# SUBORDINATE LEGISLATION COMMITTEE

Tuesday 15 March 2005

Session 2

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# SUBORDINATE LEGISLATION COMMITTEE
## 9th Meeting 2005, Session 2

**CONVENER**

*Dr Sylvia Jackson (Stirling) (Lab)

**DEPUTY CONVENER**

Gordon Jackson (Glasgow Govan) (Lab)

**COMMITTEE MEMBERS**

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

**COMMITTEE SUBSTITUTES**

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

*attended

**THE FOLLOWING GAVE EVIDENCE:**

Dave Gorman (Scottish Environment Protection Agency)
Sandy McDougall (Food Standards Agency Scotland)
Janice Milne (Scottish Environment Protection Agency)
Martin Reid (Food Standards Agency Scotland)

**CLERK TO THE COMMITTEE**

Ruth Cooper

**ASSISTANT CLERK**

Bruce Adamson

**LOCATION**

Committee Room 4

# Scottish Parliament

## Subordinate Legislation Committee

*Tuesday 15 March 2005*

[THE CONVENER *opened the meeting at 10:39*]

## Regulatory Framework Inquiry

**The Convener (Dr Sylvia Jackson):** I welcome members to the ninth meeting in 2005 of the Subordinate Legislation Committee. I have apologies from Gordon Jackson. I expect that Murray Tosh will appear in the next few minutes.

As part of our regulatory framework inquiry, I welcome from the Food Standards Agency Scotland Martin Reid, the business manager, and Sandy McDougall, the branch head. I also welcome from the Scottish Environment Protection Agency Dave Gorman, the operations co-ordinator, and Janice Milne, the environmental development manager. We are very pleased to see you. We are grateful for your written submissions, which have given us a lot of food for thought, if you pardon the pun. You may make introductory statements, if you wish, after which we will go through the questions.

**Sandy McDougall (Food Standards Agency Scotland):** Good morning. By way of introduction, I will say a few words about the Food Standards Agency. The FSA is a non-ministerial Government department, which operates at arm's length from ministers. It is governed by a board and acts in the public interest. The FSA provides information and advice for consumers by advising Government on food safety and standards through regulation.

The primary function of the FSA is to protect public health. We are active in improving the quality of regulation in Scotland. We also consider alternatives to regulation, where European Union law permits that. However, it is fair to say that most of the FSA's work involves the implementation of EU regulations.

**Dave Gorman (Scottish Environment Protection Agency):** Good morning. We are pleased to be before the committee and we welcome its inquiry. We have made some detailed comments in our written submission, which I hope were useful.

We will highlight a few of our ideas about better regulation. Since 2003, I have been running a project in SEPA called effective regulation. We are trying to establish what better regulation looks like. We would be happy to talk about that. In 2003, we also published some principles for regulation, which seem to have been reasonably well received. We tried to set out what better regulation looked like, how it should be developed and how it should be implemented. We are also about to appoint a better regulation manager, to show that we take the matter seriously.

We are keen on the idea of trying to get legislation across to businesses. We have been active with the NetRegs project—I am the project manager for NetRegs, so I will be happy to talk about it if it is of interest. We see the project as a way of getting across to businesses the complexity of environmental regulation.

The only other point that we want to make at this stage concerns a small change from our written evidence. We stated that we felt that reviews should be statutory, but we think that the same results could probably be achieved by administrative means. I wanted to draw that to the committee's attention. Both Janice Milne and I are pleased to be here.

**The Convener:** Thank you. The first issue that we will address this morning is improving the quality of new regulation. First, how could we improve the quality of regulatory impact assessments?

**Martin Reid (Food Standards Agency Scotland):** One of the questions that we encounter regularly is when one should start the process of developing a regulatory impact assessment. The obvious answer is that one should start it as soon as one can. My view is that, when new policy is being developed, departments should, in most cases, already have a good idea of where industry would sit on an issue and what the enforcement issues that surround that issue might be. We probably all have a good idea of where we are starting from. It is rare to find oneself in a position in which one is considering something totally new. It should be possible to start the impact assessment process early.

There is some inconsistency across Government on when the process should begin and when the Government should get something out there in the public domain. I have worked in several Government departments and my experience is that the process starts at different stages. Some departments are good at initiating early consultation exercises, which are linked not necessarily to the production of a statutory instrument but to the development of a proposal. It is entirely feasible to start developing the RIA at that stage and departments should be encouraged to take that approach, so that they gather as much information as possible at the earliest stage. That is a useful recommendation.

10:45

Another problem, which is perhaps more difficult to deal with, is the quality of information that we receive when we seek information to complete RIAs. Enforcement information is probably not quite as difficult to gather, because we tend to receive good-quality information from local government, but it is harder to prise information out of industry. Given that we are often dealing with regulations that will impact directly on industry, it can be difficult to come up with a meaningful RIA when industry is not able or inclined to give departments information.

I am not quite sure what the answer is; we wrestle with the problem all the time. One factor might be to do with how well departments develop their relationships with particular industries. Another factor is the size of the industry. It can be difficult to obtain information from microbusinesses, whereas it can be easier to assess the potential impact on larger industries of what might be more of a blunt instrument. I have identified a couple of problem areas that lead to the development of RIAs not being the easiest thing in the world. Perhaps those areas could be considered.

**The Convener:** Christine May has a question.

**Christine May (Central Fife) (Lab):** Mr Reid has covered the matter that I was going to raise.

**The Convener:** In that case, I will ask another question before I bring in other members. The committee heard evidence from Dr McHarg that there is a danger that the process can be selective and subjective. How can we make it more robust? Mr Reid talked about starting RIAs earlier, but I am still not sure how we can ensure that we get back good-quality information, particularly from businesses. The Federation of Small Businesses in Scotland is adamant that there is not enough consultation with small businesses. How can we reach that end of the sector?

**Martin Reid:** Perhaps more targeted advice could be provided centrally. I do not necessarily have the answer to your question, but it would be useful if departments were given advice from the centre on how to access small businesses. I know that there are routes to small businesses, but rather than ask individual Executive departments or divisions to develop their own solutions to what is a common problem across the board, it might be useful if solutions could be identified centrally and developed with representative industry organisations, which could indicate whether a proposed approach would be effective or indeed suggest another approach. Civil servants do not always have the answers up their sleeves, but we are interested in producing documentation that is of the best possible quality.

Perhaps there could be an increased role for the improving regulation in Scotland unit in that context. Obviously, IRIS would have to be resourced to develop such functions. The FSA makes extensive use of the unit—even though we are outside the core Executive—and we have always found it helpful: IRIS has given us good advice, which has helped us to produce better RIAs. As I said, I do not necessarily have the answers, but it would be useful if responsibility could be taken centrally to develop methods of accessing better-quality information, particularly from industry, which is a hard area to access.

**The Convener:** What contact do you have with organisations such as the Federation of Small Businesses and the Scottish Civic Forum?

**Sandy McDougall:** In the past few years, we have attempted to build a better relationship with the Federation of Small Businesses, but only as part of our overall stakeholder engagement. In the past two years, the FSA has, uniquely, undertaken a stakeholder mapping exercise. We identified all our key stakeholders and we are actively working at building our relationships with them. Part of the culture of our organisation, from our director right the way down through the organisation, is that building effective working relationships with stakeholders is the primary responsibility of almost all staff. In relation to engagement and extracting information, those developed stakeholder relationships are often the secret of a good result.

**Dave Gorman:** We agree with a lot of what Martin Reid and Sandy McDougall have said. Timing is certainly a crucial issue; there is little point in writing an RIA at the point at which one is putting out a bill. We also agree with the comment that was made on information gaps. Businesses sometimes perceive that agencies and Government departments have vast amounts of information to hand. Sometimes we do, but not always, so it would be useful to consider the information gaps in the writing of RIAs. Instead of our waiting until an issue arises and then writing an RIA, it would be helpful if there was a more proactive approach and a policy information system that would identify in advance the information that civil servants would like to have. The situation varies, but it can be hard to get information out of business, partly because people are busy trying to run their companies.

We will perhaps move on to consider the role of IRIS, but we certainly envisage a role for someone to challenge and scrutinise RIAs in Scotland—perhaps this committee and IRIS. From my perspective, knowing that somebody will challenge what I am doing will cause me to give it greater emphasis; the challenge and scrutiny element is important.

As an environmental organisation, we want to be sure that RIAs cover environmental issues. We do not write RIAs, but we often comment on them. The ones that we see are not bad, but we are interested in the new strategic environmental assessment directive and the way in which that might impact on RIAs. We think that it represents an opportunity, but we are not sure about the details behind it.

**Mr Stewart Maxwell (West of Scotland) (SNP):** I have a question on a comment that you made at the start. I do not know whether you said that you have changed your mind or whether you just wanted to clarify the benefits of statutory reviews as opposed to administrative means. Will you expand on that point?

**Dave Gorman:** We said in our evidence that there should be statutory reviews of all new legislation within a certain period. However, we submitted that evidence some time ago. When we discussed the matter internally, we decided that the same result could be achieved by administrative means, as long as there is a strong commitment. We wanted to clarify that administrative means would be just as effective.

**Mr Maxwell:** I wonder why you have changed your mind on that. Will you develop your comments on why you originally thought that the requirement should be statutory but have now decided that administrative practices will do?

**Dave Gorman:** In the environmental sphere, the Aarhus convention will give third parties more rights to challenge legislation. Our concern is that, even if all the parties involved think that there is no merit in doing a review at a certain time, we might be forced to do one just because someone challenges the legislation. We are always trying to avoid doing things simply because there is a formal requirement to do them. That is the main reason behind our change of heart.

**Christine May:** I am interested in the witnesses' comments that it is difficult to get the information that they need from businesses. Mr Gorman talked about working more proactively. I wonder whether it would be possible to do an exercise on the responses that are needed. You could say to businesses, "Do you collect this information? If not, how difficult would it be for you to do that?" I am thinking, for example, of the large combustion plants directive, which has had investment consequences for companies and led to issues being discussed in boardrooms—the directive has been on the go for eight years. Given that the process involving environmental and food regulations takes a long time from initial consultation to final directive, have you thought about how you could work with businesses to codify what you need and how you want it to be produced?

**Dave Gorman:** I will offer some comments on that, although Janice Milne might also like to do so. We have a number of liaison groups, one of whose main purposes is to state that we will be asking for certain information and to ask how easy it will be to get. Difficulties arise when regulation is brand new and an entire sector is coming under environmental regulation for the first time, as it is often difficult to work out who the regulation covers.

Last year, we tried to be proactive. We were considering the Pollution Prevention and Control (Scotland) Regulations 2000 (SSI 2000/323) to work out whether the costs arose from the application process, the permit requirements—which was more likely—maintenance costs or capital investment. We tried to use our liaison mechanism to get information, but, unfortunately, we had a response rate of only 8 per cent. I do not blame businesses—they are busy and have struggled to provide us with information—but it has been difficult even when we have tried to be proactive.

**Janice Milne (Scottish Environment Protection Agency):** Industry is consulted through each stage of the development of regulations. Sometimes it misses that opportunity, so we must think about how the consultation process is publicised. It often happens that industry will say that it does not like a particular regulation even though it was consulted before the regulations were made. The key lies in making it clear to businesses when they are being consulted and publicising the consultation process.

**Christine May:** Has anyone ever considered that businesses might have given the answers already, perhaps in the consultation on another piece of legislation? Is there any way of checking the responses that different types of businesses or individual businesses have submitted across all the agencies? Perhaps better sharing of the information that is provided would help.

**Dave Gorman:** The Hampton review in England and Wales, which has been considering regulatory inspection and enforcement, has raised the issue of repeated requests for information in slightly different forms from multiple Government regulators. We have had to hold up our hands and say that practice could be better. In SEPA, we try to co-ordinate consultation. We have examples in which the process has worked well—we do a lot of work under the Control of Major Accident Hazards Regulations 1999 (SI 1999/743) with the Health and Safety Executive and we also do a lot of close work with HM nuclear installations inspectorate—but we could not say that that happens routinely across the piece. That is an issue for Government. It is difficult for individual agencies to get together and share information, although that happens. We

would like there to be more of a push to address the issue through a joint project. We have sympathy with businesses, but we have to ask for the information and the problem is that we are not the only ones who ask for it.

**The Convener:** Would it be possible for you to supply us with a couple of examples in which the different agencies have worked well together? You mentioned one such example. Will you also tell us how that good practice might be followed and indicate how the practice could have been even better? That would help us to see a way forward. Secondly, on quality control, you said that it might be useful if a central agency examined the quality of information that is being collected. Will you elaborate on that and tell us which central body you think might be used?

11:00

**Dave Gorman:** We had one eye on IRIS—that seems the logical body to challenge the quality of the information coming in and, if it finds that the information is not right, to set in train processes to ensure that it is. It is probably for someone else to say how that might happen, but such proactivity could be helpful.

Scrutiny and challenge are always helpful. We have set up a better regulation project and we are trying to improve things, but it helps if we feel that we are doing that in a wider context. That is why we were keen to submit evidence to the inquiry; when we are challenged, that helps us to think through our approach.

**The Convener:** Can you give us information on the better regulation project?

**Dave Gorman:** We are more than happy to do so.

**The Convener:** Excellent. That would be helpful. Finally, do you think that RIAs should be conducted for every statutory instrument or should they be limited in some way?

**Martin Reid:** I do not think that it is necessary to conduct RIAs for all regulations, particularly when we are dealing with minor technical amendments to legislation that will have little impact. For example, the agency deals with cases where two items might be added to a list of approved sweeteners or additives, the impact of which is minimal. In such cases, the amount of effort involved in conducting an RIA would be entirely disproportionate to the benefit that would be produced. It is not necessary to conduct such assessments on every occasion.

I will backtrack for a second, if the committee will allow me to. On quality issues associated with RIAs, there are two points to consider. One is the quality of the document produced by the department in possession of the information in the first place. That is about how good the departments are at producing RIAs. The second point is that, as I said earlier, if we get in poor-quality information, we cannot produce a good-quality document. How do we make a judgment about the quality? I do not think that a central unit would be in a position to make such a judgment; the parent department would be best placed to do so.

However, that still does not get round how we improve the quality of the information. This is just my opinion, but perhaps part of the solution is getting people to realise that the consultation process is real and that they can influence what is going on. There is a view that consultation on a statutory instrument is not worth a lot of effort, because the SI is already written and the policy has been agreed. There is a high degree of truth in that once we are at the stage of producing an SI, particularly in the context of European legislation.

As I am sure the committee is aware, the point at which to exercise influence is during the development of the proposal. However, the difficulty is that we have to consult regularly in short timescales. The Commission produces proposals for a working group in two weeks' time; we try to get the document out the door to industry for comment and we give it 10 days in which to reply, which will give us time to develop a United Kingdom negotiating position. We get criticised for that timescale. It is difficult to strike a balance, but we have to make people understand the process. If we can increase understanding of that, we might have a better chance of getting people to engage positively and constructively.

**Dave Gorman:** On RIAs, we agree with Martin Reid that there can be the danger that a prescriptive process does not add value. However, our view is that there is a presumption in favour of RIAs and that people should justify why they are not being done—they should not be let off the hook. We would also like the RIAs to go beyond business and to tackle the public sector burdens. The Freedom of Information (Scotland) Act 2002 had a major impact on us and we would have liked an RIA that examined the impact on the public sector as well. There is sometimes an assumption that such things do not have an impact on us. We would like the impact to be quantified from our perspective.

**Sandy McDougall:** Following up on Dave Gorman's last point, I should add that a lot of our activities are delivered through local authorities. Local authorities are certainly among our key stakeholders and our relationships with them allow us to assess rapidly and with a high degree of

confidence the impact of many of our policies at the point of delivery.

**Mr Maxwell:** I want to pursue further the issue of statutory practice and administrative practice. The SEPA witnesses view the work that is done in the process of preparing environmental assessments as being like the procedures for RIAs, but environmental assessments will be a statutory requirement under the Environmental Assessment (Scotland) Bill. Given that the two processes seem similar, are you suggesting that that is a mistake and that they should be administrative, not statutory? Why do you think that environmental assessments should be statutory but that RIAs should be non-statutory?

**Dave Gorman:** That is a good question. We are pleased to see environmental assessments put on a statutory footing, possibly because it is harder to get people to think out of the box at a strategic level—that is our main reason for wanting that. We have had environmental impact assessments for major developments for 20 years, and I have often felt that the debates that were going on tended to be between protesters who were saying, "I want a different transport policy," and road builders who were saying, "This is the best environmental solution for this road." There is some merit in having a statutory assessment in such situations.

We will obviously do what we are told and if something is statutory, we will do it. However, our reluctance in relation to some of the RIAs and reviews may be due to a worry about whether a new procedure will add any value. Sometimes, if a statutory requirement is put in place to review legislation after a certain period, and that is not done, people might think that we have something to hide, whereas it may be the case that all parties feel that it is not required. I am not sure whether that answers the question, but we certainly see strategic environmental assessments as important and are therefore delighted that they are being made statutory. That is our opportunity to exert influence and ensure that the environment is considered early in the process.

**Mr Maxwell:** I agree with you about the environmental assessments. The fact that they are now to be statutory is welcome. However, I cannot quite grasp the difference between the importance of environmental impact assessments being statutory and your view—I may be putting words into your mouth—that RIAs are less important in terms of their impact on the regulations that they are dealing with.

**Dave Gorman:** That is not what we are trying to say. Perhaps that is a question on which we should come back to you.

**Mr Maxwell:** That would be helpful. A more detailed explanation would help us to understand the difference.

Moving on, you have said in your evidence that consideration should be given to the potential environmental impact in all RIAs, along with the costs of doing nothing. Could you expand on that?

**Dave Gorman:** You might expect that, as the environmental regulator, we would want to see the environment protected and improved. We are keen to engage with the better regulation agenda, but we do not see that as being the same as deregulation. As we said in our response to the Hampton report, we think that much environmental regulation has major benefits to society and to the environment and we are sometimes concerned that we jump straight to the costs of everything. We wanted to see the environmental benefits being more clearly laid out sometimes, so that people can be clear that there is an environmental benefit and a human health benefit, for example, in protecting air quality. The debate then becomes a debate about how to minimise the burdens of that on industry. The two questions are not the same.

Our worry has been that much of the debate about better regulation can fall into the trap of talking about costs and burdens all the time. We want the balance to be redressed through acknowledgment of the fact that although it is sometimes difficult to quantify environmental benefits, they exist.

**Mr Maxwell:** I mentioned the environmental assessments that will be required under the Environmental Assessment (Scotland) Bill. Are you advocating that the assessment of environmental impact that takes place as part of the RIA process should be much more detailed than is the case under the current set-up?

**Dave Gorman:** I think that that is what we are saying, but it is fair to say that we are not quite clear about how the strategic environmental assessment process and the RIA process fit together. We would certainly like environmental issues to receive much more detailed consideration somewhere along the line.

The risk for us is that people will come to bodies such as SEPA to ask for such information. I suppose that that is only fair. We will have to try to gear up to deal with those requests. Basically, we are in favour of environmental matters receiving much more structured consideration.

**Mr Maxwell:** That should include consideration of the costs of doing nothing.

**Dave Gorman:** Yes.

**Mr Maxwell:** I have a question for the FSA. At the moment, much of the guidance on food

standards is, in effect, voluntary rather than statutory. Is the current set-up adequate or is there a case for having more statutory guidance on food standards?

**Sandy McDougall:** We are probably comfortable with the current mix. We believe that the appropriate use of voluntary guidance or the development of industry guides has a distinct part to play in contributing to the overall process of interpreting and applying regulation at grass-roots level.

Perhaps one of the best examples of the move away from statutory provisions is the initiative on the promotion of foods to children, with which members are probably familiar. Primarily, that has gone down the path of working with industry players through guidance, especially in areas such as salt reduction. Those measures are all the result of a voluntary approach.

**Mr Maxwell:** That is what is behind my question. Do you think that voluntary guidance has been effective in achieving ends such as those that you have just mentioned?

**Sandy McDougall:** On the promotion of foods to children and salt reduction, there are initial signs that the voluntary approach is working, although on salt reduction, it will take a number of years to obtain clear evidence that that is the case. The activity by many of the major industry players and retailers is having an effect.

**Mr Maxwell:** That is perhaps a matter of opinion at the moment.

**The Convener:** Christine May wants to ask about EU directives.

**Christine May:** Before I do, I want to clarify something that Mr Gorman said earlier. I think that I am correct in saying that he suggested that SEPA needs to be able to quantify the environmental benefits and then to consider how they can be implemented without putting undue burden on business. Does SEPA prioritise those two tasks in that order? In other words, is assessment of the environmental benefits more important or are the two jobs broadly of equal importance?

**Janice Milne:** There must be a balance. As well as protecting the environment and improving public health, SEPA's role is to contribute to the Scottish ministers' goal of sustainable development. We are an environmental regulator, but we must also take into account the cost to business and social impacts, so I would say that we give equal weight to those two roles.

**Christine May:** Thank you.

I turn to the fact that most of the regulation that relates to food standards and the environment derives from EU directives. We have already discussed the length of time that is spent on preparing directives and the amount of consultation to which they are subject. Given that that is the case, does each agency consider that it is still useful to produce an RIA on how every directive will be implemented? Perhaps SEPA can answer that first.

**Janice Milne:** RIAs are needed, because each directive can be implemented in different ways. A directive sets a framework, but ministers produce regulations. Within that, there is scope for how we regulate and issue permits, so an RIA should still be produced for each set of regulations when applicable.

11:15

**Dave Gorman:** I very much agree. Before I joined a regulator, I thought that once legislation was agreed at the European level, it was just implemented, but my eyes have been opened to the amount of detail and the number of choices that can have an impact. Part of the problem for members is that the devil is in the detail. The difference between good and poor implementation is sometimes not obvious. Much depends on the detail, on when people are consulted and on the scope of regulations. I very much agree with Janice Milne that having a European law does not mean that thinking through its Scottish implementation has no value.

**Christine May:** Does the FSA disagree?

**Martin Reid:** We do not disagree. We must consider the three distinct stages in an impact assessment's development, all of which are important. When a proposal is first tabled and the initial impact assessment is developed, we hope still to be considering several options for delivery at European and domestic levels. That impact assessment can influence a European negotiating position. It must be recognised that that could be a key function of developing an impact assessment.

Once we have in effect adopted a piece of European legislation, we may still not have the final impact assessment, because a statutory instrument has not been produced and put out the door with the final regulatory impact assessment. At that time, we may still consider options. The impact assessment still has a role at that point, but that may have moved away from negotiation and how we might achieve something to practical domestic implementation.

It must be recognised that an RIA has different functions that are not consistent throughout the process and that it can deliver different things. An RIA may be more useful at one stage than at another. Domestic implementation depends on the framework in European legislation. If that is

prescriptive, the RIA becomes less useful. If the legislation has been drafted loosely, the RIA is highly useful in identifying the best way to deliver on the ground. The context of an RIA must be considered. We cannot say that all RIAs are or are not useful—that depends on the context.

**The Convener:** We will move on to consultation, which is an important part of the process, as we have said.

**Mr Adam Ingram (South of Scotland) (SNP):** Both submissions stress that to have any chance of influencing policy development, input must be made at a very early stage. How might consultation with stakeholders and the public be managed to take place early enough to influence policy formation?

**Dave Gorman:** I will give an example in which I am involved that I hope will illustrate the situation. SEPA is reviewing its enforcement policy, which could be described as a statement of the rules of the game. The game is between us and industry—we are the main players—but the likes of politicians, stakeholders and the media are watching. It is important for the enforcement policy to make the rules of the game clear.

The standard way for us to proceed would be to rewrite our leaflet, send it to a list of 100-plus people and wait for comments. However, we felt that that would not go into the matters on which we want people's opinions, so we produced instead a list of about 17 issues and ran focus groups. On one day we invited the industry, on the second day we invited communities, Friends of the Earth and the like and on the third day we invited the legal community. We gave them a chance to raise their own issues, but we also gave them our fairly structured list of issues and asked what they thought. We have done that recently and found it valuable. In a consultation, getting beyond an exchange of letters adds value, but it takes more time. People sometimes get frustrated at how long the public sector takes to do things, but the more effort is put into consultation up front, the more likely it is that the whole process will take longer.

I will give members an example. The convener may well remember commenting on the Forth valley area waste plan back in 2000. We had published an issues paper, setting out the way in which we thought waste management should go in the area. As technocrats, we thought that the paper was quite clear but, once we asked the public, it became pretty clear pretty quickly that the paper was not clear. I remember the convener commenting on that.

Such comments were helpful to us. We were not trying to obfuscate but were trying to get our points across. Therefore, the next time, we asked somebody who writes plain English for a living to rewrite the paper. We would not have had time to do that if we had left the consultation until late in the day. It has been valuable to us to get beyond a routine exchange of letters and to put the effort in up front.

**Mr Ingram:** So, you would advocate a more proactive approach. Rather than simply waiting, you would anticipate things.

The FSA mentioned timescale problems in trying to consult on matters that are coming up at European level. Could the FSA do something similar to what SEPA is doing?

**Sandy McDougall:** It is all about making consultation part of everyday business. We should not simply do things in writing; we should develop innovative means of engagement and not take a one-size-fits-all approach. The FSA clearly distinguishes between informal consultation and formal consultation. Formal consultations are often simply a written document. However, we make extensive use of our website, which is a very interactive feedback tool.

We have reasonably informal engagement with large stakeholder groups. Twice a year, we gather all our stakeholders together to discuss particular topics. That was especially useful in 2004 as we formulated our new strategic plan for the agency. We were able to gather 20 or 30 of the major stakeholders and influencers in Scotland for five hours in Glasgow, to glean their views. That information was then fed into the formal consultation process—together with the responses from all organisations to the written consultation.

It is important to have a mindset that allows us to identify different approaches to consultation with different stakeholders on different topics.

**Mr Ingram:** What you describe is perhaps a more informal network approach, as opposed to a formal statutory consultee approach. Would a code of practice be useful? SEPA suggested that Aarhus convention principles ought to be used not only in environmental matters but right across the board. What are your thoughts on that?

**Sandy McDougall:** I will answer first, if I may.

We have given quite deep consideration to having a code of practice for consultations. We agree with the idea in principle but believe that it would have to be wide enough to cover all the different approaches to consultation. By its very nature, a code of practice might show organisations that there are many approaches to consultation. It might therefore help to ensure that people do not concentrate simply on the formal, written, 12-week consultation. People should realise that short-term and rapid consultation exercises to inform European negotiating positions can be just as valid.

**Dave Gorman:** We would welcome a formal code of practice. Perhaps we could consider what is in place in England and Wales and adapt that for Scotland. I certainly agree with Sandy McDougall that we do not want to cut off avenues that sometimes must be taken in haste. If there is always a commitment to having a 12-week consultation, valuable opportunities will sometimes be missed. There could be something that says what the norm would be but allows other approaches.

The Aarhus convention is radical in its requirements for environmental information, and there would be merit in thinking about it in other areas. Eventually, it will be a requirement that when we publish draft licences for major installations, not only the applicants—who receive copies anyway as part of our standard practice—but the public will get a copy of the draft licence and a document explaining why SEPA has taken the decisions that it has. There must be merit in that approach.

**The Convener:** I remember the Forth valley area waste plan well. Perhaps the example also points to the importance of civic forums, not directly through consultation in its strictest sense, but in simply raising awareness about major issues that are coming down stream.

Stewart Maxwell will ask about easily understood regulation, which has already been mentioned with respect to one or two matters.

**Mr Maxwell:** Easily understood regulation is close to the hearts of many of us and particularly to mine, given my elevation to the committee on being elected, when it would have been helpful if easily understood guidance had been available for members.

I want to begin by exploring what steps SEPA and the FSA think would be helpful to assist in making new environmental and food legislation regulations easier to understand and use for businesses that are faced with them.

**Sandy McDougall:** The FSA has two or three tools that we regularly use to attempt to interpret regulation, fundamentally for our local authority enforcement colleagues. The enforcement code of practice is a well-respected and continually updated document. Only last year, there were 20 individual guides, but they have now been consolidated into one enforcement code of practice, which acts as a bible of reference for local authority enforcers.

We encourage the development of industry guides in different sectors of the food industry. Perhaps there will be a guide for the catering industry or one for butchers. The aim is to have a guide for interpreting regulations in a fairly readable and standard format for industry players to use.

At a more informal level, we want to ensure that our communications with stakeholders through interested party letters, for example, are in reasonably plain English, with an executive summary and—

**Mr Maxwell:** I am sorry to interrupt, but how do you ensure that something is in plain English? Sometimes people think that something is in plain English, but that is because they are used to the jargon.

**Sandy McDougall:** There is a learning process, and we are probably not there yet. We recently conducted a consultation on what has been colloquially called a "plain man's guide" to new hygiene regulations, which has resulted in quite a major exercise in the agency. The feedback from the consultation will now allow us to reformulate that guide so that it really is a plain man's guide. However, organisations almost undergo an evolutionary process in moving from using jargon extensively to making documents easily understood.

11:30

**Mr Maxwell:** The "plain man's guide" is also mentioned in your written evidence. Speaking as someone who has a background in the meat industry, I believe that it is an excellent idea to have such a guide for meat hygiene directives. However, the meat industry is a large industry that has many small, medium and large players. I can understand why it would be useful to invest time and effort in producing such a guide, given the size of that industry. Would it be reasonable for the agency to fulfil its duty by following the same process for smaller sectors outwith the meat industry?

**Sandy McDougall:** A plain man's guide is particularly relevant for the new hygiene regulations because of their complexity. I do not suggest that such guides are applicable to every activity, but they can potentially be used for a complex series of regulations, such as the new hygiene regulations, which cover the whole spectrum of the food industry. We have proved that it is possible to develop a plain man's guide that deals with everyone, from small game establishments up to major drinks players.

**Mr Maxwell:** Is the enforcement code of practice aimed at environmental health officers?

**Sandy McDougall:** Yes, it is primarily for environmental health officers.

**Mr Maxwell:** Is the code of practice now in place? Can we see it?

**Sandy McDougall:** Yes, it is in place and it is available to everyone via a link on our website.

**Mr Maxwell:** That is useful. Does SEPA have any comments along the same lines on that issue?

**Janice Milne:** Together with the Environment Agency in England and Wales, SEPA produces NetRegs, which is a guide specifically for small and medium-sized businesses. We recognise that SMEs may not have the same resources as larger organisations, so the guide is written in plain English.

For larger regulations, such as the Pollution Prevention and Control (Scotland) Regulations 2000 and the regulations under the waste incineration directive, we have worked with the Scottish Executive to put together a practical guide that explains some of the complexities. A practical guide is written for each set of such regulations.

When new regulations are made, we work closely with the sectors on which the regulations will have an impact. For example, the Pollution Prevention and Control (Scotland) Regulations 2000 had an impact on industry sectors, such as intensive pig and poultry installations, that had previously never been regulated by SEPA. In that instance, we worked closely with the industry associations to run seminars to explain the requirements of the new regulations and we looked at how we could simplify the permitting regime where that was possible. The approach needs to be very sector specific. One must consider the sectors that will be affected and the number of units that it is estimated will be impacted by the regulations.

**Mr Maxwell:** Let me ask the same question that I asked before. How do you ensure that what you think is plain English is what the recipients think is plain English?

**Janice Milne:** Our organisation has a good public affairs section, which we can ask to put the regulations through a plain English test.

**Mr Maxwell:** Is that done in advance of publication?

**Janice Milne:** Yes.

**Dave Gorman:** NetRegs is my pet project, so I encourage everyone to have a look at it. In NetRegs, we have tried to move beyond generic guidance by writing guidance for each of the 100 sectors that are listed online. Instead of simply stating all the environmental legislation, the site describes how the environmental legislation applies to, say, the printing sector or the metal finishing sector.

We test the site's usefulness through extensive market research. We have carried out about six exercises with dozens of focus groups who have been shown the site and asked whether it makes sense. Fortunately, most of the time they have said yes, but they have occasionally been pretty brutal and said, "No, that is very poor." In those cases, we have rewritten the material. For NetRegs, we have a pretty structured process.

**Mr Maxwell:** I was about to come on to NetRegs. Given that it is your pet project, I am sure that you will be able to answer my question. That useful website is probably fine for most businesses that have no problem because they have access to technology. However, that is not always the case with microbusinesses. How do you deal with that sector, especially one-man businesses and those that do not have access to the internet?

**Dave Gorman:** That is a good point. As far as we can tell, access varies by sector. In some sectors, even quite small businesses are online, but in others they are not. We are in the process of writing a strategy; it is a UK project, so we work with the Environment Agency and the Environment and Heritage Service of Northern Ireland. We believe that we now have a fairly good product. I will provide the committee with some background. One reason for putting guidance online was to encourage people to understand the legislation as being simple and non-threatening. People worry that if they invite a regulator to examine one issue on their site, the regulator will spot other issues. The idea was that businesses should be able to access information in a non-threatening way. That is the core product.

As the committee has, we have picked up on the fact that not everyone uses the website. Even if they do use the website, they would sometimes also like a CD-ROM or a seminar. We have moved the NetRegs team beyond the NetRegs project: members of the team attend about one seminar a week, at the invitation of industry, to talk about legislation. The next step, for which I am trying to get funding—this is a little plug for the project—is to move beyond the internet and to ask whether we can provide better guidance on CD-ROMs and so on. The farming community has told us that many farmers who have computers may not have internet access.

**Mr Maxwell:** You are right that some single-person businesses have considerable internet access whereas others do not and that that will depend on the kind of business.

I want to ask a general question. The points that you made about websites and the plain man's guides that are being issued to users are interesting. I wonder what feedback you have received on how much the guidance helps. Do we have any way of quantifying the effect that it has on users and enforcers?

**Martin Reid:** I will throw in another example of an area in which the agency has been active in developing guidance. I am referring to hazard analysis critical control points—members may be familiar with the acronym HACCP. It is a generic approach that is used in a number of industries, but we have focused on introducing HACCP to catering businesses as part of a new consolidated hygiene package. From 1 January 2006, there will be a legal requirement on businesses to introduce the system. I will no doubt get a wee brown envelope later with a request to explain what HACCP is.

We have tried to take away the mystery that surrounds how caterers should implement HACCP in their businesses and we have produced a manual for them, which was developed in consultation with enforcers, who are primarily responsible for advising food businesses on how to implement HACCP. It was piloted and is undergoing revision in response to feedback that we have received so far. The manual is subject to constant review. For now, we have introduced HACCP in the catering sector, but the agency's longer-term plan is that such guidance should also be introduced in other sectors. We would provide support and advice on how to introduce the system of food safety management in different types of food business. It is an open-ended situation that will be under constant review based on feedback from users of the documentation. The manual will be updated to take account of developments and advances in food technology and current thinking about food hygiene practice; it will not stand still. It has been issued for use right now, but it is under review and has been developed in consultation with enforcers and users in food businesses.

The manual is a good example of a document that is not subject to a timed review process in which we say that we will have another look at it in 12 months. Instead, we receive constant feedback and, at appropriate times and if sufficient change is required, we update the document. The manual is a working document that lends itself to being updated in that way because it is broken down into different sections. We do not necessarily re-issue the entire document if only one section of it has changed; we update and issue that section. Businesses have access to and refer to the manual, which is available on our website. We are developing a version that will be available electronically and we are considering production of versions in various languages, including Punjabi and Urdu. Obviously, many ethnic groups are involved in the catering sector, so we want to ensure that the document has the right target and focus. As Sandy McDougall said, we do not take a one-size-fits-all approach to HACCP. We keep the manual under review to ensure that it is appropriate and delivered properly.

**Mr Maxwell:** I accept that that is a particularly good example of how you are developing guidance through feedback and ensuring that information is available, but there is a bit of a gap, because no matter how many times you do that, you cannot be sure that the guidance is being used. You are putting the information out there, but is it lying on a shelf, rather than being used by businesses? Is it used to help businesses to deal with the regulations?

**Martin Reid:** We have a simple way of assessing whether the guidance is used. Our delivery mechanism, which is the local authority enforcement officers, can assist by introducing the HACCP manual into businesses. Initially, that will be new for the officers, but in the long term it should be incorporated into their normal inspection programme. I hope that the system will not put new burdens on local authority enforcement officers; it should mean that businesses will improve, which will result in less work for the officers. Through our local authorities partners, we have a direct means of measuring whether businesses use the document and, importantly, whether they use it effectively to improve hygiene standards.

**Dave Gorman:** We have a methodology for measuring compliance with environmental law. One way in which to test the effectiveness of guidance is simply to see whether compliance increases or, at least, is maintained. That has been the case in examples that I can think of. For instance, after we tried to improve compliance with the bathing water directive by talking to farmers, we found out that the advice that we had offered had been taken up, which was encouraging.

We carry out industry surveys and general marketing research. In 2002, we published our service standards for regulated persons—a pretty snappy name—which are the standards that those whom SEPA regulates can expect of us. For example, people should have a named officer who is responsible for their site; if they do not, they should push us until they have one. As the standards contained many words, we wondered how we should measure the outcome. Our plan was to do an industry survey every other year—or perhaps every three years—to ask whether we are fair and effective, as we said we wanted to be. That gives people in the industry the chance to say something strong if they are not happy with us, but so far the results are encouraging. However, we will keep an eye on the situation and, if the results start to deteriorate, that will cause concern.

It is easy to measure the usage of NetRegs because we can measure the number of hits. At

present, we have about 30,000 users a month and about 100,000 hits a month. The usage figure has grown at a rate of about 80 per cent a year for the past three years. We know that people use the site and that they do so effectively. We have also managed to secure up to 300 industry endorsements from people who are willing to put their name on a bit of paper that says that NetRegs is useful. It is great that people are using the site, but the next trick for us is to find out whether they are implementing environmental policy or reducing energy use. From the evidence that we have seen, between one in five and one in four people actively does something differently within a reasonable timescale as a result of using the site. One benefit of the NetRegs approach is that we can measure usage more easily.

11:45

**Mr Maxwell:** The SEPA response says that the transposition of European directives is achieved in various ways, such as acts, regulations and so on. Does the fact that there are many different vehicles cause problems? Could complexity be reduced if all European directives were transposed uniformly?

**Dave Gorman:** My opinion—which is a personal one rather than a SEPA one—is that it is sensible to have general acts such as the Pollution Prevention and Control Act 1999 to set a framework. However, when that framework is used to implement all sorts of other European regulations, we end up with the basic set of regulations being amended again and again, so everything becomes difficult to follow. I do not have an answer for how that can be solved.

**Janice Milne:** With regard to EU directives, we need to concentrate on early influence. One of the issues that we face relates to definitions within various EU directives. For example, the Control of Major Accident Hazards Regulations 1999 defines an establishment, whereas the Pollution Prevention and Control Regulations (Scotland) 2000 defines an installation. We were able to include amendments to the large combustion plant directive. In fact, SEPA's response to the consultation on the directive said that we did not see the need for it because it would be subsumed by the pollution prevention and control directive when it came in.

One of the problems is that directives are developed by different groups in the Commission. That causes us problems early on in relation to transposition. Our response mentions the EU network for the implementation and enforcement of environmental laws project, or IMPEL. We want to see some of the outputs from that driving forward improvements at EU level.

**Mr Maxwell:** So, in effect, you think that the problem is more to do with a lack of communication between different departments at European level.

**Janice Milne:** That is an area that we need to concentrate on. SEPA recognises that and will work with the Scottish Executive on the issue.

**The Convener:** As I remember, the Federation of Small Businesses said that there was a particular problem with interpretation of the definition of waste. While we have you here, I might as well ask whether SEPA has had any feedback on that.

**Janice Milne:** We could discuss this all day. With regard to the definition of waste, we are bound by judgments in the European Court of Justice. SEPA does not want regulation of waste to diminish the novel approach in the waste strategy, which Dave Gorman mentioned earlier. There can be seen to be a conflict between waste regulation and delivery of the waste strategy, so we need to work closely with the Scottish Executive to ensure that that does not happen.

We have had some input into the EU thematic strategy on waste prevention and recycling, and the definition of waste will be addressed in the waste framework directive. However, as I said, we are bound by decisions that are made in the European Court of Justice and by the associated regulatory framework. We are aware that the definition of waste causes certain sectors some problems. However, SEPA has to consider the whole waste permitting regime and ask how we can be a bit smarter with regard to how we issue permits, given the regulations. We are actively considering that; to do so will be one of the roles of the better regulation manager.

**Dave Gorman:** I want to reinforce what Janice Milne said. There is a European problem. Our approach is that, where we can use the flexibility that is given to us by the law, we will do so but—understandably—legislators are reluctant to give an agency such as SEPA extensive powers because it is not quite clear what we will do with them.

We can only work within the flexibility that we have. People assume that activities that have an environmental benefit will not be affected by waste laws, but the legal advice is fairly clear that they will be because they involve waste. European case law tells us that that is the situation. Therefore, we do not really think that we should turn round and say, "Just because we feel like it, we'll arbitrarily ignore what the law clearly requires." That problem applies not just to Scotland, but to Europe. I have a great deal of sympathy for a businessman who, for example, comes up with an alternative approach to recycling

only to find that we require them to have a waste management licence. However, according to the law, our approach is perfectly correct. As Janice Milne pointed out, we are trying to get the Commission to accept that action must be taken to tackle the matter. However, that cannot happen on a country-by-country basis, because that would be contrary to European law.

**The Convener:** Could the matter have been flagged up better? For example, could there have been better consultation to ensure that we did not find ourselves in this situation, or can we simply not foresee everything that might happen?

**Dave Gorman:** I think that we simply cannot foresee everything. After all, the waste regime works on a case-by-case basis. Its whole thrust is to try to prevent harm, and it is sometimes difficult for a regulator to differentiate between someone who really sees the business opportunities of recycling and someone who simply seeks to avoid the rigours and costs of waste regulation.

**Christine May:** The subject is probably dear to all members' hearts because businesses raise it with us. I have two questions. First, do you carry out benchmarking of EU member states to find out whether a consistent approach is being taken? For example, people frequently tell us that certain things do not apply in Finland, France or the Czech Republic. Secondly, to what extent is the accusation valid that you err too much towards trying to prove the negative? After all, you cannot prove that certain waste is not harmful; all you can do is to consider evidence that it is harmful.

**Dave Gorman:** I suspect that the other witnesses will also have an opinion on these matters. On the first question, we carry out quite extensive benchmarking. As IMPEL is the practitioner, we meet there regularly to compare notes and swap best practice. We are also involved in several other networks that carry out similar work.

We have certainly heard the allegation, particularly from industry, that the situation is different in other countries. However, the EU goes through an extensive annual process to check whether European law is being implemented, and it will pick up on and pursue matters in which other member states have not implemented it.

We are pretty happy with the level of information exchange. For example, we were heavily involved in and had extensive input into intercalibration exercises for the water framework directive, which tried to ensure that what constituted good water quality in one part of Europe was the same for other parts.

Your second question is more difficult to answer—

**Christine May:** I am sorry to interrupt, but I should point out that it also has something to do with gold plating and the accusation that this is not just implementation, but implementation with bells on.

**Dave Gorman:** One can understand why businesses feel frustrated. For example, they might have secured funding—and even planning permission—for an innovative recycling idea, only to feel that the national environmental regulator is opposing them.

As one of our principles for regulation is to be fair, legally correct and consistent, we do not want individual officers to turn a blind eye to projects that they support simply because they do not want them to be regulated. In such cases, we have to implement the law; otherwise our approach will contain no checks and balances. We realise that that leads to frustration, so where we have discretion we will use it to support recycling aims.

It all comes back to the nature of the waste regime which, as Christine May said, almost tries to prove a negative. For example, it is easy to spot water pollution because there are dead fish and so on. However, when action is taken on certain waste offences under the waste regime, the question is not so much whether harm has been caused, but whether it could have been caused. Controls are in place to try and prevent things that, when they happen, are pretty harmful to health. The area is difficult; it is the one about which we get most feedback from business. Again, it is an area that has to be fixed at European level.

**The Convener:** Okay. We should press on—otherwise we will do too long a shift today. We move on to the common commencement date, on which there is considerable difference of opinion.

**Mike Pringle (Edinburgh South) (LD):** My first question is for the Food Standards Agency. I understand that you are carrying out a review of the process. Should legislation that affects different parts of the UK have a common commencement date? I believe that SEPA's view of the matter is different to that of the FSA. Perhaps you could give us the FSA's view and tell the committee what the review is all about.

**Martin Reid:** Our position is straightforward: we support common commencement dates across the UK. There would need to be a very specific set of circumstances before we could justify different policy implementation dates in different parts of the UK. After all, food hygiene is food hygiene and food safety is food safety and, by and large, there is nothing particularly Scottish, English, Welsh or Northern Irish about those issues. In the area of policy that we deal with—food hygiene and food safety—there is no real underlying reason why

commencement dates should be different across the UK.

Perhaps the more predictable response that I can give to the question is to say that, because most of what we do involves commencement dates that are set under European legislation, we work towards those dates. Although that may seem to be a fairly civil-service response, it is none the less true. We have to work to the EU implementation dates that we are set. Ultimately, where legislation originates in Brussels, our target date will be the date that is set out in that legislation.

In the vast majority of cases, we implement legislation on the date that is set out in Brussels. I am struggling to think of an example in which we formally introduced legislation ahead of a European implementation date, although there have been one or two occasions when, for one reason or another, we were a little late in implementing legislation. In most such cases, we did not take a deliberate decision to be late; lack of resources or whatever meant that a deadline slipped.

As a UK Government department, we would go for a single commencement date in all cases in which deadlines are set in Brussels. That does not mean to say that we might not wish to take action in Scotland—legislative or otherwise—that needs to be introduced differently in terms of Executive policy objectives. One historic example is butchers licensing: we not only went for a different implementation date, but took a slightly different approach than that which was being taken elsewhere. The beauty of devolution is that we can do our own thing in that way. In that case, it was appropriate to do things in that way.

SEPA has recently undertaken a review of butchers licensing throughout the UK. Although the outcome of the review is still to be announced, we decided to undertake a common review of the policy. When to do so is appropriate, we do things differently. However, because so much of what we do is driven by Brussels, by and large we aim for a common UK commencement date unless there is a very good reason not to.

**Mike Pringle:** In its evidence, SEPA said that if a common commencement date were to be applied to environmental law, it

"has the potential to overwhelm both the regulator and the regulated."

Obviously, there is a difference of opinion between SEPA and the FSA on the subject.

**Dave Gorman:** It is fair to say that SEPA's view on the matter is developing. When we were preparing for the committee, it was obvious that business felt that it would helpful to discuss the matter. We are slightly different to the FSA: the directives that we implement include dates that reflect the time at which they were published in the *Official Journal of the European Communities*. There is no other commonality about the dates—they could be sometime in January, 23 March or any date at all.

There is a risk of problems arising if, for example, there were two implementation dates at United Kingdom level—say April and October. The implementation period could be squeezed because civil servants would not adopt one of the dates, which was later than the directive's transposition date. That is one concern. A second concern is that if, regularly, many pieces of legislation came into effect on the same day—there is an example in our submission—we would be presented with difficulties. Surely there would also be a potential problem for businesses. An approach that was intended to help businesses might end up being unhelpful. We are not against the approach as such and if common commencement dates are to be used we will manage, but the approach might not be as helpful in the environmental field as it is perhaps perceived to be at first sight.

12:00

**The Convener:** Christine May will ask about enforcement, which is important.

**Christine May:** Indeed. The witnesses mentioned the enforcement concordat, which has been revised and consolidated into a single document. Are you content with how the concordat is working? Is enforcement consistent, now that there is a single document? What improvements might be made to the system? For example, should statutory powers be available for use when the voluntary code does not work properly?

**Dave Gorman:** Our view is fairly straightforward. We do not know how the concordat is working for other sectors and local authorities, but we find it very helpful because it sets out agreed good practice. We signed up to the concordat—in 2002, I think—and then slowly tried to work through our processes to ensure that they match it. For example, we expect our officers to provide a copy of a draft licence in order to enable people to comment before the full licence is issued. We also expect enforcement action to be discussed with a company before action is taken, unless there are pressing circumstances. The document is helpful, but we have no experience of how it works for other sectors. There is no particular need for the concordat to be put on a statutory footing, because it has been so useful to us that we have tried to implement it anyway.

**Christine May:** What does the FSA think?

**Sandy McDougall:** I have very little to add to what Dave Gorman said. The concordat is part of our overall enforcement regime. A framework agreement, to which local authorities work, is also in place and—fundamentally—we audit against the framework agreement. We have a number of tools that assist us in ensuring that enforcement is consistent.

**Christine May:** Are the existing statutory powers to take action for breaches sufficient?

**Dave Gorman:** Largely, in our case, they are. We are asking people whether SEPA has enough tools in the toolbox, although for the vast majority of companies we have pretty draconian powers, which we are prepared to use if necessary. We will certainly take views on whether we need one or two more powers, which relate to other matters. Largely, however, we are pretty satisfied.

**Sandy McDougall:** As part of our response to the Hampton review, we made a number of suggestions about how particular powers of enforcement might be amended. Those suggestions are still under consideration.

**The Convener:** When will SEPA conclude its review of whether it needs more powers?

**Dave Gorman:** I confess that if you had asked me that question last summer I would have said that I expected the process to be concluded by now. We hope to put out a public consultation in the summer and then, depending on the extent of people's views about how effective we are, to make substantial progress on a final report by the autumn.

**The Convener:** Thank you. Any information that you can give us would be helpful.

I am conscious that we have kept the witnesses for a long time, so I will move on to the final area of questioning. Sunset clauses have been much in the news recently and the committee would like to ask about the post-implementation review of regulation. How do you think that we might do that better? Do we need a sunset-type procedure?

**Janice Milne:** We do not see a need for sunset clauses. We believe that the regulations should not themselves contain a requirement that they be reviewed regularly, but that they should be reviewed as and when required, to reduce any administrative burden. I stress that there is an opportunity at any time to review how the regulations are working. That is especially important when considering the implementation of a new directive.

For example, the regulations implementing the pollution prevention and control directive came into force in 2000. That regime was new to SEPA and to industry. It is sometimes only when we start using the regulations that we find out that something is not working, and it is only then that we get feedback from industry or from inspectors on the ground saying, "This isn't quite right." We then proactively go back to the Scottish Executive and point out, for example, that pilot plants were not meant to be included in regulation 4 of the Pollution Prevention and Control (Scotland) Regulations 2000, which concerns the chemical sector, but were in fact included. Obviously, if something is in the directive, it is a bit more difficult to change, but when a bit of industry that is not in the directive is included in a Scottish regulation we can go back and say, "We need to amend that."

We work continually with the Scottish Executive to review legislation if we find, based on practical experience and on speaking to operators, that something is not working. That is where SEPA is coming from when we say that we do not see the need to state in the regulations that they will be regularly reviewed.

**Dave Gorman:** I believe that we said in our evidence that 10 years before a review seems a bit long. As Janice Milne has said, if after three years there has not been some sort of review, it would be sensible to have one, but 10 years feels a bit long.

**Sandy McDougall:** The Food Standards Agency Scotland agrees that there is no role for sunset clauses in food regulation. The FSA reviews regulation primarily as a result of updates of EU legislation. The food arena also changes as technology and science evolve, so we take a more proactive role in reviewing regulation. There are certainly a couple of examples of that. Martin Reid has already mentioned butchers' licensing, but I shall ask him to illustrate the point by telling you about a case that he has been very much involved in over the past two years, which relates to shellfish biotoxins.

**Martin Reid:** The point has already been made that European legislation is always there to be challenged. That is what we did when the industry approached us about how current legislation on shellfish toxins was being implemented and to ask whether we could take an alternative approach that would be less detrimental to the industry. Our point of view was that that was fine, but that the regulations had to protect public health. Working with the industry, we were able to come up with some proposals. Because the shellfish industry is an important Scottish industry, the FSA in Scotland went to Brussels, met Commission officials and discussed the possibility of a proposal being developed by the Commission to reflect our thoughts on how the matter could be handled. Ultimately, that resulted in a change to Community legislation. In effect, an addition was made to the existing directive to allow a different way of

managing a specific problem associated with shellfish toxins.

Our organisation is always open to the possibility of changing and challenging, even though directives may be viewed in a European framework as final and as stating what people have to do. We do not see it that way and we are happy to challenge existing European legislation, although we do not necessarily build that in as a periodic process in what we do.

Sandy McDougall is right: the world of food hygiene and food safety legislation is quite dynamic, believe it or not. We have recently been through a significant review of all major food hygiene legislation from Brussels, and the new legislation has been framed in a way that is almost an open door to challenge. Although the Council of Ministers and the European Parliament have agreed the framework, the responsibility for accepting or modifying European legislation has been pushed down to committee level, so the route to securing amendments is now much more accessible. We do not have to push the matter up to the Council of Ministers and the European Parliament, because the working groups can achieve the changes, which, in effect, means that the decisions about how the new legislation should be framed are being made by officials, experts from Brussels and people with appropriate technical working knowledge of the issues that are being discussed.

The mechanism is much better under the new framework, so it is much easier to challenge and achieve changes. With the legislation on biotoxins, we did that the hard way, but we succeeded; we now have an easier way to achieve change. By and large, there is no need for sunset clauses in food legislation because of the speed at which it changes anyway. I am not saying that sunset clauses are not appropriate in other areas, but I do not see a need for them in ours.

**The Convener:** As the witnesses might be aware, we have not quite covered all the areas on which we had questions. We hope that they will not mind if we write to them to get detailed information on those areas, one of which is the Subordinate Legislation Committee's role and how the committee might be improved. We also want to ask the witnesses from SEPA for more detail on the ideas on better regulation that Dave Gorman mentioned in his introductory remarks.

I thank Janice Milne, Dave Gorman, Martin Reid and Sandy McDougall very much for their written and oral evidence. They have had a very long morning with us—I am sorry that it has taken such a considerable time.

We will suspend the meeting for a minute or two while we let our guests go.

12:12

*Meeting suspended.*

12:14

*On resuming—*

# Delegated Powers Scrutiny

## Family Law (Scotland) Bill: Stage 1

**The Convener:** Item 2 is delegated powers scrutiny of the Family Law (Scotland) Bill at stage 1. Committee members will remember that we raised two points with the Executive. The first of those was to do with the parental responsibilities and parental rights of unmarried fathers under section 17(3). We were concerned that the power in proposed new section 3(1B) of the Children (Scotland) Act 1995 need not necessarily be as restricted as the Executive envisaged in the policy memorandum and could be used to extend parental responsibilities and rights to a father who had not registered anywhere as the father of the child. The Executive has interpreted the possible use of the power in the same way as the committee does, but it does not seem to believe that the power can be used more widely. Which of the options before us should we go for? I am tempted to press for the power to be limited in the bill to make sure that it is going to do what the Executive wants it to do.

12:15

**Christine May:** I agree.

**The Convener:** Are we all agreed?

**Members** *indicated agreement*.

**The Convener:** The second area with which the committee is concerned is section 34 of the bill, on the short title and commencement. Members will recall that the two provisions may be brought together in one instrument. The committee thought that it would be better to separate the powers and have two instruments instead of one. The Executive does not seem to think that that is necessary. What does the committee think that we should say to the lead committee?

**Christine May:** Once Parliament has agreed that it is content with the bill's proposals and it has had the debate, the commencement order should not provide an opportunity for any issue to be raised again. The powers should be split between two statutory instruments.

**Mr Ingram:** I agree.

**The Convener:** So that is the report that we are recommending making to the lead committee and Parliament.

**Members** *indicated agreement*.

# Executive Responses

## Sea Fishing (Restriction on Days at Sea) (Scotland) Order 2005 (SSI 2005/90)

12:16

**The Convener:** Members will recall that we asked about the meaning of the term "designated port" because we thought that there was confusion. The term is intended to apply to cod and sole, but in one part of the order the term applies only to cod. As the order carries a criminal sanction, our legal adviser rightly thinks that the order should be drafted clearly. Are we agreed that we should report the order to Parliament and the lead committee on the ground that the drafting could be clearer?

**Members** *indicated agreement*.

**The Convener:** The second question on the order was for the Executive to explain why the first paragraph in article 33 is not numbered. The Executive is not considering renumbering the paragraphs although our legal adviser thinks that it might cause a problem if someone wants to refer to the unnumbered paragraph. Should we report that point to the lead committee and Parliament?

**Members** *indicated agreement*.

**The Convener:** Our third question to the Executive on the order was in relation to the Sea Fishing (Restriction on Days at Sea) (Scotland) Order 2004 (SSI 2004/44). The Executive gives a detailed explanation of its intentions and says that the order will work. The Executive undertakes to take steps to put the issue beyond doubt at the next legislative opportunity. Are we content with that? Do we will want to report the answer even though the problem will be rectified?

**Christine May:** We should report it, but we should also indicate that we are content that the Executive has agreed to make a new order at the earliest possible opportunity.

**The Convener:** Is that agreed?

**Members** *indicated agreement*.

## Plastic Materials and Articles in Contact with Food Amendment (Scotland) Regulations 2005 (SSI 2005/92)

## Colours in Food Amendment (Scotland) Regulations 2005 (SSI 2005/94)

**The Convener:** We will take the two instruments together. Two points were raised. We asked why the preambles made no reference to either the consultation requirement in article 9 of regulation

EC 178/2002 or the consultation requirement in section 48(4) of the Food Safety Act 1990, which is the parent act.

What we have received from the Executive is quite different from what we have received from our legal advisers, who are quite firm that those references should be in the preamble. How does the committee feel about that?

**Christine May:** I agree with the legal advisers.

**The Convener:** So we will report to the Parliament and the lead committee on the ground of defective drafting.

**Members** *indicated agreement*.

**The Convener:** Our second question was about the absence of a transposition note.

**Christine May:** The Executive agrees with us that it would be nice to have a transposition note, but it has not provided one; nor has it provided the samples that are referred to. Given that the exercise to provide such samples is now being undertaken, it is probably time to step up the Christine May campaign for transposition notes. It cannot be that difficult to provide them. They can be provided in other parts of the United Kingdom, so I do not see how they cannot be produced for the Scottish situation. Please can we draw that to the attention of the lead committee, the Parliament and the world at large?

**The Convener:** Is that agreed?

**Members** *indicated agreement*.

**The Convener:** That issue is on-going.

### Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2005 (SSI 2005/93)

**The Convener:** This is the 10th set of amendments to the principal regulations. We have asked the Executive what progress is being made towards consolidation. The Executive says that progress is delayed because it is conducting an on-going strategic review. Are we content with the Executive's response, given that there is not much that we can do?

**Members** *indicated agreement*.

## Instruments Subject to Annulment

### Antisocial Behaviour (Amount of Fixed Penalty) (Scotland) Order 2005 (SSI 2005/110)

12:20

**The Convener:** No points arise. Is that agreed?

**Members** *indicated agreement*.

### Advice and Assistance (Scotland) Amendment Regulations 2005 (SSI 2005/111)

**The Convener:** No substantial points arise, but we will raise by informal letter a number of smaller points about typos and so on. Is that okay?

**Members** *indicated agreement*.

### Civil Legal Aid (Scotland) Amendment Regulations 2005 (SSI 2005/112)

**The Convener:** Our legal advice suggests that we should ask the Executive for reassurance that section 26 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 will be brought into force on 4 April. Is that agreed?

**Members** *indicated agreement*.

### Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005 (SSI 2005/113)

**The Convener:** It is suggested that we ask the Executive what progress, if any, has been made towards the consolidation of this legislation. Is that agreed?

**Members** *indicated agreement*.

### Community Care (Direct Payments) (Scotland) Amendment Regulations 2005 (SSI 2005/114)

**The Convener:** The preamble to the regulations cites as an enabling power section 93 of the Social Work (Scotland) Act 1968, as amended. However, that section confers a power to revoke or amend orders, so it would therefore not be relevant to regulations. It is suggested that we ask the Executive for an explanation of that. Our legal advice points out that, conversely, it would seem that subsection (6) of section 12B(1)(b) of the 1968 act is a relevant enabling power, but it has not been cited in the preamble. We can ask about that. Is that agreed?

**Members** *indicated agreement*.

## NHS Quality Improvement Scotland (Amendment) Order 2005 (SSI 2005/115)

**The Convener:** No points arise on the order. Is that agreed?

**Members** *indicated agreement*.

## Feeding Stuffs (Establishments and Intermediaries) Amendment (Scotland) Regulations 2005 (SSI 2005/116)

**The Convener:** The Executive has employed section 2(2) of the European Communities Act 1972 as a sole enabling power. However, there is an argument that the proper power in relation to the charging of fees is not section 2(2) of the 1972 act but section 56 of the Finance Act 1973. It is suggested that we ask the Executive for its comments on the applicability of section 56 of the 1973 act. Is that agreed?

**Members** *indicated agreement*.

**Christine May:** Where is "Sandquhar Academy"?

**Mr Maxwell:** It is Sanquhar Academy.

**Christine May:** I know that, but "Sandquhar Academy" appears regularly on the list of consultees.

**The Convener:** That point can go in our informal letter.

## Agricultural Subsidies (Appeals) (Scotland) Amendment Regulations 2005 (SSI 2005/117)

**The Convener:** No points arise on the regulations. Is that agreed?

**Members** *indicated agreement*.

## National Health Service (Service Committees and Tribunal) (Scotland) Amendment Regulations 2005 (SSI 2005/118)

**The Convener:** Our legal advisers consider both the National Health Service (Service Committees and Tribunal) (Scotland) Amendment Regulations 2005 (SSI 2005/118) and the National Health Service (Optical Charges and Payments) (Scotland) Amendment Regulations 2005 (SSI 2005/119) to be very difficult to make any sense of. The first set of regulations has been amended more than 10 times. We should ask the Executive what progress, if any, it has made towards the consolidation of the regulations. Is that agreed?

**Members** *indicated agreement*.

## National Health Service (Optical Charges and Payments) (Scotland) Amendment Regulations 2005 (SSI 2005/119)

**The Convener:** I have already mentioned these regulations. The Executive has said that it has no plans to consolidate them, so perhaps they are even more significant for us than are the previous set of regulations. It is also suggested that we should report directly to the lead committee and the Parliament on the serious issue of consolidation. Is that agreed?

**Members** *indicated agreement.*

## NHS Quality Improvement Scotland (Establishment of the Scottish Health Council) Regulations 2005 (SSI 2005/120)

**The Convener:** The reference to "paragraph 2(b)" in regulation 3 on page 2 ought to be a reference to "regulation 2(b)". An amending instrument might be required, as the issue may not be as minor as it appears. Is it agreed that we will raise that issue by formal letter?

**Members** *indicated agreement.*

## National Health Service (Dental Charges) (Scotland) Amendment Regulations 2005 (SSI 2005/121)

## Dissolution of Local Health Councils (Scotland) Order 2005 (SSI 2005/122)

## Road Traffic (NHS Charges) Amendment (Scotland) Regulations 2005 (SSI 2005/123)

## National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2005 (SSI 2005/124)

## Gender Recognition (Disclosure of Information) (Scotland) Order 2005 (SSI 2005/125)

**The Convener:** No points arise on the instruments.

## National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2005 (SSI 2005/128)

**The Convener:** The regulations are another instrument in the package of instruments amending NHS fees and charges and financial limits of eligibility for free NHS services. We need to raise informally a drafting point on regulation

1(2). We can also raise the issue of consolidation. Is that agreed?

**Members** *indicated agreement.*

## Intensive Support and Monitoring (Scotland) Regulations 2005 (SSI 2005/129)

**The Convener:** Now we come to a more serious instrument. There are a number of issues on the regulations. One is the general quality of the drafting. More important are the vires issues. First, and most important, our legal advisers have been unable to find any power in the enabling act to authorise regulation 4, at least in the way that it has been drafted. We should write to the Executive about that major concern.

**Members** *indicated agreement.*

**The Convener:** There are also vires questions in relation to regulation 6(e), and regulation 5(1)(c) on page 2, which authorises a children's hearing to designate certain persons

"in relation to monitoring compliance with regulation 7".

Regulation 7 simply prescribes the methods of monitoring compliance that may be used. It does not itself impose any requirements as to compliance with the obligations that are subject to the monitoring. Those are the major points. There are some minor ones.

**Christine May:** There is a concern with part of regulation 6(f), as well as 6(e), which we should raise.

**The Convener:** Okay. Is that agreed?

**Members** *indicated agreement.*

**The Convener:** In addition, regulation 2 defines a number of terms, all of which are defined in the act, therefore it is unnecessary. Also, the definitions of "crisis response service" and "movement restriction care plan" contain material that clearly goes beyond providing a definition. Those are the major points to be raised, and there are others to be included in an informal letter. Is that agreed?

**Members** *indicated agreement.*

## Antisocial Behaviour (Fixed Penalty Notice) (Additional Information) (Scotland) Order 2005 (SSI 2005/130)

**The Convener:** The order must specify the required information on the enabling power. It is questionable whether article 2(e) is sufficiently specific for the purpose. We seek clarification from the Executive on that point. Is that agreed?

**Members** *indicated agreement.*

**The Convener:** There is a second point, which we might as well include in the same letter, and that is to ask whether the definition in article 1(2) is necessary. Is that agreed?

**Members** *indicated agreement.*

## Inshore Fishing (Prohibition of Fishing for Cockles) (Scotland) Amendment Order 2005 (SSI 2005/140)

**The Convener:** No points arise on the order. Members will see that it breached the 21-day rule, but the matter was urgent.

## Bail Conditions (Specification of Devices) and Restriction of Liberty Order (Scotland) Amendment Regulations 2005 (SSI 2005/142)

**The Convener:** No points arise on the regulations.

## Common Agricultural Policy Single Farm Payment and Support Schemes (Scotland) Regulations 2005 (SSI 2005/143)

**Christine May:** We could raise with the Executive the reason for there being two definitions of "farmer". Regulation 2(1) has one definition and regulation 2(3) contains a different definition. Which is correct, or are there two types of farmer that the Executive knows about but that nobody else does?

**The Convener:** We can also raise points on the interpretation of community instruments and definitions of individual community instruments. Is that agreed?

**Members** *indicated agreement.*

## Instruments Not Subject to Parliamentary Procedure

### Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 12) (Scotland) Order 2004 Revocation Order 2005 (SSI 2005/136)

### Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (Scotland) Revocation Order 2005 (SSI 2005/137)

12:29

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

## Instrument Not Laid Before the Parliament

### Act of Sederunt (Rules of the Court of Session Amendment) (Jurisdiction, Recognition and Enforcement of Judgments) 2005 (SSI 2005/135)

12:29

**The Convener:** No points have been identified on the act of sederunt.

I thank colleagues for staying the distance. We will see you next week.

*Meeting closed at 12:30.*

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