibility, but workload issues arise, especially in smaller owner-manager businesses. A single commencement date might create a kind of window—a week during which people had to sit down and read nothing but guidance.

Gordon Jackson: National regulation week—a fun idea!

Alan Mitchell: Yes, but otherwise the reading of regulations will get lost, as business people will say, "Oh, I've got a customer coming in, I've got a contract to sort out and I've got an employee who's taking me to a tribunal." In smaller businesses, those are the kinds of issue that the reading of guidance notes competes with week in and week out.

David Lonsdale: I do not think that we would necessarily take up Mr Jackson's marketing slogan. However, such a thing is done across the United Kingdom. On October 1, a raft of initiatives came in covering issues such as disability. The idea of having everything in a week is good, but whether people would read all the documents is another matter—as is whether you would market it as suggested. However, the idea is good.

Mr Stewart Maxwell (West of Scotland) (SNP): I am glad that Susan Love raised the point about enforcers being, in effect, the people who guide small businesses. In my experience, that is exactly what happens. Small businesses do not read regulations and guidance; they wait for the inspector to come round—the environmental health officer, the meat inspector, or whoever—and then take guidance from that inspector. Given that that seems to be the norm—and that mistakes of interpretation can be made along the chain between the inspectors and the businesses—is it important that we target guidance and training on the inspectors rather than on the businesses or on other people in the chain?

I have experience of a small business being given information that seemed bizarre. When we double-checked through a lawyer, we found that the guidance that the inspector had given was completely wrong. There had been a complete misunderstanding of the regulation. However, it was only because the guidance was so bizarre that we double-checked it. Could we help small

businesses in particular by targeting the inspectors—because, in effect, the message comes from them?

Susan Love: We have often highlighted the importance of the links between small businesses and, in particular, local authorities. Local authority enforcers are those who are most likely to come into contact with businesses. It would therefore make sense to focus more attention on them. They may have dozens of pieces of paper on their desks that they do not have time to read and they may not be clear exactly what they are supposed to be enforcing. It would be sensible to ensure that local authorities are well briefed by the Executive on what exactly it is trying to achieve through any particular objective.

The Convener: Perhaps we should all watch the television programme that is on at the moment.

11:45

Murray Tosh (West of Scotland) (Con): Good morning. The FSB submission was especially helpful, and slightly scathing, about the impact of the enforcement concordat between local and central Government. What are the panellists' views on the difficulty that the failure of the concordat creates for the business community? Is the case made for a statutory code of good enforcement practice? Perhaps Susan Love would like to answer first, as I was referring to her paper.

Susan Love: Part of the reason for our paper being so scathing is our close involvement with the concordat. I have sat on the concordat working group in Scotland for the past two and a half years. When the concordat came out and everyone signed up to it, we genuinely believed that it could be the vehicle for highlighting the principles of good enforcement among local authorities and perhaps among other organisations. However, there were many initial problems, which have ensured that the concordat has been less successful as time has gone on.

We are just disappointed. We are not sure that we can see a way ahead for the enforcement concordat. The working group has not met for more than a year and a half now. In the Executive's annual report on improving regulation—which was issued in December—the section on the enforcement concordat is especially weak. I saw no proposals in that section to suggest a way forward for the concordat.

There is low awareness of the concordat, and poor motivation for it, among local authorities. The last work that the concordat working group did was to try to engage with local authorities to find out whether they were using the concordat. There was a very poor response rate.

As I mentioned, a good practice guide was produced in 2003 in England. It contained practical case studies of good enforcement that local authorities could use—examples of good enforcement and things that could be done to help towards it. The good practice guide was supposed to be issued in Scotland, but I have not heard anything for the past year and a half.

I am sorry to sound a bit despondent, but we are not clear about the way ahead for the concordat. However, we believe that there is something there and that the concordat could be useful.

Alan Mitchell: The CBI also supported the concordat. I confess that I do not have huge experience of it, but I suspect that its problems arose because it was set up as a tick-box exercise—let us tick a box to show that we are putting in place a process to make things work better. However, as with all tick-box exercises, unless the commitment, will and resources are there to make things happen, they will not happen. My understanding is that many local authorities do not have sufficient resources to make the commitment that they would like to.

I do not know how we can move the concordat forward. The issues to do with enforcement all come back to the same basic concept. I am sorry to keep harping on about it, but if you have too much regulation to start with, you will have problems all the way through.

I am not sure where the enforcement concordat can go; and I am not sure that making it statutory will make a huge difference. If it makes meetings happen, I guess that that is better than meetings not happening. However, if it makes meetings happen at which there is no commitment and no will to achieve anything, I wonder whether the concordat will make any difference on the ground to the businesses that we represent. Probably not.

David Lonsdale: There were two elements to your question, Mr Tosh. The first was about the difficulty for the business community. I do not have a huge amount of evidence, but one of our members recently provided a case study.

He said that his local authority had introduced an additional charging scheme and would withhold permissions and certificates for annoying repeat site inspections. I can imagine that some such instances are annoying, but in normal run-of-the-mill business, you do not slap on additional charges. Our member said that he felt unclear about the new charging guidelines, because nothing seemed to be written down. However, he was particularly clear about the levels of charges being applied to him. He was under the impression that he paid for the service anyway. He did not think that he was annoying; he just thought that he was querying, checking and ensuring that the

correct process was being applied. I did a bit of research for him, and it seemed that the charging scheme went against some of the principles that were outlined in the enforcement concordat, particularly as the one thing that the local authority stated clearly was that the scheme applied to businesses, but not domestic operators. The example comes from planning and building houses. If I built a house and sold it on to somebody, would that be personal use or business? Would the scheme apply to somebody who was building a small development of two or three houses? There was a degree of uncertainty about whether it would.

Whether there should be a statutory code is another question, which is about scrutiny and transparency. Perhaps it is even for an entire inquiry at some other stage, because I get a sense that there are some big issues in it.

Brian Jamieson: I can only echo the FSB submission, which says:

"many senior policy makers and politicians have never heard of the Concordat".

I had never heard of it, although Scottish Enterprise is not an agency with enforcement powers, so I have nothing to add.

Susan Love: The concordat's importance is in ensuring that local authorities buy in to the principles of good enforcement and that, having signed up to the concordat, they ensure that those principles filter down to every inspection officer who will call at a business. The officers do not have to be aware of the enforcement concordat, but they have to be aware of how they, as inspectors, should interact with businesses and of what businesses can expect from them. We want to ensure that those principles filter down to those on the ground. The local authorities obviously all agreed to the concordat—when the letter landed on the chief executives' desks, it was signed—but that was it. The comment that Brian Jamieson quoted from our submission refers to the head of economic development in one council, who had never heard of the concordat, which suggests to us that it has not gone far through the system. If the principles of the concordat are nonetheless being put into action and all the inspection officers are carrying them out, that is fine. I will not get hung up about a specific piece of paper, but the FSB thinks that that drive has been lost.

Murray Tosh: One or two of the witnesses have mentioned the evidence that Dr McHarg gave us last week. She gave a robust defence of unequal enforcement, in which she said that it was perfectly acceptable—and, indeed, to be expected—that enforcement regimes would focus on those whom the enforcer saw as the worst offenders and crack down most severely on poor practice. In their submissions, all the witnesses made the point that they want enforcement to be equal, and some have talked about appeal mechanisms against unequal enforcement. Should the committee be worried about unequal enforcement in every respect or should it focus more on cases in which unequal enforcement means that businesses in Scotland have to achieve higher standards, or are pursued more effectively and vigorously by inspection regimes, than their competitors south of the border or elsewhere in the European Community? What do the witnesses make of Dr McHarg's point that inspection should be most severe against those who seem to infract the basic regulations and directives most regularly and most heavily?

I thought that those questions would stir up the CBI more than any other witnesses.

David Lonsdale: I have had a quick glance at Dr McHarg's comments, and it is fair to say that her philosophical approach to the wider issue of regulation is different to that of the members of the Scottish Chambers of Commerce. Therefore, her comments on enforcement do not surprise me.

Murray Tosh: I was not seeking to get into a debate about Dr McHarg's comments; I was using them more as a lead-in to asking what we need to do to ensure that enforcement is equitable without necessarily being hung up on the principle that there must never be any inequalities.

Alan Mitchell: One of the important issues on equal enforcement is the need for the regulators to have uniform understanding of the regulations. That comes back to the point that we made earlier about the guidance and advice that is given to the regulators and the resources that are available to them. If we have an over-regulated society and the regulators do not receive the resources to keep up with that regulation, that will put pressure on their ability to offer a full guidance and advisory service.

The CBI did a survey on SEPA a couple of years ago. One of the things that our members most commonly said in that survey was that SEPA's focus appeared more and more to be regulatory enforcement and less and less to be advice, guidance and working one on one with businesses.

The CBI is very much in favour of a level playing field, so we do not want higher regulatory standards or more rigid interpretation than elsewhere to be applied in Scotland.

Murray Tosh: Do you have evidence that higher regulatory standards and more rigid interpretation are being applied in Scotland and that that is damaging the competitiveness of, and the potential for growth in, the Scottish economy?

Alan Mitchell: Every time that I sit around the table with some of our members, their number 1 complaint is the perceived lack of a level playing field.

Murray Tosh: Does that reflect your members' perception of the impact of enforcement on them or do they have the strategic ability to make comparisons with competitors and know and show that enforcement damages them, but not their competitors, to the disadvantage of their businesses?

Alan Mitchell: In some cases, it will be perception. However, if the business is a multisite or multicountry operation, it will be able to make direct comparisons of the regulatory regime that is applied in another country. In other cases, it will be anecdotal evidence based on the discussions that are conducted and the information that flows in an industry.

Murray Tosh: In the cases in which your members can identify the problem, does it stem principally from the way in which European directives are transposed into national law or from enforcement?

Alan Mitchell: It is both. On some occasions, it is a matter of the implementation of a directive in Scotland—there have been examples of the gold plating of directives in Scotland—but on others, it is down to how the regulations are enforced and how different regulatory regimes and bodies operate in different parts of the world.

There is no single problem, but enforcement is part of the issue. The enforcers' and regulators' ability to understand fully the different businesses that they regulate is crucial. One of the CBI's concerns is that the sheer volume of legislation that has to be regulated creates problems for the regulators and affects their ability to spend as much time as necessary with the businesses to understand them well enough to be able to interpret and apply regulation sensibly.

Susan Love: There might be a specific problem with SEPA, because an awful lot of recent legislation is environmental and SEPA is the enforcer of such legislation. The FSB's experience has been that, because much of the legislation is new, there is still a lot of discussion on the exact definition of what it means or of how it will be implemented. For example, there is an awful lot of discussion on the definition of waste, which has caused all kinds of problems for our members, who are not getting a clear answer from SEPA officers or are getting one answer from a SEPA officer in one area and a different answer from an officer in another area of Scotland.

There are specific occasions on which such discrepancies cause problems, but we do not want to demonise all enforcement officers throughout Scotland, because, by and large, over the past few years, most of them have moved towards more of an advisory role than a policing role. That is particularly the case in trading standards and environmental health, in which there have been distinct improvements despite much of the legislation. We think that many of the problems are in subjective areas such as planning and I am not sure how they would be solved. However, there is the specific problem of the vast amount of new regulation coming in, which has yet to run its course.

12:00

Gordon Jackson: I want to nail this down a wee bit. Murray Tosh gave the defence of unequal enforcement. Obviously, some people are persistent offenders and some are not, but that is not unequal enforcement at all. In any system, people get penalised more if they keep doing something. Unequal enforcement would be when a person who does something only once gets a different punishment from another person who has also done that thing only once. People's perception might be that they have been unequally treated, when they have not. They might say, "Well, I got punished and he didn't." I use the word "punish" loosely. However, as Dr McHarg said previously, it may turn out that the person has done something much more than once.

Is there specific, non-anecdotal evidence of unequal enforcement within Scotland? By that I mean, do you have on your records that your members experienced regulation being enforced in one way in Fife, for example, and differently in Glasgow for an identical situation? Is there just anecdotal perception or is there specific, hard evidence that organisations could give us to show that the difference is truly unequal?

Susan Love: I understood that there was a report on the butcher shop licensing, in particular, which demonstrated different implementation in different local authorities.

Gordon Jackson: I did not know about that, but that is what we are looking for.

Susan Love: I assume that that report is publicly available. It was issued to us—from the Executive, I think—a couple of years ago. The report clearly demonstrated that two local authorities had interpreted the licensing differently.

Gordon Jackson: You do not keep a kind of secret book or blacklist of unequal enforcement.

Susan Love: Our difficulty is that much of what we hear is subjective, so it is difficult to pin down how a business feels that it has been unfairly treated. A business might say, "I wanted to recycle this in this area and I was told by SEPA that I

would need a license. But I heard that Mr Bloggs in the local authority up there didn't need a licence because they interpreted it differently." Or someone might say, "I was told I needed to provide two parking spaces for this extension to my business, but in the neighbouring council area they didn't have to do that." Those kinds of anecdotes have built up the big perception.

Gordon Jackson: But you agree that this is anecdotal rather than specific evidence.

Susan Love: It is difficult to pin down exactly what the nature of a regulation is—that is what bothers businesses.

Murray Tosh: For that reason, I thought that it might be useful if we could invite the CBI to provide us with evidence. I do not think that we can promise to drill down into any specific field, such as environmental regulation, but Mr Mitchell referred to operators on sites in varying countries. I think that it would be useful to have worked examples of how the application of UK law—or European law within the UK—impacted differentially on the CBI's members. Perhaps the CBI could show, for example, that the application of a directive that came from European environmental law led to much more severe standards here than in other areas and indicate how that impacted on competitiveness and, therefore, the potential to grow the economy. Without promising that we would do a full investigation of the economy, I think that that would let us understand the severity of the difficulty that your members face.

Alan Mitchell: I am happy to try to get that information. CBI Scotland has a profound sense of frustration sometimes that we cannot provide more specific examples to people like yourselves. We hear all the time, "You always moan about regulation; but give us some examples." It is not for want of trying on our part. For example, prior to the meeting of the small business consultative group in, I think, November last year, at which regulation and over-regulation was on the agenda, I sounded out a cross-section of our members and asked them to give me specific examples of regulations that made them go, "Oh, no." I got various examples, but they were not about members saying, "This is just a bad regulation." The examples were all about the inconsistency and volume of regulations.

It is very hard for us to get the kind of factual information that you are looking for that would enable you to drill down better. However, I will certainly go back to those of our members who operate across sites and countries to see whether they can furnish me with such information. I will be more than happy to make it available to the committee. Our members want action on this. I will do my best to come back to you on that.

The Convener: That would be helpful. Indeed, it would be helpful to have that information from as many of the witnesses as possible.

Susan Love: David Lonsdale referred earlier to the regulations sub-group that the small business consultative group has set up. I understand that it will take on the holy grail of trying to identify specific regulations—indeed, the sub-group is to work solely on the identification of the specifics. I think that it plans to submit that information to the Deputy First Minister for review.

The Convener: Good; that is excellent. I am getting a wee bit concerned about time. Long Subordinate Legislation Committee meetings are unheard of.

I move on quickly to Stewart Maxwell who will address the subject of periodic reviews, which most of you welcomed earlier.

Mr Maxwell: I am aware that time is moving on. I will run some of my questions together. I want to cover two basic points: the idea of post-implementation reviews, or periodic reviews, and sunset clauses. As the subject of sunset clauses was mentioned earlier; I will leave it to one side for the moment.

The Federation of Small Businesses has given post-implementation reviews the snappy title of

"Regulatory Impact Post-Implementation Assessments",

which it says are a good idea. The FSB suggests that they

"should be carried out at a stipulated time 12-18 months after a regulation comes into force."

Others have suggested that the appropriate timescale is five years. Should there be a requirement to review regulations? If so, should it be statutory and when should the review take place? Is 12 to 18 months a good timescale? If not, would five years be better or should we split the difference and make it three years? What are the advantages of carrying out such reviews? I appreciate that I have asked a number of questions, but I am trying to speed things up a little bit.

David Lonsdale: We spoke up in favour of sunset clauses in our submission. They provide an existing regulatory MOT-type provision for review after 10 years, although we think the timescale should be five years. As I said earlier, the First Minister said that that should be the case for EU directives and we support that. We appreciate that review will, to a certain extent, increase the administrative burden on the Executive and the Parliament. However, we think that such review makes for a useful lesson for business.

Mr Maxwell: Should review be statutory?

David Lonsdale: I suggested earlier that certain aspects should not be statutory, so it would be inconsistent of me to say that. Reviews ought to be good practice, however. More scrutiny of RIAs and so forth will lead to more transparency, which is a good thing. The procedures should be fleshed out in due course. As I said earlier, good practice will become common practice throughout. At this stage, however, my answer is no.

Alan Mitchell: The question of when to review is the same as, "How long is a piece of string?" To a degree, the answer depends on the regulation. If a regulation is of a specific nature and applies to a specific industry, one would hope that, as part of the regulatory impact assessment and the initial thinking about the measure and what it means, it would be possible to come up with a sensible suggestion for a timeframe. Someone would say, "After X amount of time, given the nature of the regulation and the industry, we ought to see whether the outcomes and expectations we had are being delivered." In some cases, that might be 12 months and, in others, it might be three years. However, in cases in which the regulation applies more widely, the impact that will be felt across different sectors may vary depending on how long problems take to emerge.

It might be possible to have a system whereby, if a regulation was of a general nature, the Executive would go for a figure of 24 months or three years as being sensible in terms of the broad range of possible impacts but, in the case of more specific regulations, the timescale for review would be determined at the outset of the process. Business must know that there will be a review and that it will take place no later than 18 months or so down the road. I am not sure whether a system like that would be workable, but what I am saying is that there should be horses for courses.

Mr Maxwell: Should such reviews be placed on a statutory basis, or would that be going too far?

Alan Mitchell: I understand the concern that making a matter statutory does not make it better. However, making a matter statutory makes it happen and the first stage of making something better is to make it happen, so that we can then ensure that it happens in the best possible way. I see no compelling reasons for not putting post-implementation reviews on a statutory footing. My only reservation is that we must not create an overly complex and hugely expensive bureaucracy to create better regulations, which will simply end up costing money in a different way from the way in which bad regulations currently cost money.

Mr Maxwell: Would the advantages of post-implementation reviews outweigh the added bureaucracy and expense of carrying out such reviews? It is not always obvious that that would be the case.

Alan Mitchell: I do not know whether a review system could be designed that would allow an initial level X review that would move to a level Y review only if certain criteria to do with adverse or unintended consequences appeared to be met. I do not know whether it would be possible to create a simplified graded system. However, as a matter of principle, all regulations should be reviewed to ascertain whether they are still useful. The law of unintended consequences will come into effect in the case of every regulation and might cause huge damage in the case of some regulations. If we could find a way of creating an efficient and relatively cost-effective review system, that would be preferable to not carrying out reviews.

Susan Love: Perhaps I can explain the rationale behind our recommendation, which acknowledges the balance that has to be struck. Our proposal is based partly on the recommendations in the report of the Mandelkern group on better regulation. The group argued that review clauses can be valuable in specific circumstances: when regulation is introduced at short notice in response to a crisis and without detailed analysis; when regulation is introduced on a precautionary motive and further scientific work would provide a firmer basis for decision making; when a sector, event, technology or market is changing rapidly; when the legislation is in the nature of a pilot project; and when the regulation confers rights on the state rather than on citizens. The UK Cabinet suggested an additional circumstance: when measures are taken in the face of considerable opposition. The recommendations were made because reviews are expensive in terms of parliamentary time. We therefore suggest that such reviews should not be statutory but should be used in those specific circumstances.

Alan Mitchell outlined the benefits of post-implementation reviews: any unintended consequences of regulations would be highlighted; small businesses, consumers and others could point to the anticipated effects or costs of the regulation and highlight policy failures; departures from forecasts in RIAs could be pointed out; there would be an opportunity for swift reform if mistakes had been made, for example in RIAs; and the approach would supply feedback that would be valuable in improving the quality of future RIAs. The concept of post-implementation reviews has a sound basis in much of the work on better regulation, but if the approach is to be effective, such reviews should be carried out in specific circumstances.

We also suggest that parliamentary committees could have a stronger role in reviewing legislation that they had assessed before it was passed.

David Lonsdale: I should have said this in the context of our earlier discussions. I suggested that discrepancies between the official forecast of costs and benefits and the forecasts in other submissions should be made public in the RIA. I was not being prescriptive when I said five years, but that would be an appropriate juncture, although maybe it would be appropriate to kick in an earlier periodic review.

One of the top issues at the moment is rights of appeal in planning, to which my members are wholly opposed. However, if Parliament goes through with that, it might be an idea to review the matter in fewer than five years, perhaps after a year or two. That is one issue on which there is broad agreement. There are discrepancies in the implementation and cost benefits.

12:15

Brian Jamieson: We support a review, largely based on an analogy with our public sector interventions, which we insist are reviewed. Alan Mitchell suggested that reviews be built into proposals at the outset, depending on how controversial they are. There should probably even be a backstop for proposals that are regarded as uncontroversial, such that a review is built in at some point. We perform implementation reviews of our interventions to ensure that they are relevant, that they achieve what they set out to do, and that they do not have unintended consequences. I am not convinced that such reviews need to be statutory—we find that if policy lines are set, they are followed. Officials would be criticised if they did not review proposals as planned.

Mr Maxwell: Connected to that is the second issue that I want to ask about, which is sunset clauses, which have already been briefly mentioned this morning. Clearly, as part of efficiency savings, instead of having a review you could insert a sunset clause which, unless anybody objected, would deal with the issue by ceasing the regulations. That goes back to the point that was made about the volume of regulation, and always having more and never having less.

What is your opinion of sunset clauses? I know that there are concerns. The CBI stated that it was sympathetic to sunset clauses, so long as a

"large number of 'renewals' did not cause a parliamentary logjam."

You are concerned that sunset clauses might create parliamentary logjams—the committee is interested in examining that. Sunset clauses may have merit, but we have to consider them.

David Lonsdale: We are explicitly in favour of them, except where ministers give a sound reason why they are inappropriate.

Susan Love: The example that I gave at the start of the meeting about butcher shop licensing concerned a regulation that was introduced for a specific reason. The reason no longer exists but, nonetheless, we seem to be consulting on a new regulation. That is a good example of a regulation that should have contained a sunset clause.

Alan Mitchell: If regulation exists for a specific reason, and it is clear that that reason will no longer exist at a particular point down the road, we should get rid of the regulation automatically and drop it from the books.

Brian Jamieson: That would be built in from the start, but I am dubious about it as a general proposition for many regulations, for example, those that implement European directives.

Susan Love: If I may, I will return to a related point that we have not covered. A lot of work is done in the UK Government to ask departments to make known regulations that they have reviewed and which are now obsolete or have been duplicated. I do not get the sense that we are seeing the same kind of commitment within Executive departments. It is important that they do that, but I am not sure that they are.

Mr Maxwell: That is not an unfair point.

David Lonsdale: It goes back to the fact that the process has to be good but, at the end of the day, it has to be about more than that.

The Convener: I am changing the agenda so that we can move on more quickly. We have covered many of our questions on improving the quality of existing regulation, which is our next item. I will go through the questions with you, and ask you to reply in writing. One issue is the way in which you can access amendments to legislation, be that on the web or by other means. There is the whole online and free-of-charge issue. I wonder whether you could put together a response on that and send it back to us.

Secondly, we are always concerned that there should be consolidation to make it easy for business to read and understand regulations that might have been amended several times. After all, we have a rule that if an instrument is amended five times, there should be consolidation. Perhaps you could also provide a written response on that.

Murray Tosh will ask a few questions on reform and simplification. We have already touched on simplifying the language that is used in instruments. Murray, could we try and get to the bare bones of the matter?

Murray Tosh: In his response to questions 33 to 35 in the original consultation document, Mr Mitchell of CBI Scotland said:

"In principle, we would support reform and simplification along the lines suggested."

In practice, is there any area of regulation in which the law is crying out for review, reform and simplification?

Alan Mitchell: Off the top of my head, I do not think that there is. I must confess that, although the response is in my name, it was written by my predecessor as head of policy at CBI Scotland. It was the last thing that was done in the transition period between his leaving and my starting.

Murray Tosh: That explains a lot.

Alan Mitchell: Instead of firing off an answer, I would prefer to think about the matter and come back to the committee.

Murray Tosh: It comes down to credibility. If business is asked whether there is a problem, it should be able to come back and say "Yes, there are lots of problems, and here they are." It would be helpful to find out the extent to which you were able to identify areas of widespread practical concern. I do not know whether other witnesses want to get involved in the discussion, but the question was prompted more by CBI Scotland's response.

Susan Love: We would probably highlight waste and wider environment legislation because there seems to have been a raft of such proposals in recent years. As I said, we would like departments to be asked to come forward with proposals for simplification of regulations, which is what has happened with the UK Government. Those departments are—presumably—well placed to know whether what they are introducing duplicates existing legislation.

Murray Tosh: I do not know whether you have a view on my next question, but we are aware that much legislation gives ministers powers effectively to vary or amend primary legislation through orders instead of fresh primary legislation. What are the merits of that method of dealing with legislation, particularly legislation that impacts on business?

David Lonsdale: As I said earlier, we need a beefed-up improving regulation in Scotland unit or at least a unit that has a wider remit. After all, regardless of the mechanism that is used, some policy objectives do not get picked up under the existing RIA scheme, which is why we have argued for a more powerful body that has a wider remit and which is based in the office of the First Minister. I believe that Susan Love said something similar earlier.

Such a body would be able to pick up the aspect of the Local Government in Scotland Act 2003 that I mentioned earlier. I appreciate that that would have policy implications. However, in that example, I should point out that, during the process, we had a chance to comment on the guidance, but we were given no indication of the new burdens that potential winners of contracts had to deal with—indeed, I counted six or seven—even before they handed in their submissions for contracts. A business burdens unit or another unit that would take a much wider look at such issues would pick up on that point, which would be of real benefit and would help to get the business view in early doors. I know that "early doors" is not a parliamentary phrase.

Murray Tosh: It is not unparliamentary.

Susan Love: If legislation is made in that way, it might not be subject to the rigorous process that we have outlined as being ideal. We want to make sure that before any decision is taken, no matter through which process, the process has been followed.

I mention another matter at European level that is cause for concern. If something is agreed by an amendment—usually through a last-minute compromise in the European Parliament—it has probably not been subject to the same impact assessment as the original proposals, in the same way that guidance might not go through all the same processes. That obviously concerns us, but it need not if all the correct processes are followed.

The Convener: Thank you. We now move to the final section of questioning, about the role of IRIS. You have all written quite a lot about this and have made suggestions about how it might be improved. Adam Ingram has two questions.

Mr Ingram: Witnesses have already indicated their opinions on some matters, but where would you like changes in how IRIS functions? Alan Mitchell suggested that there ought to be some sort of business perspective in the IRIS unit and David Lonsdale mentioned beefing up IRIS. Will you pull that together in your proposals to improve the operation of IRIS?

Alan Mitchell: We favour having IRIS as part of the First Minister's office because that would give it the ultimate political credibility that it needs to do what it must do and because that would tie in with the First Minister's objectives to promote economic growth.

As an organisation, IRIS simply needs to have people resources—the numbers and quality of people who have the confidence to go to individual departments to ask, "Why have you done this?" or "Why have you not done that?" or to say "Sorry—we don't agree with this and we don't like your

assumptions about that." It comes down to a cultural mindset. The single most important starting point we could give IRIS would be to give it the personal authority of the First Minister's office. In that way it could challenge individual departments, senior civil servants or, indeed, Government ministers and say that it does not accept the logic that an act will lead to the suggested impacts at the suggested cost. It could ask how a point had been reached and ask for an explanation of the rationale. IRIS needs that kind of clout and confidence.

I thought of having some kind of business input into IRIS only today. That would give it independence from the civil service and the ability to challenge civil servants and Government ministers and to tell them, "We don't think your sums add up about the impact of this regulation—explain how you got there." IRIS's key role should be to challenge and say, "Sorry, go back and think again. We think you've got it wrong. Prove to us that you haven't." We are trying to achieve that kind of shift.

Mr Ingram: Do others agree?

Susan Love: We have to be clear about how much of a disappointment IRIS has been. At the time of writing our submissions—last year—we had not really seen anything happen with IRIS in the previous three years. We are business organisations that work with the Enterprise, Transport and Lifelong Learning Department every week, so we are in a position to ask what IRIS does and whether anyone has heard about anything that it has done in the past three years. One has to admit that the situation is fairly disappointing.

As I said, the advice that we have received from Europe about better regulation is that we must have a strong central co-ordinating body that has real resources and strong political backing, but we do not believe that that is the case at the moment. As I said, although the RIAs should still be completed by each policy department, they should go to the IRIS unit for approval before they are sent on to the minister to be signed off.

Mr Ingram: Should IRIS report directly to the First Minister?

Susan Love: We suggested that the IRIS unit should be based in a beefed-up finance department that does a cross-cutting review. Such a finance department would review all costed proposals from all departments; IRIS would therefore fit into that. However, if there is to be no reformed finance department, it would make sense for IRIS to sit in the First Minister's office.

David Lonsdale: One would like to think that IRIS would help departments to rise above turf wars and that it would also be in line with some of the recommendations that are contained in the Mandelkern report, which talked about direct support from the head of the Government, which in our case is the First Minister's office.

Brian Jamieson: I agree generally, but I tread carefully because I notice that IRIS is at present lodged in the department to which we report. I spoke earlier about an independent challenge which—if it comes from IRIS—has to have clout. We also find that internally, when we have an independent challenge to appraisals, the challenge must have sufficient clout against the proposer so that proposals are not bulldozed through.

David Lonsdale: There would be other benefits. IRIS might get some money to commission independent research. We spoke earlier about the quality of RIAs and what is being done down south to try to address that. We have concerns about the quality of RIAs that we outlined today. We might get better access to resources—possibly even better access than the finance department.

The Convener: I thank the witnesses very much for the time that they have spent with us this morning and for their written material. I hope that they will not mind providing the additional information that they spoke about as well as answering the questions that we will send them about accessibility—there were three or four.

We will take a brief break before we return to item 1 on the agenda so that Professor Page can present his paper.

12:32

Meeting suspended.

12:36

On resuming—

The Convener: I apologise to Professor Page, the committee's adviser on European issues relating to our inquiry, who has been waiting for a little while. He has kindly produced a paper and will go over some of the main points of it with us.

Professor Alan Page (Adviser): The apologies are all mine for being late and disrupting your programme. My train was late.

I wrote the paper on the European aspects of the inquiry for the committee towards the end of last year and I have subsequently revised it in the light of the evidence that you received in response to the consultation paper. The suggestion was made that I take you through the main points and answer questions, which I am happy to do. In a sense, the paper is a response to the committee's initial consultation paper.

The first point that occurred to me is that the concern to minimise burdens on business has been much slower to manifest itself at European level than at UK level. Governments that are committed to reducing burdens on business—which successive British Governments have been since the mid-1980s—will find it rather frustrating if their efforts are offset by developments at European level that compel them to increase burdens. A great deal of effort has been put into building at European level the kind of disciplines that have become accepted at national level.

The consultation paper picks up on the report of the Mandelkern group. I draw to your attention a number of developments that have taken place since then, which are highly relevant to the inquiry, such as the Commission framework for better law making, the accompanying action plan for simplifying and improving the regulatory environment and the inter-institutional agreement on better law making. Those initiatives stand separate from and are independent of the constitution treaty. A lot has been going on, but it is fair to say that although all those initiatives are important, we are some way short of being able to say with confidence that better law making has firmly embedded itself in the culture of the EU.

Earlier in the meeting, the representative from the Federation of Small Businesses in Scotland made the point that there was a great deal to be learned from Europe. I suspect that the theory is pretty well known; problems come when we get to implementation. The same problems that are talked about at the UK and Scottish levels are experienced at European level.

Recent developments apart, it seems to me that the main points apply to European law making generally and are not confined to improving regulation. In my paper, I divide consideration of those points into two parts. I deal first with the negotiation of EU obligations and then with their implementation.

As far as negotiation is concerned, the devolved Government of Scotland obviously finds itself in a difficult position in the sense that it may find itself responsible for implementing or transposing obligations on the content of which it has not necessarily had any real say. The Scottish Government does not have a guaranteed voice in the European decision-making process. The UK Government response to that is the commitment to consultation that is embodied in the memorandum of understanding between the UK Government and the devolved Administrations. I do not think that the committee will find anyone who says that that arrangement does not work well. Of course everyone will say that it works well, but there is enough evidence around to suggest that in particular cases it may not work as well as people would like it to. Some of what the committee heard earlier about the environmental field may reflect that. I suggest that that is an area in which the committee might want to do follow-up work, although I am not certain about how it would do that. The point has already been made about the significant difficulty of drilling down in a limited time. Nevertheless, the committee might want to bear my suggestion in mind. There is a parliamentary dimension to the issue, which I pick up in paragraph 9. The European and External Relations Committee goes through proposals to identify those that are important. I ask how well that process is working.

The first point that I make on implementation is that the implementation of EU obligations is an important impulse to law making in the devolved Scotland. That is done principally through subordinate legislation—the Scottish pattern follows the UK pattern. EU obligations tend to be implemented through subordinate legislation, which is the committee's province, rather than through acts of the Scottish Parliament. In my paper, I quote a written answer on that subject. In the Parliament's first session, two acts were about the implementation of EU obligations, whereas about 10 per cent—or perhaps more—of all subordinate legislation had something to do with it.

There is the question of the relationship between the endeavours of the Subordinate Legislation Committee and those of the European and External Relations Committee. In the first session, the European and External Relations Committee's predecessor committee—the European Committee—focused on the two aspects that I pick up in paragraph 12. The first is how quickly EU legislation is implemented and whether it is done on time. In the immediate aftermath of devolution, timely implementation of obligations was an issue, but I am not sure that it is of such significance now. The second aspect is whether our freedom to implement such obligations is a genuine freedom or is illusory, in the sense that the obligations are written in such a way that we have no real choice. Do we exercise that freedom or are we content to hand back such matters to, or to rely on, the UK Government? There has been a fair amount of reliance on UK Government implementation. I make the point that the European Committee said that it was content with that, provided that no specifically Scottish interests were involved and that there was no specific Scottish dimension to implementation.

12:45

In paragraph 13 of my paper, I pick up what seem to be the sort of issues that one might want to bear in mind in the course of the inquiry. The first of those is the question of differential

implementation: does the Scottish Executive always make full use of the discretion that it possesses in the implementation of obligations, or is it too willing to hand back responsibility to Westminster and not to exercise a discretion where it enjoys one? Representatives of business tend to speak with mixed voices on that question. On the one hand, they want uniformity throughout the UK, which is one reason for handing back responsibility to Westminster; on the other hand, they talk about the desirability of flexibility and making full use of the scope for differential implementation. A fair amount of scrutiny would probably be required to work out the cases in which there was room to do things differently, as opposed to those in which there was no real choice.

The difficult issue of gold plating came up this morning. As I say, one person's gold plating can be another person's additional protection for the environment. We are not talking about a scientific process; we are talking about choices that have to be made.

How well does the consultation process work between the UK Government and the devolved Administrations? In theory, obligations should be negotiated with a view to their practical implementation and, in signing up to them, account should be taken of what problems will be involved at the implementation stage and whether those have been sufficiently addressed. In theory, bodies such as SEPA should be part and parcel of that process. I read SEPA's evidence—perhaps wrongly—as suggesting that that does not always happen and that those who are responsible for the enforcement of obligations are not asked for their views when obligations are being negotiated. Some of the evidence that you heard this morning was consistent with the view that the question of enforcement comes up only once a directive has been adopted and the implementing regulations have been put in place, at which stage there is not much room for manoeuvre.

In listening to the evidence, I was reminded of a general point that did not come up this morning. A lack of coherence at the European level can cause massive problems at the level of implementation and enforcement. The environment is one area in which there has been detailed work of the kind that you are looking for, which substantiates that point. Separate directives have been negotiated, but there has been no attempt to make them consistent with one another. At the level of transposition or implementation, that creates what I suspect must look like a nightmare for anyone who has to try to make the whole thing coherent, as there is no coherence or consistency.

This point was not made this morning, but it has been suggested in some evidence that the committee has received that that process of consultation with outside interests is rushed. Because there is a transposition deadline, there is not really time at that point to listen to what people have to say.

I picked up on a couple of technical points. First, should regulation be introduced by primary legislation—through an act of the Scottish Parliament—or by subordinate legislation? Secondly, if it is decided to introduce regulation through subordinate legislation, should the affirmative or the negative resolution procedure be used?

On transposition notes, I am not quite sure what the position is in Scotland, but at the UK level an attempt is being made to make it plain to people when an instrument is being made in the implementation of obligations, what it tries to do and how it will do that. That is just a check that what is being done makes sense and is not excessively burdensome. I am not sure about the Scottish position, but I am not aware of any Scottish equivalent. If there is none, perhaps one could be considered.

There is also the general question of parliamentary scrutiny, the relationship between this committee and the European and External Relations Committee and—given that we are talking about things that are being done at the UK level that could, in theory, be done in the devolved Scotland—the relationship between the Scottish Parliament and the Westminster Parliament. The terms of reference of the House of Lords Select Committee on the Merits of Statutory Instruments state that that committee can draw attention to instruments on the ground that they inappropriately implement European Union obligations.

Those were the main points that I wanted to draw to your attention on the European dimensions. In the last paragraph of the paper, I pick up things that occurred to me when I was reading the consultation paper, which I do not need to go over.

The Convener: Thank you for taking us gently through the main points in your paper. That was helpful.

I have questions on paragraphs 12 and 13. Do you know the proportion of EU directives that have been implemented by the UK Government rather than the Scottish Executive? My second question relates to differential implementation. Do we have any information on cases in which implementation in Scotland has been different from that in Westminster? I am trying to get a handle on whether there are any case studies on that.

Professor Page: I do not have hard-and-fast figures on the proportion of directives that are

implemented UK or Great Britain-wide as opposed to those that are devolved to Scotland, but I have a copy somewhere of a written answer from the Executive that listed the directives that had been implemented in that way. It is not an insignificant number.

The Convener: Do you mean the number of directives that are implemented in Scotland?

Professor Page: I mean the number of those that are implemented UK-wide rather than devolved to Scotland. In other words, it is not infrequently that the decision is taken to implement directives in that way.

I think that I quote in one of the footnotes to my paper a study that was done on Wales. At the time of devolution, the new constitutional settlement was held up as a brave new dawn and an opportunity to do things differently and to experiment. The study suggests that, in Wales, that opportunity has proved elusive, because the pressure of time and lack of resources have meant that the freedom for Wales to go its own way has not been properly or fully explored.

That takes us to your second question. I am not aware of any decent study having been done on a case in which Scotland has decided to implement a directive differently, although that is not to say that no such study exists. A paper on the water services directive or the water framework directive was prepared for the committee; it purported to explain the freedom that existed but did not go far into it.

The Convener: That is useful. I can remember that, in previous meetings, the legal adviser has often told us that we have taken a different approach from that taken at Westminster, so I wondered whether there was any hard information on that.

Mr Maxwell: Is part of the problem with differential implementation—which is discussed in the first bullet point in paragraph 13—that, once the UK Government has decided to implement a directive in a certain fashion, the timescale means that the Scottish Executive has no option other than to fall in line? Is it the case that the Scottish Government is forced to go down that route regardless of whether it wishes to do so because EU directives have to be implemented by a certain date?

Professor Page: I suppose it is a question of how quickly you are out of the blocks in the implementation of obligations. One can understand why a UK department might be reluctant for a devolved Administration to go its own way, because that would put pressure on it to justify its own approach. Agriculture is one area in which it has been suggested that there has been an unwillingness for the freedom that exists in theory to be exploited to the full.

Murray Tosh: On that last point, do you feel that enforcement—which we discussed earlier—is an important area in which law could be applied differently in Scotland?

Professor Page: The Deputy First Minister made a speech in December to accompany IRIS's first annual report. Europe has an attraction for politicians in that it can allow them to say, "This is not down to us. It's all because of Europe." There was a certain amount in the speech—and in the report—to the effect that what business people in Scotland complain about is not down to the Scottish Executive, but down to reserved UK responsibilities or European responsibilities. I always view that claim with a degree of scepticism. I would want to inquire a little more closely into whether things were as tied down as all that, or whether there really was so little room for manoeuvre. Such close inquiry must be required for enforcement, because enforcement is a matter of discretion. You would expect an enforcement agency to adopt an approach to enforcement that reflected Scottish circumstances and was not necessarily a mirror image of the approach taken elsewhere in the UK or in Europe.

Murray Tosh: If a Scottish Executive department has not been heavily involved on the policy-making or transposition side of legislation, and if the legislation has therefore been delivered via UK subordinate legislation and arrived, in effect, on tablets of stone, there is a risk that people will apply a rulebook mentality without really considering Scotland's specific circumstances or how legislation could be made to apply to Scotland's advantage.

Professor Page: Absolutely. That is why, at the initial negotiation stage, what happens before policies are adopted is all important. The question is whether a Scottish voice is heard and whether consideration is given to the issues that you mention.

Murray Tosh: It is an interesting question.

Mr Ingram: In your submission, Professor Page, you make the point that outside bodies are not as involved as they could be. We heard earlier about environmental legislation and the amount of it that comes from Europe. SEPA has complained that it has no input at the early stages of consultation.

You talk about the relationship between consultation and policy development not being as robust as it could be in terms of involving the devolved Administrations. To what extent has this Parliament focused on that? Has the European and External Relations Committee looked into it in any depth?

Professor Page: I am not aware that it has—I stress that I am not aware, because I have not looked into the question in detail. However, from my reading, I have picked up that the focus of the European and External Relations Committee has shifted. It had received a legacy paper from the European Committee on that committee's work during the first session of the Parliament, and it is now thinking again about the most effective approach towards its scrutiny obligations.

Mr Ingram: Your paper suggests that it would probably be to the Scottish Parliament's advantage to focus in on this area and to take advantage of the flexibilities that are available to us to assist Scottish business and the wider Scottish community. You are saying that that is a project that could be undertaken.

13:00

Professor Page: Yes. That would fit very much with what has been said this morning. We know that things are going to happen and we need to determine the extent to which issues relating to those things are being addressed at the moment.

Mr Ingram: Do you have any suggestions as to what our next steps might be with regard to focusing in on the issue?

Professor Page: You should have a forward-looking agenda that identifies the things that are happening and—because resources are limited—tries to work out which ones are important and are, therefore, the ones that this committee, perhaps in conjunction with another committee, should focus on. You should also draw on other things that are happening. For example, I would want to use the expertise of the Merits of Statutory Instruments Committee of the House of Lords, which can draw attention to instruments that inappropriately implement European Union obligations, which is, arguably, what you would want to prevent. In the light of what we have just been talking about, however, it is a bit late in the day by the time that that committee takes action.

The Convener: When I was on the European Committee, I was aware of the change that you talked about and there was a much greater emphasis on being proactive. There is a lot of mileage in there being much more discussion between this committee and the European and External Relations Committee with regard to the issue of advance notice of upcoming matters. If committee members agree, we will liaise with the European and External Relations Committee to take the matter forward within the context of this review.

Because we are short of time, Professor Page, I am sure that you will not mind if we write to you with any other questions that committee members might have.

Professor Page: Of course.

The Convener: You have certainly raised quite big issues that we can work on. I thank you for your attendance. I am very sorry that you have had to wait so long.

Delegated Powers Scrutiny

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

13:03

The Convener: We come to agenda item 3. The committee raised one question with the Executive on the delegated powers in the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. The Executive has undertaken to take full account of the committee's views on the matter when considering lodging amendments at stage 2. The Executive's intentions in that regard will be confirmed by the Deputy Minister for Justice in due course.

Our big concern was that we were looking for an affirmative procedure. Is it the feeling of the committee that we should write to the Executive to welcome what is happening but state that we are still looking for an affirmative procedure, or do members want to recommend another course of action?

Mr Maxwell: I think that we should stick to our guns and maintain our view that there should be an affirmative procedure.

Murray Tosh: The briefing paper suggested that, if the Executive could indulge in some skilful redrafting, it might be possible to separate out the policy areas in which a negative procedure could legitimately be used from the more complicated and challenging aspects of the bill for which the affirmative procedure would be required. It might be useful to have that flagged up to the Executive as being a suitable way of meeting our aspirations without having too much use of the affirmative procedure.

Mr Maxwell: Is that the third way?

Murray Tosh: I would hesitate to be seen to be espousing that approach in any sense. You could call my suggestion a compromise, however.

The Convener: We will suggest that as a possible way forward, but we will emphasise our concern that the affirmative procedure be used for certain issues. Is that agreed?

Members *indicated agreement*.

Charities and Trustee Investment (Scotland) Bill: Stage 1

The Convener: Agenda item 4 is scrutiny of the delegated powers in the Charities and Trustee Investment (Scotland) Bill. On section 6(1), which provides for further procedure on applications, the Executive accepts that the drafting is what is described as "circular" and it will make appropriate amendment to the section at stage 2. Are we happy about that?

Members *indicated agreement*.

The Convener: Section 19 deals with the protection of assets of a body that is removed from the Scottish charity register. We asked the Executive to comment on whether the power in section 19(8) could be seen to allow the minister by order to oust the jurisdiction of the court, but the Executive wishes to retain the power as currently drafted. The issue concerns the balance between primary and secondary legislation.

If I remember rightly, we agreed to ask the question of the Executive, but I am not sure that we had a strong feeling either way. Are we happy to leave the issue as it is, or do we want to pursue it? I am advised that the Executive has provided supporting information on why it wants to keep the power as it is.

Murray Tosh: The legal adviser's briefing suggests, if I read the inference correctly, that the negative procedure might not meet the normal standard that the committee expects.

The Convener: Do you suggest that we stick to our guns?

Murray Tosh: I seek amplification on the legal advice.

The Convener: I gather that the briefing makes only a suggestion. I think that the legal adviser's opinion is that the balance is a fine one.

Murray Tosh: Given the initial concern over whether the proper balance between primary and subordinate legislation had been struck, the case inherent in that opinion would seem to argue that, if we are to accept the proposal to proceed through subordinate legislation, our preference should be for an affirmative rather than for a negative procedure.

The Convener: The Executive highlighted the particular difficulty with certain cultural non-departmental public bodies.

Margaret Macdonald (Legal Adviser): The further information that the Executive has provided seems to make the issue clearer.

Murray Tosh: So the Executive has provided further information since the briefing note was written. The press coverage that I saw last week suggested that ministers would change their minds on the broader issue of the cultural NDPBs. We could perhaps reconsider the issue when we see the Executive's redrafted wording.

The Convener: I think so. The Executive has supplied additional information as to why it saw a particular difficulty. We can leave the issue until we see what the redrafting looks like.

If members have no other thoughts on that, we shall proceed to section 82, which deals with regulations about fundraising. The Executive has informed us that it is considering whether the section will need further amendment and redrafting at stage 2. I gather that the Executive is considering whether to separate out the powers under sections 82(2)(h) and 82(3). My reading of the legal advice is that it would be good to have such a redrafting, but we should also encourage the Executive to provide for the affirmative procedure for the second issue. As I read it, the Executive has agreed to make a change on the first issue, but it has not yet said that regulations on the second issue should be subject to the affirmative procedure.

Murray Tosh: How will we clock what the Executive does? If we are able to consider the issue only when an amendment is lodged at stage 2, we might have no opportunity to reconsider it.

The Convener: I was about to make that point. I think that we would be best to encourage the Executive to provide for an affirmative procedure for the regulations under sections 82(2)(h) and 82(3). That is probably the strongest thing that we can do at this point. Is that agreed?

Members *indicated agreement*.

The Convener: Sections 85(5)(d) and 85(10) are on local authority consents. The committee suggested that the matters dealt with by section 85 could perhaps have been left to guidance or a circular. The Executive agrees, but feels that there is merit in developing a common standard for badges and certificates. If I remember correctly, Murray Tosh said that, although we did not feel too strongly about the matter, we should ask the question anyway, given that we were raising a number of questions.

Murray Tosh: The answer is not entirely convincing, but it is perhaps better on balance to have things done in the way that is suggested.

The Convener: Okay. Shall we leave that as it is?

Members *indicated agreement*.

The Convener: Section 97(2) is on transitional arrangements. We suggested that there might be a cut-off date. The Executive's response sets out further background information about the provision. The Executive believes that it is impractical to set a cut-off date at this stage. We wondered whether one way out might be to suggest that, as the Executive will not look at the issue at this stage, we could perhaps come back to it at a later stage.

Mr Maxwell: It is difficult to know whether we can say much more than we have said already. We could highlight to the lead committee the fact that the power is open ended and that it could effectively end up being a permanent feature rather than a temporary one. We should definitely do that, but I do not think that we can do much more.

The Convener: We can write to the lead committee.

Mr Maxwell: Yes, to highlight that we are concerned about the open-ended nature of the power.

The Convener: Shall we agree to do that?

Members *indicated agreement*.

The Convener: Section 104(2) is on the short title and commencement. Committee members will remember that two sections refer to commencement and we said that they had to be the same; it had to be all or nothing. The Executive has said that it does not think that there is any need for section 97 to be commenced on royal assent, so it will remove the reference to section 97. Is that okay?

Members *indicated agreement*.

Budget (Scotland) (No 2) Bill: Stage 1

The Convener: Item 5 is on the Budget (Scotland) (No 2) Bill. The provision under section 7 of the bill seems to be very similar to past provisions, in that any order made under the section will be subject to the affirmative procedure. Are we content with the power as drafted?

Members *indicated agreement*.

Fire (Scotland) Bill: as amended at stage 2

The Convener: Item 6 is on the Fire (Scotland) Bill as amended at stage 2. Section 2(1) deals with schemes to constitute joint fire and rescue boards. During a stage 1 evidence session, the Deputy Minister for Justice gave assurances that the power would be amended so that it would be subject to the affirmative procedure in order to ensure a greater level of parliamentary scrutiny. Are we content with the situation now?

Members *indicated agreement*.

Gordon Jackson: If we were not content, what could we do? There are no meetings of Parliament or committees next week and stage 3 is to be held on Wednesday afternoon of the following week—the bill goes to stage 3 almost right away.

The Convener: The next opportunity to deal with the matter would be the stage 3 debate.

Gordon Jackson: I have a reason for knowing when the stage 3 debate will be held—it will be held on the first afternoon that we are back and we are on holiday after tomorrow. What mechanism

could we use to intimate that we do not like something? There would be no point in going back to the lead committee, because it will not meet again before stage 3.

The Convener: There will be a report to the Parliament.

Gordon Jackson: So if we have any issues we would need to raise them during the stage 3 debate.

The Convener: Yes. We did that once before.

Gordon Jackson: How would we do that? The stage 2 amendments would not be discussed at stage 3. I am trying to understand how, if we are not entirely happy with something after stage 2—and given that the amendments will not be lodged again at stage 3—we could get the issue into the domain of argument.

The Convener: We would have to tap into the timetable for lodging amendments at stage 3.

Mr Maxwell: We would need to lodge an amendment.

Gordon Jackson: If, as a committee, we did not like something—I am not saying that that is the case on this occasion—the mechanism to address the issue would be to lodge an amendment at stage 3.

The Convener: If we wanted to do something, we would either have to do it today or members could delegate the matter to me and we would put the proposal forward as an amendment. Alternatively, any member could lodge an amendment individually.

Mr Maxwell: We did that once before.

The Convener: Yes. That is what we did previously. I recall that there was a very tight timescale.

As we are agreed on that matter, we will move on to section 5(3), which deals with the power to transfer staff, property rights or liabilities to a joint fire board. Section 5 was amended at stage 2 to insert a new transitional provision, which gives ministers the power by order to transfer the property rights, liabilities or staff of existing joint fire boards made under existing administration schemes to the joint fire and rescue boards made under section 2(1) of the bill. Are we content with the changes that have been made?

Members *indicated agreement*.

13:15

The Convener: Section 53(2)(f), which provided a power for Scottish ministers to specify intervals at which reviews must be carried out, has been deleted.

Section 54(2)(l), which provided a power to create criminal offences and specify rules on the burden of proof in relation to such offences, was also removed from the bill at stage 2.

Section 54A, on the power to make further provision for the protection of firefighters, allows Scottish ministers to apply such provision to common areas of private dwellings, where such equipment is often located. It is a new section, which extends the power that is exercisable under section 54(1). Are we content with the changes?

Members *indicated agreement*.

The Convener: Section 55, which is on

"special case: temporary suspension of Chapter 1 duties"

has been amended to confer a power on Scottish ministers to prescribe by regulations further categories of persons who may cause temporary suspension of fire duties. Are members happy with that?

Gordon Jackson: There is an issue about whether the affirmative procedure would be more appropriate.

The Convener: It was considered that a regulation-making power would be helpful to enable the persons who are covered by the section to be added. Our legal advice is that it is possibly all right as a negative instrument, but is the procedure acceptable?

Murray Tosh: I am inclined to agree with Gordon Jackson about going for the affirmative procedure.

The Convener: You think that annulment does not provide the right level of scrutiny.

Gordon Jackson: That is what the committee would say if it was considering the matter at stage 1. I do not know whether the matter is worth dying in a ditch for at so late a stage. There is no doubt that our normal response would be to say to the Executive, "Hey guys, why don't you make this affirmative?" The question is whether it is worth an amendment at stage 3.

The Convener: We could make one last—

Gordon Jackson: Request.

The Convener: If we make a request to the Executive, it might consider the matter.

Gordon Jackson: We would normally ask for that.

The Convener: Yes. We will ask the Executive again whether it will consider using the affirmative procedure.

Section 56 is on enforcing authorities. A new power has been added at section 56(7) to enable

Scottish ministers by regulation to modify section 56(6). Our legal advice is that that is okay.

Members *indicated agreement*.

The Convener: Section 67 is on offences. A number of changes were made at stage 2 to modify and extend the delegated powers. The issue is either that the power needs to be redrafted because it is too wide, or that it ought to be subject to the affirmative procedure.

Gordon Jackson: This is an example of the point that I raised. In such cases, we would normally ask for clarification and the matter would be sorted out between the committee and the Executive. The problem arises because it is so late.

The Convener: Our response depends on how strongly the committee feels about the matter. We can write a letter to say that we are concerned about it, or we can go for some form of amendment.

Murray Tosh: We should do the former.

Gordon Jackson: I am inclined to flag up the matter.

The Convener: The report will state that we are concerned about the matter and that we raised the issue of a possible amendment. I do not know whether we can do much more than that.

Mr Maxwell: Have we agreed that that we will write to the Executive about subsections (11) and (12)?

The Convener: Yes.

Mr Maxwell: I accept that we will not get a response in time, but it would still be worth while for us to write to the Executive. What is the deadline for the Executive to lodge an amendment?

The Convener: The deadline is 10 February.

Murray Tosh: So we will fax that one, will we?

The Convener: Perhaps we should say quickly to the Executive that we still have concerns not only about section 67, but about section 55, as we will not have our report ready. We will flag up those two sections. Obviously, there is more to do on section 67 and there is the possibility of an amendment.

Mr Maxwell: Can we also say that the power ought to be subject to the affirmative procedure? We would probably agree that that is more appropriate, as a fairly wide Henry VIII power is involved. There are a number of wide powers in the bill, but that could be mentioned.

The Convener: Yes. The provision is either too widely drafted and needs redrafting or, if it is to stay as it is, the affirmative procedure needs to be used. Are members agreed?

Members *indicated agreement*.

The Convener: Is section 69(b) okay?

Members *indicated agreement*.

The Convener: Sections 72(6) and 72(7) are on the meaning of "relevant premises". The Executive honoured its undertaking to lodge an appropriate amendment at stage 2, but I wonder whether subsection (7) also merits the affirmative procedure.

Murray Tosh: We can link that to the other two issues that will be raised with the Executive and ask the Executive to lodge the necessary amendments by 10 February.

Gordon Jackson: In such situations, I suppose that there is nothing to stop us lodging our own amendments and asking the Executive to agree to them. Of course, we can always withdraw them. It sounds a bit cynical to say that we will withdraw our amendments if we are given a good answer, but the position will be covered by our lodging amendments. Is that too circular?

The Convener: That is up to the committee.

Gordon Jackson: The Executive could say, "Well, you're probably quite right, but we left it a bit late and we cannae get them in now." Amendments could be lodged for the Executive, as it were. It could be decided later whether to insist on them.

Murray Tosh: I assume that we could do that in relation to the affirmative rather than the negative procedure, but I do not think that we should try to disentangle subsections (11) and (12).

Gordon Jackson: I do not mean that. If we think that there should be changes in respect of the affirmative procedure, there is nothing to stop us lodging an amendment. The Executive cannot then come back and say that it did not have time to lodge an amendment. We could say that we have an amendment that we prepared earlier. We could give the Executive a "Blue Peter" amendment. That is just a thought.

The Convener: If the committee agrees, we are saying that we want to lodge an amendment to three different parts of the bill so that the affirmative procedure will be used.

Gordon Jackson: By the time of our next meeting, which will be the day before stage 3, we could consider the Executive response and decide whether we will insist on the amendments.

The Convener: Absolutely. In fact, we will make that point when we write to the Executive. We will also do so when we write our report.

Gordon Jackson: We will visit the matter again the day before stage 3, but that covers it.

The Convener: Absolutely. Are members agreed?

Members *indicated agreement*.

Draft Instruments Subject to Approval

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2005 (draft)

Advice and Assistance (Financial Conditions) (Scotland) Regulations 2005 (draft)

Civil Legal Aid (Financial Conditions) (Scotland) Regulations 2005 (draft)

Housing Support Grant (Scotland) Order 2005 (draft)

13:23

The Convener: No points arise on the instruments.

Landfill Allowances Scheme (Scotland) Regulations 2005 (draft)

The Convener: Our legal advice is that we ought to get a better explanation of the meaning and effect of the definition of "P" in regulations 19(3) and (4). I take it on trust that the formula works. We should also consider asking the Executive whether in the definition of "European Waste Catalogue" in regulation 2(1), the Council directive is correctly cited. Is that agreed?

Members *indicated agreement*.

Renewables Obligation (Scotland) Order 2005 (draft)

The Convener: Hands have been raised about a mistake in the order, but it has been suggested that the Executive will amend it next year, as it does not affect anything in practical terms. Do we agree to that?

Murray Tosh: We will simply draw the matter to the attention of the lead committee.

Members *indicated agreement*.

Instruments Subject to Annulment

Antisocial Behaviour (Noise Control) (Scotland) Regulations 2005 (SSI 2005/43)

European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005 (SSI 2005/42)

Domestic Water and Sewerage Charges (Reduction) (Scotland) Regulations 2005 (SSI 2005/53)

Water Services Charges (Billing and Collection) (Scotland) Order 2005 (SSI 2005/54)

13:25

The Convener: No points arise on the instruments.

Instruments Not Laid Before the Parliament

Act of Adjournal (Criminal Procedure Rules Amendment) (Criminal Procedure (Amendment) (Scotland) Act 2004) 2005 (SSI 2005/44)

Waste and Emissions Trading Act 2003 (Commencement) (Scotland) Order 2005 (SSI 2005/52)

13:25

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

Regulatory Framework Inquiry (Witness Expenses)

13:25

The Convener: Agenda item 10 is witness expenses for the regulatory framework inquiry. Do members agree the paper?

Members *indicated agreement*.

The Convener: I thank you very much for attending this long meeting.

Meeting closed at 13:25.

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