SUBORDINATE LEGISLATION COMMITTEE

Tuesday 19 April 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
12th 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:

Ms Margaret Curran (Minister for Parliamentary Business)
Douglas Greig (Scottish Executive Enterprise, Transport and Lifelong Learning Department)
Patrick Layden (Scottish Executive Legal and Parliamentary Services)
Murray Sinclair (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Ruth Cooper

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 19 April 2005

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

Regulatory Framework Inquiry

The Convener (Dr Sylvia Jackson): I begin by welcoming members to the 12th meeting in 2005 of the Subordinate Legislation Committee. I have received apologies from Mike Pringle, and Christine May is away with the Enterprise and Culture Committee today. I do not have apologies from Gordon Jackson, so I expect him to appear at some point. I welcome Murray Tosh.

Item 1 is our on-going inquiry into the regulatory framework in Scotland. I welcome Margaret Curran, the Minister for Parliamentary Business. It is very nice to see you. I also welcome Patrick Layden and Murray Sinclair who are from the office of the solicitor to the Scottish Executive, and Douglas Greig who is with us today as head of the enterprise and industry division of the Scottish Executive.

As you will be aware, minister, the Deputy First Minister, Jim Wallace, has an interest in this area, so we might be writing to him with some questions. We might ask you questions that you feel are more in his domain; we will highlight them as we go through. As you might know, we have heard from several witnesses already and we will keep to the same questioning format as we have used for those witnesses, so we are building on the information that we have collected so far.

I start with a general question. We have heard various views about the better regulation agenda. How should the Executive regulate effectively in Scotland?

The Minister for Parliamentary Business (Ms Margaret Curran): Thank you, convener. I am pleased to be here this morning and, with a bit of luck, I will be back, although that might depend on what I say here and what the First Minister thinks about it. I look forward to having a relationship with the committee. I have been following its work and I welcome the inquiry. Members will appreciate that we must reflect on such issues and a joint approach is useful.

The Executive gave some response to the range of issues that the committee is considering in the letter that I sent in November. That remains the substance of our approach, but we are interested in holding a dialogue with the committee and considering its findings and how it views the developing situation. We will respond constructively to all that.

I will make a few preliminary remarks that will cover what you asked. The regulatory framework is of great importance to the work of the Scottish Executive and the Parliament. It is important to us as legislators, but we also appreciate its importance to the significant interests in Scotland.

Obviously, Jim Wallace is not here, but Douglas Greig is an official in the department and he will be able to give an insight into the work of the department and to help you to develop your understanding. If it is not appropriate for him to answer, I am sure that he will be the first to say that he does not speak for the minister and we will find another way of picking the question up and giving the committee what it needs.

Business has a key interest in the discussion that we must have about regulation, as do the voluntary sector, local authorities and, perhaps more important, those on the receiving end of regulation. Does it make life better? Is legislation made more effective? Does it improve the quality of life for Scottish citizens? If we consider the framework in terms of those questions, it will give us an understanding of the impact of regulation. We must ensure that it is fit for purpose; that theme runs through the Executive's approach to regulation.

Within that, there are three issues to which we want to give consideration. First, is the regulation effective and proportionate? There is an issue of balance and I am sure that I will be using the phrase "proportionate and balanced" a lot this morning. Secondly, is it clear and concise? I know that the committee is interested in language, and it must be precise. Thirdly, we must continue to reflect on effectiveness. The regulatory framework is not cast in stone; it lives and is creative, helping us to do our business rather than being a burden. That is how we see regulation in Scotland and we want to continue to develop it within that framework.

I think that that might be part of the answer to what you asked.

The Convener: That is a good start and I am sure that members agree with the aims that you have laid out. They are the basis of what we have been discussing.

Since the Parliament began in 1999, how have we progressed towards meeting some of the aims that you have mentioned, such as that of being fit for purpose? No system can be rigid and you seem to be saying that you need flexibility. How has the Executive moved towards translating into practice the aims that you have described?

Ms Curran: I would never say that the existing framework is perfect and that there is no room for improvement. That is why we value this inquiry. I will start with some of our strengths and I am sure that you will probe us on where we must go next.

The experience of the business community is instructive for the partnership that the Enterprise, Transport and Lifelong Learning Department has tried to develop to ensure that regulation is not thought of as an overwhelming burden but as something helpful. I am sure that we will pick up some of the strands of that thought as we go through your questions, and I will ask Douglas Greig to say a few words about that in a moment.

The other strand in which I am interested—and again it is on the committee's agenda—is the debate on involvement, consultation and engagement in the broadest sense. Again, we must be balanced and proportionate in that because we could go completely over the top with consultation and involvement and end up not being able to move unless we have spoken to absolutely everyone. That is not good and we understand that. We must also ensure that consultation touches on the changes that are really required and that, in that sense, it lives.

We have done well on consultation. It is a strength of the Parliament, and the committee system has helped the Executive enormously with the evidence-based approach that we want to take by ensuring that we hear about criticisms, so that we can respond to whatever issues emerge. All that is helpful, but we still have a way to go and I do not know whether we have quite struck the balance between effective consultation and effective decision making. We still have work to do on that, and I can talk about that later if the committee wants to pursue the subject.

In the meantime, I will use the business model as an example, because we can all learn from that.

Douglas Greig (Scottish Executive Enterprise, Transport and Lifelong Learning Department): The business model arose from a feeling among business organisations that, although they understood why new regulations were being imposed, the burden when those regulations were introduced was not always recognised.

Shortly after devolution, we introduced the improving regulation in Scotland—IRIS—unit, which is situated in the Enterprise, Transport and Lifelong Learning Department, with the objective of raising awareness of the compliance costs on business and the burden of meeting the variety of regulations from throughout the Executive. Some compliance costs are unforeseen or are not fully appreciated when regulations are imposed, and the best way to address that was considered to be regulatory impact assessments.

I have to say that initially RIAs were of variable quality. The unit's role was to raise awareness of both the quality of RIAs and the issues to be addressed in them. It has continued to do that and it has now produced its first annual report. It is a bit of a cheek to call it an annual report because it covers three or four years rather than just the past year, but it was probably right to set a baseline for what we want to achieve.

Since I appeared before the committee with a couple of my colleagues in March last year, the agenda has been taken further, which shows that the situation is creative and is still evolving, as the minister said. Last time I was here, I mentioned that we had engaged with the small business consultative group on having a standing agenda item. There was a general feeling that standing agenda items are fine but that often they do not allow the meat of the issue to be dug down into. This is a terribly civil-service way of approaching things, but we have formed a sub-group that involves all the main business organisations and which will drill down into the detail of a variety of types of Scottish regulation. It will consider proposals for legislation, from the first idea onwards, and existing Scottish regulations to see whether the RIA was correct, whether it assessed the business impact correctly and whether the enforcement regime was correct. It will pick a few examples to assess whether a process can be rolled out throughout the Executive.

The sub-group will also examine European Union and United Kingdom regulations. The vast majority of regulations that businesses identify as affecting them and creating costs stem from such regulations, so we need to ensure that the Scottish voice is heard at the EU and UK levels. Again, the sub-group will examine some existing regulations and some proposals for new regulations. The Scotland Office is represented on the regulatory sub-group to link us in with Whitehall.

The Convener: That is helpful. We heard from the Federation of Small Businesses a lot of concern about consultation and, in particular, about regulatory impact assessments in relation to European directives. The waste directive was highlighted as an example. Any information that you can give us about how you are moving the agenda along would be helpful.

Before I steal any more thunder, I hand over to Stewart Maxwell, who will ask about regulatory impact assessments.

Mr Stewart Maxwell (West of Scotland) (SNP): Good morning, minister. I was interested in your comments on the need for balance, with which I

think we would all agree. In your written submission, you say that RIAs are

"a key tool for … assisting policymakers to think through the consequences of proposals".

You also say:

"the Executive actively promote the appropriate use of RIAs."

In the light of those comments and your earlier comment about balance, will you define what success the Executive has had in preparing RIAs? On the other side of the coin, what obstacles has the Executive faced in preparing RIAs?

Ms Curran: I will let Murray Sinclair talk about the detail of the preparation process, because ministers are not directly involved in detailed discussions with key stakeholders when RIAs are being worked up. However, it seems to me that one of the important things that we need to establish, and which is in everyone's interests, is clarity. One of the benefits of our approach is the ability to identify the projected impact of RIAs, so that people are clear about the changes that will result.

One of the obstacles occurs when people think that they are over-regulated. It is easier to comply with regulation when it is clearer, but some organisations still think that there is too much regulation. I am thinking of my previous field; Douglas Greig is more familiar with business and I am more familiar with organisations in the social sector, which think that any process that we implement must be attuned to their day-to-day experience. The process must not just be about the Executive covering its concerns about safety or whatever; it must be seen in the context of how organisations work and perform. That is one of the obstacles that we have to overcome, but the process that we have introduced—regulatory impact assessments—allows us to do that. It is fair to say that we are reassured that we do not tip over into the problem that I mentioned, but I repeat that it is important to be close to the organisations that are affected.

10:45

Murray Sinclair (Scottish Executive Legal and Parliamentary Services): In our experience, there is no hard evidence that we have not got the balance right, although it is a difficult balance to strike. Douglas Greig will say more about the matter.

Douglas Greig: The question was about how we measure success and what problems exist. Measuring success is difficult. I hope that in my opening remarks I gave the impression that we seek to change the culture in the Executive, so that when a piece of legislation is proposed its potential consequences are properly examined. Success lies in encouraging people to measure and address properly the unintended consequences of legislation.

In the RIA process, there is a small problem with ensuring that we get the compliance costs correct. It is not easy to get data on that, but the improving regulation unit makes every effort to encourage policy makers to go out and engage with relevant people in industry to get the information. That is also the reason why the regulatory sub-group will examine some RIAs after the event to consider whether we got the process right and whether the compliance cost assessment was correct.

Mr Maxwell: I accept that. The question is whether you have got the correct balance and whether we are properly addressing the comments that you just made about the impact on business and other sectors. A rough calculation suggests that in 2004 RIAs were completed for only 4 per cent of Scottish statutory instruments. I understand that that figure is much lower than the figure for the UK Parliament. Given the difference between the Parliaments, has the Executive got the balance right? Four per cent seems very low.

Douglas Greig: I hope that we catch every statutory instrument that will have an effect on business. I have no idea whether 4 per cent is the correct figure, but nobody has come to us with a statutory instrument that does not have an RIA and said that it should have one. If that happened during a consultation period, we would try to generate an RIA, although we would try to spot it ourselves. I hope that the parliamentary process would spot that an RIA should have been done for a particular instrument or order. I have not received from the regulatory sub-group any evidence to suggest that RIAs have been missed.

Mr Maxwell: I am just curious about the figure and about the difference between the figure for the UK Parliament and the figure for the Scottish Parliament.

Ms Curran: We would need to look at it and do some comparisons. Given some of the things that go on at the UK level, the figure is interesting. The matter will bear some consideration and we will examine it.

Mr Maxwell: I am not suggesting that there is anything wrong with the figure; I am suggesting that there is a difference, and I wonder why that is the case.

Some witnesses have expressed the view that RIAs should always be produced where there will be a significant impact. You would probably agree with that. The problem is how we define what is significant. What are your thoughts on the idea that if an RIA is not produced, a statement should be made to explain the reasons why?

Ms Curran: We would need to think about that. Again, it is a question of being balanced and proportionate so that we do not create a bureaucratic exercise for the sake of it. We might have good reasons for not producing an RIA and we would have to produce a long report to say why we did not produce one. Nevertheless, I take your point and I understand the import behind what you say, which is about ensuring that people think about the impact and the wider consequences of what they do. They might not consider that impact if they do not live in the environment that will be affected. I take your point, but we should perhaps not be required to produce lengthy reports.

Mr Maxwell: I am not talking about lengthy reports, and I do not think that the witnesses were either. They were talking more about a statement or explanation to say: "We have looked at this. We've thought about it. And this is the reason why."

Ms Curran: Yes. As long as it was proportionate.

Murray Sinclair: Was there a feeling in the evidence that it was not reasonably clear why a statement was not being made?

Mr Maxwell: That view was not universal, but it was expressed by some witnesses. The presumption was that there should be either an RIA or an explanation of why there is not an RIA. Many witnesses felt that much regulation has an impact, which they see as significant where the Executive might not. The view of what is and what is not significant might be part of the problem. There might be a difference of opinion.

Murray Sinclair: That is certainly something to be considered. In many cases, the reason why we have decided that an RIA is not necessary will be discernible against the reasonably clear criteria that we have, but obviously there is a feeling that in some instances that is not the case.

Mr Maxwell: It was certainly mentioned to the committee. It is in the *Official Report*, so you might want to look at that.

Ms Curran: We will have a look at that.

Mr Maxwell: Douglas Greig, I think, mentioned the robustness of the data that are used to try to predict what will be the case and consideration of those data afterwards. Some of the witnesses have suggested how to improve the situation, for example through better links with small business. There might already be many such links, but the evidence suggested that the links could be improved and that there could be independent scrutiny of the process or more subject committee involvement. What does the Executive think? Do you have any further suggestions for improving the usefulness and effectiveness of the RIAs that you produce?

Ms Curran: I will talk about some of the principles, and perhaps Douglas Greig will have more detailed evidence.

I would encourage subject committee involvement as a matter of principle—it is probably quite healthy for the whole process. It broadens appreciation of the issues and allows us parliamentarians to—

Mr Maxwell: I think that you would accept that subject committee involvement is not particularly great at the moment.

Ms Curran: It is there in theory; whether it is there in practice—

Mr Maxwell: It varies.

Ms Curran: In previous incarnations, I was quite interested in that. However, when it comes to the detail a committee might be directed on to something else. It is about us appreciating that what we do is as important as what we want to do. We want to encourage not just the creation of legislation but consideration of the impact of legislation, in all its detail. We would need to discuss that with committees and get an appropriate balance with their work.

I have no doubt that we should have a better relationship with small business. I have been told by my colleagues that the relationship is good, but I am sure that we could do better on that front. It is about spreading more broadly an appreciation of enterprise and the role that it can have in different walks of life, not just in its narrow focus.

Mr Maxwell: Independent scrutiny was also mentioned.

Ms Curran: Yes, there is the matter of independent scrutiny. I hope that this does not sound defensive, but I think that we do quite well. We would not rule anything out if we thought that it would lead to improvements. However, to be brutally honest, my first priority would be to improve parliamentary scrutiny, because that is the democratic, legitimate scrutiny of these procedures. Independent scrutiny sometimes sounds good, but we might just be empowering one individual or one organisation unduly. My core drive would be towards parliamentary scrutiny. However, I will reflect on that and perhaps come back to you on it.

Murray Sinclair: Just as a small addendum to that from the business side, the small business consultative group's regulatory sub-committee is chaired by a member of the Confederation of British Industry Scotland. All the other CBI members sit on the sub-committee and will, over time, be given a greater role, partly to ensure that

the RIA process is working properly. We are trying to build in a degree of independent scrutiny in that respect.

The Convener: We will move on to the common commencement date, which the Scottish Environment Protection Agency and the Food Standards Agency Scotland brought to our notice. They thought that a common commencement date would be useful for similar types of legislation in different parts of the UK. What do you think about that? I have noticed that that is happening already with what comes before us, but should it happen more?

Ms Curran: When I was considering the work that the committee has been doing, I asked for advice on the common commencement date. There are arguments for and against it. Organisations would say that their lives would be made much easier if there were a common commencement date. There is a strong case for it, where it can be done. However, other organisations would say that phasing in implementation of legislation is more manageable for them because they are not being hit with the legislation all at once. We can reflect on that as the committee's inquiry proceeds. The officials may have their own views.

Murray Sinclair: If the legislation represents a burden, it might be easier to impose it incrementally than to impose it at one time, especially where the burdens are not related. Staggered commencement might be easier, especially if policy reasons militate in favour of as early a commencement date as possible. In the wider sense, subordinate legislation delivers policy. If a mischief has been identified that we want to address through policy, that will be a driver for delivering that policy sooner rather than later. It very much depends on the circumstances.

The Convener: One of the things that we will be touching on later is a point that was made by the Office of the Scottish Charity Regulator, which is that, where we are considering the whole of the UK, organisations will find it difficult if Scotland implements legislation at different time from, say, England and Wales.

Murray Sinclair: That is a separate point, but it is one that we should bear in mind. It is not just about joining commencement dates at a particular time of year but ensuring that regimes north and south of the border are more in synch. That is a good point.

Patrick Layden (Scottish Executive Legal and Parliamentary Services): One of the objects of devolution was to enable us to do things differently. There is a balance there.

The Convener: Exactly. The minister did say that balance would be the key word in all of this.

We move to an important area on which we have received a lot of comment, which is public consultation. Murray Tosh has a few questions.

Murray Tosh (West of Scotland) (Con): Good morning, minister. I read your paper on public consultation and considered it to be very balanced. It came to the conclusion that consultation efforts should be focused where they are likely to yield the greatest benefit. We have heard different views at various stages of the inquiry about where consultation is important. It could be important at the stage where a problem is identified, or it could be important at the stage where policy options and their impacts are being considered. It is also important at the final stage, when we are considering a draft regulation or when we are about to put a regulation into the public domain. Particularly from the point of view of those who are being regulated—who have the principal interest in what the regulations will say—where do you think that the focus of consultation should be? How does the Executive try to ensure that the correct form of consultation takes place at each stage? How does it allow those being regulated the best possible opportunity to be fully involved in the debate about the emerging regulations?

Ms Curran: That is interesting. That is exactly the kind of approach that we are taking. The general approach is to have horses for courses and to be fit for purpose. This is not just about those who are being regulated but about the customers—as it were—of regulation. For example, we would talk not only to the housing associations—or a comparable organisation—but to the service users. We would try to broaden out consultation. That makes it a bit trickier, because often we are reaching out to people who do not traditionally get engaged in a public conversation about policies that affect them.

Before I go into the specifics that Murray Tosh has asked me about, I inform the committee that the Executive is undertaking a wider review of consultation processes. We want to broaden the scope of who we are engaged with and to be as innovative as possible with the mechanisms of participation, consultation and engagement, in the broadest sense of those terms. If we get people into a process early, and they develop confidence that they are being heard and that they have influence, that will pay off later on. It is about creating a different kind of climate around consultation. We will use the review not only to inform this aspect of our work, but more broadly, in many of our other engagements.

11:00

It is one thing for us to send out 250 copies of a consultation document on our new policy, and of

course it is good when people respond and we are pleased when people have strong views, but there might be people whose views we would want to hear who might not be sent a copy or who might not normally talk to us about a 200-page consultation document. To an extent, the issue is about form and the variety of ways in which it is possible to consult.

That is part of the background, but you are right to say that we need to be clear about the purpose of any given piece of consultation—to use that term in its broadest sense—and about who the key audience is. Sometimes people get confused about that, which is why we end up with some consultations that have little impact and tend to be more like talking shops than genuine forums for discussion that allow useful conclusions to be drawn. People need to be much more precise about the task in hand and must customise consultation processes for that purpose. That means that people must be clear about who their audience is and the techniques that must be used to talk to it.

To date, the Executive has been fairly successful in much of the work that it has done in that regard and has engaged with a variety of key stakeholders. Without being too sweeping, I think that most of the key stakeholders who are on the receiving end of our regulation have the opportunity to participate actively in that regulation and probably take advantage of that opportunity. Presumably, some of them would say that they are not satisfied that their views have been taken on board or have had the effect that they would have liked them to have had, but we have certainly created the correct form of consultation. However, we want to improve on that and deepen some of the discussions that we have had.

What we have done in relation to business is an interesting model that we can use to take us forward. The Scottish compact for the voluntary sector has been useful, as it has created an on-going relationship in which, rather than discussions being one-offs, each discussion relates back to a previous discussion. That means that we can have more informed dialogue and are able to talk about the detail of draft regulations. Rather than having someone come in at the last minute to say yes or no to a piece of regulation, we are able to ensure that people have an on-going and informed influence on what should or should not happen. The compact was about ensuring that we do not simply have people coming in, sitting at a table and leaving again, but have a detailed and influential relationship with people. Those are the kind of on-going partnerships that we need to develop in the framework of a more innovative and changing set of consultations.

I am sorry that my answer was quite long.

Murray Tosh: Your answer was helpful and it was useful to hear you broaden out the issue to talk about the different polarity—I was going to say tension, but that is perhaps not the right word—that a producer or a provider can bring as opposed to a consumer. Both sides will have different perspectives.

If you were consulting on a set of regulations relating to food quality, for example, the producers, the industry and the organisations that represent them would have the resources, the strategic grasp and the ability to engage with the people who were drafting the regulations. However, how would you consult the consumers, who would be disparate, unorganised and unrepresented agents in the process, in a way that ensured that you could balance their input adequately with the professionalism and the vigour of what will effectively be industry lobby groups?

Ms Curran: That is tricky, but should not be avoided on that ground.

Looking back at my ministerial experience, I see that how we work often involves developing working relationships with key players in the set-up. Civil servants will have good relationships with some of the professional organisations. I presume that Douglas Greig knows who is who in CBI Scotland. Certainly, when Murray Sinclair worked with me in housing, he used to know who all the key stakeholders were in that area. We would all have our own field of expertise. Knowledge, dialogue and partnership grow in a way that ensures that people know who to speak to about general issues and who to speak to about detailed issues and can assess what the likely responses will be to a given scenario. However, we need to include the customer or consumer much more in that process.

If I have any worry about how far we have come since devolution, it is to do with a feeling that we are having a professional conversation about the issues that we face. We talk to SEPA, the lobby groups, the Law Society of Scotland, professionals in the social services and so on. By and large, that is who comes to committees. That is quite proper and I am not trying to undermine or dismiss that, but we need to broaden the process and make it more sustained and informed. I have done this myself, so I am not criticising others, but sometimes the consultations that we have with the broader interest groups involve one-off meetings and visits rather than sustained influence. The answer lies in ensuring that we do not have one-off, magic bullet consultations involving a special formula that will somehow reach people who would otherwise not have been reached, but instead have sustained contact that enables sustained and informed relationships to be

developed between broader interest groups and civil servants, ministers and committees.

Murray Tosh: I appreciate that your answers imply a commitment to flexibility, horses for courses and doing the right thing in the appropriate circumstances, but we have also heard arguments that consultation should move from the current mixture of statutory and administrative consultation to become totally statutory. For example, Dr McHarg, who gave evidence a couple of months ago, suggested that even a non-statutory requirement to consult on an administrative basis becomes, in the eyes of many people involved in the process, almost a legal requirement. She called it the doctrine of legitimate expectation, but that is just lawyer-speak, I suppose. Her argument was essentially that, if all consultation were statutory, at least the situation would be clear, everybody would know what the rules were and what their rights were and the confusion that arises due to the current mix of approaches would be avoided. What is your view on that? Do your officials have any insight into that?

Ms Curran: My understanding—which I hope is right—is that we have a sort of minimum standard of consultation. I know that there must be a minimum of 12 weeks' consultation on legislation. My officials might be able to correct me, but I think that we specify that timescale in relation to some regulations. I think that we ensure that committees are involved to a certain extent in relation to regulation and guidance—you might be able to correct me if I am wrong in that regard, Mr Tosh. I do not know if there is an automatic minimum standard but I think that the mix of approaches comes into play when people move beyond the minimum standard. People use different models in relation to different subjects. Perhaps that should be examined further.

Murray Sinclair: The Executive's policy, which is wide ranging and non-statutory, is that there should usually be a minimum of 12 weeks' consultation. The policy reflects the need for the customisation of processes, which the minister talked about. It is important that we continue to bear it in mind that one size does not fit all and that we ensure that whatever consultation process we use gets the balance right in terms of the information that is given out and the people who are consulted.

We have some specific statutory consultation requirements, particularly in the context of regulations. Often, before we make regulations, we are under a statutory requirement to consult groups with a particular interest in the regulations. For example, in the context of housing regulations, we have to consult registered social landlords. Our guidance, which states what we must do, could give rise to a legitimate expectation of consultation—to use the lawyer-speak that you mentioned—quite apart from any statutory requirement. However, that is a side issue.

We can certainly think about extending statutory consultation requirements. However, the concern would be that, if you had a general statutory statement, it is not clear that that would necessarily help to address the issues that the minister mentioned, which concern the question whether our existing consultation procedures could be improved. Certainly, we could not have a general statutory requirement that could identify exactly what should be consulted on and, more important, who should be consulted. Therefore, I am not certain that something in very general terms would necessarily assist in identifying the problems that we are trying to address.

Murray Tosh: That is fine. I simply leave the observation that the committee's questioning whether there is sufficient stated responsibility to consult on proposed legislation and whether there should be statutory consultation is part of the traffic between us and the Executive. Perhaps we need to clarify issues and move frontiers in the on-going discussions between us.

The Convener: The clerk has just told me that Australia is moving towards statutory consultation. Following that through and seeing the criteria—if there are criteria—that are used would be interesting. The point that has been made about trying to obtain flexibility and appropriate consultation is good and we will pursue that.

Adam Ingram is going to ask about understanding legislation and the need for clarity and simple language.

Mr Adam Ingram (South of Scotland) (SNP): I will have a stab at asking about those matters.

Minister, the partnership agreement contains a commitment to ask the Scottish Law Commission to investigate methods by which legislation could be published in plain English. What progress has been made on that so far? Will any initiatives arise?

Ms Curran: I sincerely hope so. The Scottish Law Commission has already been approached. There have been on-going discussions with it and we are awaiting a report.

Patrick Layden: There will be a report from the Scottish parliamentary counsel.

Ms Curran: The Scottish parliamentary counsel will take matters forward for us.

Mr Ingram: Is there likely to be something soon?

Patrick Layden: I cannot say precisely when the Scottish parliamentary counsel report will be

issued, but it will be issued soon. The report is being prepared and practices in other parts of the world have been considered. A UK Government exercise on simplifying tax legislation has gone on for several years, for example.

There is a tension between simplifying language and keeping it clear. Modern societies are complex and tend to require complex legislation. Complex ideas cannot necessarily be expressed using plain and simple statements simply because the ideas are complex. It is essential that modern Governments and modern regulations are precise so that people who are affected by such regulations know exactly what duties are incumbent on them. Several witnesses, including CBI Scotland and Dr McHarg, said that simplifying language is good, but that doing so should not be at the expense of clarity. I can expand on what I have said if members want me to, but that is the general line. We must make the statute book intelligible for the audience at which it is directed.

Mr Ingram: I take your point.

The Executive often produces explanatory material or guidance in order to assist readers by explaining the effect of legislation in more everyday language. You are right. Witnesses have expressed concern that guidance might not always reflect the full meaning of the legislation—indeed, courts might use guidance as an aid in interpreting the legislation. Do you have a view on the role of guidance in association with the legislative text? How can the conflicting objectives be married?

Patrick Layden: The single most important objective is for the legislation to set out clearly and precisely what the policy is, as approved by the Parliament. The guidance is only guidance—it may say what the legislation's aim is in generic terms but it will not say precisely how the legislation operates, otherwise it would be the legislation itself and we would be no better off. For example, if a set of regulations relating to electrical standards for computers in cars is produced, it is absolutely essential that those regulations are right, otherwise a car may not be safe, electrics may cross and short-circuit and there could be explosions. The regulations must be technically precisely correct, but they would be completely incomprehensible to people who were not qualified electricians. However, the guidance could say that the object of the regulations is to ensure that a particular type of electrical equipment will operate safely alongside other equipment in cars. Two separate ideas are involved. Perhaps that is an extreme example and others can be thought of in which the guidance and legislation are closer, but it serves to illustrate my point.

11:15

Mr Ingram: So they must be kept separate.

Patrick Layden: I think so, because the courts ought to consider the legislation, which is what the Parliament will have approved.

Mr Ingram: Is there any case to be made for parliamentary scrutiny of the guidance that is issued with the legislation?

Patrick Layden: The Parliament is free to scrutinise anything, but whether scrutiny—other than glancing through the guidance and saying whether or not it is good, or as good as it could be—is worth while is a value judgment. However, if the Parliament wanted to scrutinise guidance, I cannot think of anybody who would stop it doing so.

Ms Curran: I understand that if ministers say that something will be in the guidance it is becoming more common for committees to ask to see that guidance as bills progress, which is perhaps helpful. I absolutely accept that the language must be right to ensure that what has been said is clear, but we must also use accessible language for people who are not as adept with the language that has been used or as informed about the subject. Emphasising that we must make as much effort as we can to be as clear and plain as possible is critical, and we can do more in that respect.

Mr Ingram: The guidance is clearly the means by which the general public can understand the legislation, hence our interest in making it clearer.

The Convener: I thought that Adam Ingram was going to go on to say how important the guidance is to the committee—which it is.

The committee has noticed tables and flow charts in regulations that have come before us, which, in general, we have thought to be useful—I do not think that only I, as a scientist, have thought that. Making tax legislation more understandable was mentioned. I am not sure whether using formulae was considered in that context.

Patrick Layden: I gather that such things are being used. Rather than try to express something in lots of words, put in a picture.

Ms Curran: That puts the scientists back in their place.

The Convener: We would welcome such an approach.

We will now move to the rather thorny subject of periodic review, about which Stewart Maxwell has questions.

Mr Maxwell: The subject is thorny. Perhaps I am being unfair, but there seems to be resistance, or at least reluctance, on the part of the Executive

to tackle the problem of periodic review. Your evidence to the committee says:

"the Executive believe that such activity should be undertaken only as and when particular circumstances suggest that it is appropriate."

On the face of it, that sounds absolutely fine. However, will you expand on that and tell us when you know that particular circumstances have arisen? How are you informed that those circumstances have arisen? If no set procedure for periodic review is in place, what processes are in place that lead you to know that certain instruments or legislation should be reviewed?

Ms Curran: Perhaps hesitation is too strong a word to use, but our questioning of some of these ideas does not show that we are in principle against periodic review, sun setting or any of the other types of review. However, we are concerned that an essentially imbalanced system of review could be created. There is evidence that a review could require more effort and could divert us from the task itself. I have considered the matter, as have Douglas Greig and his section, and we have mechanisms to ensure that we address issues, which I will come to. However, if we get into periodic review, it is important to ensure that we do not throw out the baby with the bath water and that the system of review is not more cumbersome than introducing the regulation. I know that that is an obvious point to make, but there are some instances where that could happen, and the cost of the review itself could be unduly punitive.

It is important to ensure that you assess properly when periodic review would be appropriate. The best way to do that is through the impact of the regulation itself. You have to know the field to know when a regulation is no longer effective or no longer required. That is the best way to do it. If you do it just because you think that you should, you could miss the focus. That is not to say that you should not do it or that no one can come up with a procedure that would be appropriate in certain circumstances, but I would be nervous about simply introducing a sunset clause, because you could spend so much time deciding whether it was time to withdraw it that you might forget that the primary focus should be on ensuring that the regulations work in the first place.

There may be some circumstances where, given the nature of what it is that you are trying to do and depending on the task that you are engaged in, you should think at the very beginning about the longevity of the procedure, its likely impact and the key stages at which you would evaluate it. I would be more inclined to evaluation than towards a rigid set of periodic reviews. There are various acts of which you could say that they are, by definition, a temporary legislative approach, or that they should be reviewed after five years before taking stock. I would be more inclined to such an approach, which can be customised to the task that you are engaged in, rather than to a bureaucratic exercise, because there is some evidence that the latter could take you off in a different direction.

Douglas Greig is quite interested in the issue.

Douglas Greig: The Executive has introduced regulatory MOTs, if you like: a review of RIAs after 10 years. Of course, that is post devolution, so we have not reached the point of doing those reviews yet. Nevertheless, the regulation sub-group will examine earlier regulations if they are raised with us by the business organisations that are represented. We are prepared to look at unforeseen consequences that were not picked up in an RIA but have become apparent since. However, deciding whether an issue is to be examined is an evidence-led process. We would have some concerns if it became a tick-box exercise that you had to do after a certain length of time.

Without speaking for them, I suggest that the business organisations might, if they gave it a bit of thought, be reluctant to call for such an approach to reviewing regulations, because they are aware of consultation fatigue. If they are asked to go through a review process on absolutely everything, will they be able to prioritise the regulations that are most important to them and ensure that they get the attention that they deserve? If they are so busy trying to tick the box for absolutely everything, they might not be able to do that.

Murray Sinclair: Ticking the box means that you end up missing the point. That is precisely the minister's argument. We ought to be, and are, constantly evaluating whether a policy proposal or bill is actually working. We should continually keep under review the extent to which it is working and, if it is not working, we should take the appropriate steps—throughout its life and not just at certain stages.

Mr Maxwell: I accept everything that you have said and I understand the difficulty. In a sense, the question is predicated on the accepted fact that regulation tends to grow, so that there is more regulation rather than less. It is not obvious what the process is and what mechanisms are in place for culling regulations that are no longer appropriate or that need updating in some way. That is why I am asking. I am not sure that I am absolutely clear about what process is used in the Executive, other than somebody coming to you and saying, "Oh, by the way, this seems a bit out of date now."

Ms Curran: My officials may know more about procedures elsewhere, but I understand that the

review of regulation comes out of the policy rather than the procedure. That may be where the difference is. I am not saying that there is no place for culling legislation or that there is no need for a stocktaking exercise to be imposed on us because we might not do it ourselves. I am not ruling that out and it is something that we might consider when the committee's report is published. These discussions are part of the on-going dialogue, and you are putting forward an argument that we need to consider. However, my inclination at this stage is still to say that reviewing regulation should arise from policy rather than from procedure. For example, if you are engaged in health policy, where there is a raft of legislation and where there is always a demand for legislation—we are always doing things in health—it is common sense to ask whether we should look at what is already on the statute book and clear up any inconsistencies that may have come about. Some organisations may feel overwhelmed by the rapid activity in that policy area.

That is a logical approach, but the drive towards sorting out regulation should spring from the question, "What do you want to do with health policy, what improvements do you want to make and what are you trying to sort out?" That is a better approach than waiting for some official to say that it is time to look at a certain section and saying, "We've got to regulate. Minister, are we closing this or not?" If we did that, it could become merely procedural, rather than the primary drive being what we want to do. That may be why we are rather hesitant just now. I am not saying that things are perfect and that we do not have to do anything.

Mr Maxwell: I accept that. We are back at the argument about balance again. Nobody is suggesting that we want to get involved in a tick-box exercise or something that is disproportionate to the outcome.

You mentioned the fact that you have not totally closed the door. That is something that you also mentioned in your letter with regard to some types of periodic review, such as sunset clauses, and particularly in relation to the Mandelkern report and the various options that it suggests. What is your thinking on the options that were outlined in the report's recommendations?

Ms Curran: I am laughing because you ask as if I were an expert on the Mandelkern report. I have to say, in all honesty, that I have not read the Mandelkern report, although I have been briefed on it. I shall ask Douglas Greig, who knows much more about it than I do, to answer your question.

Douglas Greig: Mandelkern comes out against sunset clauses across the board and identifies four or five more specific areas where they should be considered, such as in cases where legislation is introduced at short notice in response to a crisis. There is already a feeling that that is the sort of thing that we might well want to take on board, although I would have to ask my colleagues whether there are any cases in which we have actually done that. Whether we build sunset clauses into legislation is another matter, and I am not an expert on that. However, in terms of examining the impact that sunset clauses would have on regulation, we might want to see in our legislation some of the other things mentioned in the Mandelkern report.

To return to the point that I made at the outset, however, businesses identify more than half of the impact, compliance cost or burden of regulation as coming from EU legislation, and the vast majority of the rest as coming from UK legislation. Our introducing something like that here might not make a discernible impact, from a purely business angle. What we would be keen to do is to feed directly into the EU and UK reviews that are now promised under the Hampton review. We have started that process, and I know that there is a desire in the EU better regulation unit—our equivalent in the Commission—to examine specific sectors to look at the cumulative burden. That takes us away from the idea that an extra layer of regulation is simply added each time without considering what is already there. Everyone needs to consider whether existing regulation can be reformed when seeking to add a new level, and we hope to feed directly into that with our colleagues in Brussels.

Mr Maxwell: That is helpful. I accept the arguments about short notice, the precautionary motive and various other things mentioned by Mandelkern. I just wondered what the Executive's thinking was on that report.

You mentioned the review of RIAs and the regulatory MOT. You also mentioned that you would be conducting that review after 10 years. A number of witnesses—I am trying to remember whether it was all of them, but it was certainly most of them—thought that 10 years was far too long and felt that five years would be more appropriate. In fact, some felt that it should be even shorter than five years. Do you think that the 10-year period is correct, or do you think that there should be a shorter period for that review? Should that review cover not only secondary legislation but primary legislation?

Ms Curran: That is an issue for the enterprise portfolio.

Douglas Greig: Purely on the business side, what we say is that a review should take place within 10 years—

Mr Maxwell: The minister said that the review had not been started yet.

Ms Curran: Douglas Greig should be a politician.

Douglas Greig: That takes me back to a comment that I made earlier. It is still horses for courses. It will not be in the interests of business to do those reviews too frequently, because there are costs involved in establishing certain procedures for complying. If we review regulation quickly, businesses will be put to more costs, both in taking part in the review and in putting new systems in place. We have to ask where the pressure points are from industry to tell us that there is a problem that businesses would like us to address, and that could happen within the 10-year period that we have specified.

11:30

Mr Maxwell: I accept that, but witnesses—some of whom were from the business community—thought that 10 years is too long. Your evidence states that

"there should be a 'Review RIA' or 'Regulatory MOT' within 10 years".

The minister said that that had not happened yet, although there have been six years of devolution so far. The window of opportunity is closing, if I may put it that way. When you say "within 10 years", do you mean that there should be a review within nine and a half years or six and a half years?

Ms Curran: "Soon" is a great word. In essence, however, the issue is for Jim Wallace in the business field.

On the general work that we are considering, we must look at models of review that take on board the points that we have made and which do not become cumbersome. We do not want there to be evidence that the review and regulation are annoying. Models should be customised appropriately. To be honest, if we want to respond to your inquiry and consider our own procedures, it will be a couple of years before there is an effect. I will not talk about regulatory MOTs, as that is a business issue. However, it would be realistic to say that we will consider such matters this session.

Murray Sinclair: I think that Douglas Greig said that 10 years is the maximum period. If a need for an earlier RIA review is identified, that need will be taken on board and acted on, but it has not been identified so far.

Douglas Greig: That may be partly our fault. We must go out and help businesses to identify areas that they want to be reviewed earlier, rather than simply rely on them to come to us.

The Convener: We seem to be saying that RIAs are mostly to do with business, and we are therefore directing questions at Douglas Greig. Stewart Maxwell asked about RIAs being completed for only 4 per cent of Scottish statutory instruments. I do not know how many are non-business instruments, but if there was an increase in RIAs, the question would apply in that area, too. We would welcome feedback on that matter, if that is possible.

Ms Curran: Absolutely. I am happy to give such feedback.

I talked about considering appropriate models of review. The Enterprise, Transport and Lifelong Learning Department has developed an appropriate model for its circumstances and it has a system, which we perhaps need to broaden out. That model might not be appropriate for other sectors, but we can learn from it broadly.

The Convener: I am thinking about what you said about the voluntary sector in particular. You also mentioned housing. The model could be appropriate in a number of areas.

Ms Curran: Yes.

The Convener: In your November letter to the committee, you mentioned the importance of enforcement and said that the enforcement concordat

"goes some way to achieving the best regulatory environment".

However, witnesses from the CBI and the Federation of Small Businesses stated that they were disappointed that the concordat is not working effectively. How is the concordat operating? What could be done to improve things? Your letter says that a group considers that matter.

Ms Curran: We think that the concordat is useful and we want to encourage its effective working. Work has been undertaken on good practice, to ensure that there is ownership and to ensure that the concordat works. In particular, work has been done with the Convention of Scottish Local Authorities to try to ensure that there is an appropriate balance between regulation and service delivery. However, there are opportunities for us to develop that agenda.

Douglas Greig: I am sure that the CBI would dispute what has been said. Again, we are more than happy for the small business consultative group's regulatory sub-group to consider enforcement issues—indeed, one of the first examples that it has picked will do exactly that. There will be consideration of enforcement with an Executive agency and local authorities.

I am not sure whether the CBI's comments were linked more to local authorities than to our agencies. We ensure that our agencies engage with the concordat, consider such things as risk

assessment in their enforcement regimes and spread good practice as best they can. It is for COSLA to spread the word about the concordat to local authorities. I am not sure whether you have spoken to COSLA directly.

The Convener: We shall look again at the detail of the evidence that we got from the CBI and the Federation of Small Businesses and come back to you, if that is okay.

The Food Standards Agency told us about the procedures, statutory codes of practice and audit processes that it has put in place not only to ensure compliance but to monitor the enforcement of food and feed law, in Scotland, outwith our boundaries and in the rest of the EU. Does the Executive believe that those procedures could be followed more generally?

Douglas Greig: Again, you might want to put that to us in writing. The FSA is a non-ministerial Government department, so I would need to check carefully what statute it operates under and whether there is dissemination of good practice.

The Convener: Okay. I think that we had taken out the FSA for the moment because it seemed to have a best practice way of working. We wondered whether that way of working might be applied more generally.

Douglas Greig: We work closely with the Food Standards Agency, which adopts our microbusiness test, which is a peculiarly Scottish thing, for the RIA. We would be more than happy to learn from the FSA if there were things that we were missing.

The Convener: Excellent.

The Executive agrees that SSIs should normally be consolidated—this point follows on from what we were saying about reviews—if they are amended five times or more, depending on the extent as well as the number of amendments. What importance do you place on consolidation, given its impact on accessibility?

Ms Curran: I shall let Patrick Layden come in on some of those issues. I do not want to repeat myself about balance and proportionality. If something can be done in that regard while still allowing effective legislation to be passed, it should be done. However, I do not think that it should be done as a matter of course; it should be done because it leads to more effective access to legislation.

Patrick Layden: I have been here before on this subject. Consolidation is a good idea in terms of legislative housekeeping; that applies to both subordinate legislation and primary legislation. As I think it says in your paper, perhaps there are advantages, as far as primary legislation is concerned, from the electronic databases that are becoming available.

As the committee knows, the Department for Constitutional Affairs is responsible for the production of the statute law database. I have had contact with that department when I was in London and since I came up to Edinburgh, and it provides an extremely good database of all the primary legislation from the UK Government; I think that the database also includes Scottish legislation. There have been technical difficulties over the past couple of years and, because it is so advanced, the database was started off with technology that now looks rather old. However, I am told that the process of changing that is just about finished and that user trials on the new product with the new technology are beginning. The department hopes to start work on a version that will be available to the public later this year, and its aim—which it thinks is manageable—is to have the statute law database available free to the public shortly after the beginning of next year.

That is what I have been told by colleagues in the DCA, who are much closer to the project than I am. The plan is that, from early next year, the United Kingdom's statute law will be available free of charge to any citizen who has access to a computer with an internet connection. The statute law database does not simply publish statutes as they are enacted; it has an editorial function and incorporates new amendments into existing legislation. When the editorial job is up to date—and there are procedures for doing that more quickly—what is seen on the screen is the up-to-date version of that statute as amended by the last batch of UK acts.

As a result, the database is the most up-to-date statute that one could get. My experience of it suggests that it is a much better product than some of the privately produced statutes that are available for specific business areas. Those statutes are good, but the statute law database should be much more authoritative than they are. In terms of primary legislation, the picture is good and getting better. The committee asked whether the database would be freely available, and I am told that that is the policy of the Department for Constitutional Affairs

The Convener: Are there any plans to extend what you describe to cover subordinate legislation?

Patrick Layden: I do not think that there are any plans to do the same sort of exercise in relation to subordinate legislation, but I do not know for sure. My position is based on a lack of knowledge rather than a feeling that there are no such plans. I could find out for you.

The Convener: Thank you.

Everybody was positive about the database and said that it will be useful. However, there will come a time when there will need to be a full review with regard to consolidation. We have noticed already that it is difficult to keep track of orders that have come before us and which have been amended. Even if the database were extended to cover subordinate legislation, there would come a point at which it would not be easy to keep track of the amendments.

What plans do you have for the consolidation of primary and secondary legislation? I am told that there has been no consolidation of primary legislation since 1999.

Patrick Layden: That is not entirely accurate.

The Convener: I am sorry about that. Tell me more.

Patrick Layden: There was the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, but I know about that only because I drafted it. I am parti pris with regard to that one.

You are right to say that even recent consolidating legislation, such as the Criminal Procedure (Scotland) Act 1995, has been amended materially since it was passed. The new sections of that act have been put in as, for example, 27A, 27B, 27C and so on. An electronic version of that legislation would be perfectly coherent and the internal cross-referencing and so on would work. Nevertheless, it would be convenient to have that sort of document, which is used daily in the courts, in a coherent form in which all the sections followed as numbers rather than as numbers and letters.

Older pieces of legislation, such as the Education (Scotland) Act 1980, the National Health Service (Scotland) Act 1978 or the Public Health (Scotland) Act 1897, might have been amended greatly since the last consolidated version was produced. The argument for consolidating such acts is very strong. We would like to have a positive programme of consolidation. I believe that people in the Health Department are interested in consolidating the legislation that they use—in fact, that is true of all the departments. In the Justice Department, there is a focus on prison rules, which we plan to consolidate and amend further.

My ideal, certainly with regard to subordinate legislation, would be a system of rolling consolidation. When an up-to-date version of an order was being amended in a minor way, instead of a small order being made with the minor amendment in it, the whole order would be reproduced, with a note—the attached guidance—that outlined the respects in which the order had changed. That would mean that the main order would simply carry forward. Obviously, the bigger the changes that were made, the more alterations would be required. However, such a system would mean that the user, who may not necessarily be a member of the public—not many people stand at bus stops reading their copy of the Civil Legal Aid (Scotland) Amendment Regulations 1995—

Ms Curran: Oh, I don't know.

11:45

Patrick Layden: The minister obviously uses higher quality buses than I do.

The user would find such a system much easier. Anybody who wanted to print off the regulations would be printing off the up-to-date version, and anybody who just wanted to see what the regulations were about would be able to look at the most recent version and say, "Ah yes, that's it." For professionals, it might not matter too much. There are not many legal aid lawyers in the country. People do not keep up to date with the latest amendments to the legal aid regulations. In any sphere of activity, the people who do the job know the up-to-date state of the law, but it is our business to make that easier for them. I aim to do that with current technology.

We are starting to get people in to consolidate some of the easier pieces of legislation. Consolidation sounds straightforward, but if the regulations or acts have been in force for some time, it involves a certain amount of policy input from the department to say, "Yes, you've produced two alternative versions of what this rather old phrase might mean. This is the one we've been going with, and this is why we think it means what it means." That would then have to be explained to the relevant committee. It is not a simple cut and paste exercise, as I think the director of the Scottish Law Commission told you it was when she gave evidence. The process can be complicated, depending on the area of legislation.

My aim is to have a rolling process of subordinate legislation consolidation. There will be issues to address with this committee, and with the subject committees, with regard to the level of scrutiny that will be required for consolidated subordinate legislation. If the committee had considered the basic principles of a piece of subordinate legislation recently, it might not want to do that work again but would examine only the changes that had been made. We will all need to think about that as the process develops.

The Convener: Do you have a timescale for that process? I am sure that you will say that there are resource implications, because it takes time to do such work.

Patrick Layden: Yes, it does. I would like to start as soon as possible.

Prison rules are being consolidated at this instant, and we hope to bring them forward soon; that is a straightforward, almost word-for-word consolidation with perhaps one or two minor amendments. In the reasonably near future, we will bring forward further amendments to the prison rules to address various policy issues. The amendments will be policy adjustments that the relevant committees will be able to examine and decide upon. In other areas, consolidation depends on when the department and its legal advisers can find the resources to do it.

There is a prize. Things are easier for us when we have a consolidated version, because we have a firm text on the basic regulations, which is not liable to the textual and internal cross-referencing errors that occur when we have freestanding amendments. Once the first stage has been done, our workload will be reduced, which is good for us; the committee's workload will also be reduced, which is good for you. We are interested in consolidation. Whenever I get the chance, if I see somebody producing amending subordinate legislation, I say , "Can we do a consolidation first, then carry on with that?"

With European regulation, we have to look south as well as to our own affairs. Sometimes it is not sensible for us to undertake consolidation if we are out of step with Whitehall, because to do so would produce confusion north and south of the border.

The Convener: That takes me to my final question. Have you had discussions on consolidation with colleagues at Westminster?

Patrick Layden: I would have to talk to the people on the European side of the office, who have more contact with Westminster. I can investigate that.

Mr Maxwell: Perhaps this is more a question for the minister. On a number of occasions we have been told, "We will consolidate when resources allow." There seems to be an issue to do with resources—whether in certain departments or in all departments at certain times I am unsure. As Patrick Layden said, although he would like to consolidate, there is a resource problem. Is it a question of the Executive investing resources to get over the initial hurdle, so that we can get to the position that Patrick Layden has just laid out?

Ms Curran: I am tempted to talk about certain politicians who think that it is easy to cut the number of civil servants, but I will not go there, because we are not at that kind of meeting. [*Interruption.*] I did not hear that comment, although I wish that I had.

Murray Tosh: We assume that you mean Jack McConnell.

Mr Maxwell: Or Tom McCabe.

Ms Curran: Consolidation has resource implications. I cannot say that we could easily do everything that the committee wants to be done or even everything that I want to be done. Many issues need to be addressed. Murray Sinclair and I whispered to each other just now that his department would do it, but that it would be difficult. We must marshal the available resources and ensure that they are focused on the Executive's priorities. Of course, where the Parliament wants us to take action, we will focus on that. We have not yet wilfully neglected the will of Parliament or failed to pass legislation because we have not had sufficient resources to implement it. We need to keep focused and follow good practice. New technology has helped a bit, but we sometimes need to front-load resources to get the return down the road that is needed from new technology. I do not minimise the difficulties, but they are not insuperable yet.

Murray Sinclair: The issue goes back to balancing—there are many priorities and a limited resource, so a balancing exercise will always have to be done. Patrick Layden has indicated our willingness to do what we can with new technology. Apart from anything else, technology can minimise the resource burden so that we can do more consolidation.

Mr Maxwell: I know that the issue is about balance, flexibility and horses for courses, but consolidation is a particular hobby-horse for the committee. It is important that it is as easy as possible for users of legislation to access the up-to-date versions. I understand the difficulties and priorities, but it would be in everyone's best interests if we got to the point that Patrick Layden laid out for us.

Ms Curran: I take your point.

The Convener: You will be glad to hear that we have got to the final issue, which is mostly for Douglas Greig, because it is about the role of the improving regulation in Scotland unit.

Mr Ingram: Witnesses who represent business have suggested that IRIS's role and profile should be strengthened. What are your views on that?

Douglas Greig: I could just repeat everything that has gone before. To start at the beginning, we are seeking to change the culture throughout the Scottish Executive. That can be done in any number of ways, including by establishing a huge, central improving regulation unit as a core or by trying to change the ways in which people operate in every other department. We have opted for the latter as the most cost-effective method. However, IRIS is a strong unit that has influence throughout the Scottish Executive, especially in relation to the quality of RIAs, although that is difficult to measure from a base point five years ago—we can

measure the numbers, but it is difficult to measure quality. The existing improving regulation unit in the Executive has strength.

I am not convinced that the issue is just a matter of structure or where the unit is situated, although I am happy to listen to suggestions on that. The issue is about how we change people's attitudes to regulation, within the Executive and among politicians. When we want to do something, we must consider all its implications and unforeseen consequences. It is not always easy to change attitudes, but that has happened in the past five years, which suggests that the improving regulation unit has strength already.

Mr Ingram: I was interested in what you said earlier about links, particularly with down south and Europe. Given that the big legislative burden flows from Europe—50 per cent of all regulations relate to European legislation—are there ways and means of trying to influence that process? Will you say a little more about what you are doing on that front?

Douglas Greig: The small business consultative group has been visited by the head of the improving regulation unit in Brussels and I have visited him in Brussels. Our European office has had small-scale seminars and conferences on the improving regulation agenda to show how legislatures at sub-member state level can contribute to reduction in the overall burden of regulation across the EU. We have taken a number of such measures.

The regulatory sub-group, which is chaired by someone from the business organisations, will consider how the Scottish voice can be heard in forming new EU regulations, in the simplification process that is under way as part of the Lisbon agenda and in the reviews of existing EU regulation. That is an on-going process. We must prioritise by identifying the main pressures and what it is realistic for us to achieve.

To enable us to influence the agenda, we have established the relevant links with Brussels and the UK. Tomorrow, I will attend the Cabinet Office meeting on rolling out the better regulation task force reports that accompanied the budget, at which we will consider the implications for Scotland and how best we can feed in the business voice to ensure that the reports are rolled out in the most acceptable manner.

The Convener: Following on from Adam Ingram's question—

Ms Curran: You keep saying that you have one final question.

The Convener: Do you have anything to add to what Douglas Greig has said? He has said that, on certain matters, it is up to ministers to make decisions.

Ms Curran: I reinforce what he said about how we should not always look to structures to provide the answers; it is a question of having a broader appreciation of the situation. We must ensure that IRIS's work is broadly understood across the Executive and is not just compartmentalised. If I am honest, that is an on-going task for us, which we may talk about again.

The Convener: That would be helpful.

I thank Margaret Curran and her colleagues for coming. Jim Wallace was not with us, but what Douglas Greig has told us has been most helpful. We look forward to receiving the written information that you have said that you will send us. I hope that we will be able to invite the minister back again when we get to the next stage of our inquiry.

11:57

Meeting suspended.

12:05

On resuming—

Delegated Powers Scrutiny

Further and Higher Education (Scotland) Bill: as amended at Stage 2

The Convener: Agenda item 2 is delegated powers scrutiny. The first bill is the Further and Higher Education (Scotland) Bill, as amended at stage 2. The committee will remember that we made several points regarding the bill. I think that members will be quite pleased with the responses that we have received.

Our first point related to section 5(7), on fundable and higher education. We expressed concern about the width of the power, and we wanted it to be considered that the affirmative procedure would be appropriate. The Executive has recognised that concern and lodged an amendment to section 32(4) to provide that orders made under section 5(7) will be subject to the affirmative procedure. That is a welcome amendment. Is that agreed?

Members *indicated agreement*.

The Convener: Our second point related to section 7(1), on fundable bodies and further provision. Again, we expressed concern about the width of the power and said that we thought that orders made under it should be subject to the affirmative procedure. Again, the Executive has lodged an amendment to section 32(4) to ensure that orders made under section 7(1) will be subject to the affirmative procedure. That is also welcome. Is that agreed?

Members *indicated agreement*.

The Convener: Sections 8(6) and 8(7) relate to the funding of the council and deal with more contentious issues. We were concerned about the possibility of the powers in those sections being used to introduce top-up fees and to set the level of fees. Members will recall that the minister gave an assurance that there was no such intention; however, the committee noted the width of the power that section 8(6) grants to ministers and, accordingly, recommended that any orders made under that section should be subject to the affirmative procedure. We also raised with the Executive the possibility of using the super-affirmative procedure for orders made under section 8(7).

The Executive lodged an amendment to ensure that orders made under section 8(6) will be subject to the affirmative procedure. In addition, it lodged an amendment to insert a new subsection (12A) in section 8, which will oblige ministers who make an order under section 8(6) to consult a number of bodies. Are we satisfied with the Executive's responses to those points on sections 8(6) and 8(7)?

Mr Maxwell: It is clearly an improvement.

The Convener: It is an improvement.

Mr Maxwell: I do not want to seem churlish, as I think that things have come some way, but I am not convinced that the Executive has gone as far as would have been appropriate. We said that we wanted something explicit in the bill about the use of the power in section 8(6), but the Executive has not gone that far. The power is still wide and I think that we should report to the lead committee that that is still our view.

The Convener: That we think that the Executive could go further?

Mr Maxwell: Yes.

The Convener: Stage 3 of the bill is tomorrow, so we would have to report to Parliament.

Mr Maxwell: So it is. I am sorry. Yes.

Murray Tosh: The fact that stage 3 is tomorrow constrains our ability to take the matter further. The Executive's response is positive and is to be welcomed. All that would be left to those of us who might feel that it is not sufficient would be to support any amendment at stage 3 that would allow the Parliament to take the matter further. It will not be possible for a further amendment to be lodged at this stage, and I do not know whether an amendment has been lodged that would suit that purpose.

Given the attendance at today's meeting, it would probably be unwise to invoke the practice of asking the convener to speak for the committee in relation to an amendment tomorrow. It is up to individual members who wish to support any possible amendments to do so and to reflect, in any speech that they might make, the discussions that we have had and the consideration that we have given to the issue.

Mr Maxwell: Given the almost unique balance of the committee today, this is perhaps a perfect opportunity to do that—sorry; I joke.

Mr Ingram: Murray Tosh has summed up the situation rather well. I was reassured by the promise of consultation and the fact that the legal situation has been clarified. When consultation appears in legislation, it is automatically assumed that consultees' views will be properly considered. I did not know that before, and it is useful to have teased that out. The Executive has moved, and I believe that Murray Tosh's proposal is the correct thing to do in this situation.

The Convener: What Murray Tosh has suggested would work well, as an amendment has been lodged that reflects the concern and the wish to move towards the use of the super-affirmative procedure. Is it agreed that we go with that line? I will have no hesitation in representing the committee's views and the concerns that were expressed when we put our questions on the issue to the Executive.

Mr Maxwell: That is reasonable. I apologise, convener. I forgot that the stage 3 debate is being held tomorrow.

The Convener: Is that agreed?

Members *indicated agreement*.

The Convener: We move to section 22(4)(j), on the subject of consultation and collaboration. We were concerned that the provision allowed only for additions to the list and not for amendments to it. Members may remember that our legal adviser, Margaret Macdonald, raised the point.

The Executive lodged an amendment to remove section 22(4)(j) and to insert in its place new section 22(5A), which confers upon ministers the power to modify the list. As the amendment accords with our suggestions, members will welcome the new provision. Is that agreed?

Members *indicated agreement*.

Gaelic Language (Scotland) Bill: as amended at Stage 2

The Convener: The second item under our delegated powers scrutiny is the Gaelic Language (Scotland) Bill, as amended at stage 2. We raised a couple of points on the bill.

Section 2 concerns the national Gaelic language plan. In response to the committee's letter at stage 1, the Executive undertook to amend the bill at stage 2. The national Gaelic language plan will now be laid before the Parliament when it is approved by Scottish ministers; members will find the revised provision in new section 2(6)(b). Members will also see that new section 2(2)(za) allows Bòrd na Gàidhlig to consult the Parliament.

Mr Ingram: I think that it was the subject committee that suggested that more use should be made of the affirmative procedure in respect of the national plan. I guess that the amendment was the Executive's response to that request.

The Convener: It was made in response to our recommendation and that of the subject committee. Both committees made the same recommendation to the Executive.

Mr Ingram: The stage 3 debate on the bill is also being held this week. It will be interesting to see what is said on the issue.

The Convener: Does any member have a point to raise on either section 2(6)(b) or section 2(2)(za)?

Members: No.

The Convener: In that case, are we agreed that the new sections address our concerns?

Members *indicated agreement*.

The Convener: Section 3(7) concerns regulations to make

"further provision in relation to the content of Gaelic language plans."

The Executive amended section 3(7) so that ministers can make the regulations that provide for the content of the language plans only after it has consulted Bòrd na Gàidhlig. I assume that the amendment reflects the Executive's policy wish to give the board a greater input into the content of the regulations. Are we agreed that the amendment addresses our concerns?

Members *indicated agreement*.

Executive Responses

Vulnerable Witnesses (Scotland) Act 2004 (Commencement) Order 2005 (SSI 2005/168)

12:13

The Convener: We move to agenda item 4, which is our consideration of Executive responses. The first order for our consideration is SSI 2005/168. Members will recall that we raised two separate points on the interpretation provisions in the order. The Executive response includes an acknowledgement of the errors in the order, one of which related to an unnecessary interpretation provision and the other to the inconsistent use of a term.

Are members happy to report the errors as a failure to follow normal drafting practice?

Members *indicated agreement*.

Advice and Assistance (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/171)

The Convener: We raised a consolidation issue in relation to these regulations. The Executive has responded by saying that, as it is undertaking a strategic review of the delivery of legal aid, advice and information, it might be a bit silly to start consolidating the regulations until the review is in hand. Do members agree with that approach?

Members *indicated agreement*.

National Health Service (Travelling Expenses and Remission of Charges) (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/179)

The Convener: We raised two issues of concern in relation to these regulations, the first of which was the breach of the 21-day rule. Members will recall that we asked the Executive whether it was aware of the timescale involved. The Executive response argues that as the Department of Health did not confirm the final agreed changes to the English regulations until 8 March, the Executive had only from that date until 29 March to lay the regulations. Does any member have a point to raise on the response?

Murray Tosh: Did the English regulations also fail to meet the deadline?

The Convener: We can find that out.

Murray Tosh: It becomes a footnote. Nonetheless it strikes me that what the Executive did in the circumstances was not unreasonable. I presume that there was good cause for both sets of amendment regulations to reflect each other and to come into effect on the same day, and the Executive per se cannot be criticised for the delay.

However, there might be a fault in the system, which would be worth knowing about. There is an indication that Scottish regulations follow UK regulations to a considerable degree and that the Scottish Executive may be left to hang on for decisions on points of substance before it knows what it wishes to include in its regulations. That probably happens more often than we see and may reflect a lack of equality between the two Governments regarding the detail of regulations. We may regard this as a politically contentious issue, rather than as an administrative problem that is deserving of severe censure. I am inclined to say that we are satisfied with the Executive's explanation. However, at some stage the committee may wish to examine the interface between UK and Scottish statutory instruments.

12:15

Mr Maxwell: I agree with what most of what Murray Tosh has said. I was curious about some of the wording in the Executive's response, which states that regulations

"were only confirmed by Department of Health on 8 March."

Was the decision taken on 8 March or was the Scottish Executive informed of it on that date? Those are two entirely different things.

It would also be interesting to know whether the English regulations breached the 21-day rule. If the decision was taken on 8 March, the English regulations would have breached the rule; however, if the rule was observed in England, that tends to suggest that the decision was taken earlier and was revealed on 8 March, when information was given to the Scottish Executive.

The Convener: Do we have time to write back to the Executive, or do we have to report on the regulations today?

Ruth Cooper (Clerk): I am afraid that we must report on the regulations today.

Mr Maxwell: We can report on the regulations, but we could still ask about what happened elsewhere. Murray Tosh is right to say that there may be an administrative problem between what is happening in London and what is happening here in Edinburgh. That problem may need to be sorted out.

The Convener: Absolutely. Ruth Cooper wants to clarify an issue.

Ruth Cooper: I should clarify the point that Stewart Maxwell made about the 21-day rule. From legal advice, I understand that, although the

rule is a precedent at Westminster, it is not statutory, as it is here. However, it might still be of interest to find out what the timescale was.

Mr Maxwell: The timescale will be the same, regardless of whether the rule is statutory.

Ruth Cooper: We can pursue the matter.

Murray Tosh: The issue that Ruth Cooper raises is important, because it offers an insight into the way in which the two Governments may handle statutory instruments. If the requirement at Westminster is less onerous, the issue may be for us to establish that that is the explanation for what has happened and to press for Westminster to amend its practices when it is dealing with parallel regulations, to ensure that the greater responsibility on the Scottish Executive can be honoured. An interesting inquiry into the issue may be held. For that reason, I would like to have the information that we have requested, although I do not think that it is germane to these regulations, which will become history.

The Convener: We will do two things. We will send a letter to the Scottish Executive and ask all the questions that we have highlighted. We will also draw the attention of the lead committee and the Parliament to the explanation that we have received and indicate that there has been a justifiable breach of the 21-day rule.

The Executive acknowledges that regulation 6 ought to have included a cross-reference to the principal regulations and indicates that it will make an appropriate amendment when the principal regulations are next amended. Do we agree to bring that defective drafting to the attention of the lead committee?

Members *indicated agreement*.

Intensive Support and Monitoring (Scotland) Amendment Regulations 2005 (SSI 2005/201)

The Convener: The Executive acknowledges that section 70(12) of the parent act ought to have been cited in the preamble to the regulations, but points out that its vires are not affected. Do we agree to draw that defective drafting and failure to cite a relevant enabling power to the attention of the lead committee and the Parliament?

Members *indicated agreement*.

Draft Instrument Subject to Approval

Fire (Scotland) Act 2005 (Relevant Premises) Regulations 2005 (draft)

12:19

The Convener: The regulations are subject to the affirmative procedure, but do not comply with the normal drafting conventions.

Members will have read the following in our legal brief:

"the italic headnotes should not refer to 'laid before the Scottish Parliament'; secondly, the preamble, after 'Regulations' should state 'a draft of which has, in accordance with section 88(4) of that Act, been laid before and approved by resolution of the Scottish Parliament'".

Are we agreed that we should bring that to the attention of the Executive by a formal letter, as it is fairly important?

Members *indicated agreement.*

Instruments Subject to Annulment

Miscellaneous Food Additives Amendment (Scotland) Regulations 2005 (SSI 2005/214)

12:20

The Convener: The point that arises in relation to these regulations is very similar to that which arises in relation to the Smoke Flavourings (Scotland) Regulations 2005 (SSI 2005/215). Members will recall that the issue was previously raised very strongly in legal advice. As I understand the position from my notes, legal advice suggests that the reference to consultation should be in the preamble, as would occur with any domestic statutory instrument. It is suggested that European regulations should follow the same procedure, whereas in this case the reference is in the footnote. Members might recall from what Margaret Curran told us that previous legal advice was that the footnote was not seen as part of an instrument. We want to know why there is a different approach.

Murray Tosh: I am quite happy for us to ask the Executive that question.

The Convener: We will ask the Executive about its failure to cite in the preamble to these regulations the obligation to consult under article 9 of regulation (EC) 178/2002.

Mr Maxwell: The issue comes up virtually every week. Can we ask a more general question as to why the Executive takes that different point of view? Why does the Executive not do as is done elsewhere and as the committee suggests? Perhaps the Executive has a good explanation—if so, I do not know what it is.

The Convener: That is what we need to know.

Members *indicated agreement.*

Smoke Flavourings (Scotland) Regulations 2005 (SSI 2005/215)

The Convener: Exactly the same point arises in relation to these regulations as arose in relation to SSI 2005/214.

Plant Health (Import Inspection Fees) (Scotland) Regulations 2005 (SSI 2005/216)

The Convener: We should find out the authority for adopting the 10 per cent increase above the exchange rate.

Mr Maxwell: One way of putting it would be to ask why the Executive is taking a cut.

The Convener: The Executive seems to be arguing that it is taking that action because of the fluctuation in the exchange rate.

Mr Maxwell: It seems clear from the information that we have in front of us that there are only two options, but that the Executive taking option three, which does not exist. We should ask about that.

The Convener: We have to get an answer.

Members *indicated agreement.*

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 5) (Scotland) Order 2004 Revocation Order 2005 (SSI 2005/212)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 3) (Scotland) Order 2004 Revocation Order 2005 (SSI 2005/213)

12:23

The Convener: No points arise on these orders.

Instruments Not Laid Before the Parliament

Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Miscellaneous) 2005 (SSI 2005/160)

Act of Adjournal (Criminal Procedure Rules Amendment No 3) (Vulnerable Witnesses (Scotland) Act 2004) 2005 (SSI 2005/188)

12:23

The Convener: No points arise on these acts of adjournal.

Act of Sederunt (Ordinary Cause Rules) Amendment (Gender Recognition Act 2004) 2005 (SSI 2005/189)

The Convener: No substantive points arise on this act of sederunt, although minor points arise that we might have to put in an informal letter. Is that agreed?

Members *indicated agreement.*

Act of Sederunt (Child Care and Maintenance Rules) Amendment (Vulnerable Witnesses (Scotland) Act 2004) 2005 (SSI 2005/190)

The Convener: No points of substance arise on this act of sederunt.

Act of Sederunt (Rules of the Court of Session Amendment No 5) (Miscellaneous) 2005 (SSI 2005/193)

The Convener: No points of substance arise on this act of sederunt, but members will note that paragraph 2(5) amends the principal rules to take account of a drafting defect raised by the committee in its 11th report of 2005 in relation to the Act of Sederunt (Rules of the Court of Session Amendment No 4) (Prevention of Terrorism Act 2005) 2005 (SSI 2005/153) which the Lord President's office acknowledged at the time and undertook to rectify. Do we welcome that?

Members *indicated agreement.*

Act of Sederunt (Rules of the Court of Session Amendment No 6) (Asylum and Immigration (Treatment of Claimants, etc) Act 2004) 2005 (SSI 2005/198)

Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules Amendment) (Caution and Insurance) 2005 (SSI 2005/199)

The Convener: No substantive points arise on these acts of sederunt.

Meeting closed at 12:24.

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