SUBORDINATE LEGISLATION COMMITTEE

Tuesday 27 September 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
26th 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 Kenneth Macintosh (Eastwood) (Lab)
Mr Stewart Maxwell (West of Scotland) (SNP)
*Mike Pringle (Edinburgh South) (LD)
*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Lorna Drummond (Faculty of Advocates)
Professor Chris Himsworth (University of Edinburgh)
Dr Aileen McHarg (University of Glasgow)
Jonathan Mitchell (Faculty of Advocates)
Professor Colin T Reid (University of Dundee)

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 27 September 2005

[THE CONVENER *opened the meeting at 10:36*]

Regulatory Framework Inquiry

The Convener (Dr Sylvia Jackson): I welcome everybody to the 26th meeting in 2005 of the Subordinate Legislation Committee. We have received apologies from Stewart Maxwell. Stewart Stevenson is here as his substitute. We welcome him and thank him for coming to the meeting.

Agenda item 1 is a round-table discussion on the regulatory framework in Scotland. We are commencing phase 2 of our inquiry. Some of the witnesses who are here have been at the committee previously and have therefore met committee members. I welcome Professor Chris Himsworth, from the University of Edinburgh; Professor Colin Reid, who is professor of environmental law and accountancy at the University of Dundee; Dr Aileen McHarg of the University of Glasgow's school of law—we have met before—and Lorna Drummond and Jonathan Mitchell of the Faculty of Advocates.

I have not convened a round-table session before and would like to explain a few rules about how the session should operate. Members and witnesses may wish to ask questions of one another or to everyone at the meeting, or they may wish to make general contributions. They can do any of those things, but they must speak one at a time, preferably through me. Therefore, they should indicate to me or to the clerk, Ruth Cooper—who will be mainly responsible for noting who wishes to speak—that they wish to contribute. For the *Official Report,* I will say people's names before they speak. I have a plan of where everybody is sitting and will try my best to get things right. We hope to have a coffee break and an informal chat at around 20 or 25 past 11, but the exact time will depend on how the session goes. I think that that covers the rules of the game. Iain Jamieson, who is the committee's adviser for phases 1 and 2 of the inquiry, is on my left.

I will ask the first question. What do people think about how the Parliament's committees currently supervise the legality and policy of an instrument? I refer to the Subordinate Legislation Committee—obviously—and to the subject committees.

Stewart Stevenson (Banff and Buchan) (SNP): I have a slightly provocative observation to stimulate discussion. Of course, the parliamentary process ensures that subordinate legislation will be allocated to particular committees to consider, but there is a broader issue to do with the personal interests, abilities and previous experience of members, which are often disjoint from that process. There is often a genuine problem in spotting something that may be of constituency interest or in relation to which, as a member with previous experience, one thinks that one might want to contribute to the debate. The framework may be too restrictive to serve the purposes of good public policy and good law making.

The Convener: This is a very general question: was anybody thinking that there might be an alternative way of looking at subordinate legislation? I take it that we are happy with the general way in which we deal with things.

Professor Colin T Reid (University of Dundee): It is important that policy and technicalities are kept separate; they are quite different tasks. If one tries to merge the two, there is a risk that anything that is genuinely a technical objection can be characterised as just a spanner being thrown in the works for political reasons.

However, we should ask ourselves whether the technical side has to be carried out through a full committee structure. There could be alternatives, such as having a smaller group or appointing an official of the Parliament to do much of the initial work if a committee's workload were an issue. However, the internal workings of the Parliament are not a matter on which we are equipped to comment.

Murray Tosh (West of Scotland) (Con): That is an excellent idea. Let us be honest—members of the committee perform a weekly pantomime of reading a long legal brief of dry-as-dust technical questions. We believe absolutely everything that our legal advisers tell us, because we find in practice that they are right, and because they know the law and we do not. We then ask the questions in the name of the committee. Everything has to go through the committee.

However, it seems to me that an empowered individual could crack on with that work and get committee approval for things in which we are moderately interested, such as improving practices rather than worrying about the niceties of how the imported Chilean groundnut regulations are defined or whether paragraph 3 really ought to have been paragraph 3(1). Much of that could be cleared out of the system to free us from doing things that better-qualified people ought to be doing.

Professor Chris Himsworth (University of Edinburgh): I am interested to hear those comments. One of the ideas that I threw into the pool was that much of the technical scrutiny work could be assigned to an official of the Parliament, although the committee could have an overseeing role.

There is another side to the argument. It would not be altogether improper to imagine that the Parliament could draw on sufficient people from its ranks with the will to look—in a relatively technical way, it must be admitted—at regulatory instruments. There is an argument there, although perhaps it slightly contradicts the earlier one of the committee having an oversight role.

To return to the initial point, I suppose that comments could be made at two rather different levels. One could look at what has been done in the past five or six years to make small, rather measured, improvements to the mechanisms. That is the sort of level at which one should consider technical scrutiny. Redefining the grounds of technical scrutiny could be part of such an exercise, while keeping an eye on the division between technical and merit scrutiny. I take that point.

The other dimension is to look at whether the Parliament, in doing its business by the conventional allocation of legislative scrutiny at primary and secondary level, is doing what it really wants to do in the long term. We have had six years of that, and it has gone really rather well. However, we should ask ourselves whether the Parliament is adequately hanging on to control of the huge enterprise of promulgating secondary legislation. That issue is still to be decided.

The Convener: We will come on to the detail of that in a moment.

10:45

Mr Kenneth Macintosh (Eastwood) (Lab): I want to reinforce Murray Tosh's comments about the committee's work. The committee is necessary, because, given the structure of the Parliament, elected representatives have to approve the decisions in the end; I do not think that we could delegate that work to a commission. At the same time, it must be said that we spend an awful lot of time considering technical details, even though that is only one part of our job and most of the work is done by our lawyers. I feel that improvements can be made.

As Chris Himsworth said, we have had six years of the process and, although it could be improved, there are not many examples in those six years in which we have failed to scrutinise secondary legislation. I cannot think of any horrific examples, or of a multitude of small bad examples, in which the process clearly did not work sufficiently or could have been improved. Perhaps the Faculty of Advocates or others can think of some examples.

Gordon Jackson (Glasgow Govan) (Lab): I have sympathy with Murray Tosh's comments. We conduct a pantomime or a charade, but I have a caveat to add to that: it does not take a fantastic amount of time. The reality is that, almost every time, we simply rubber stamp the legal adviser's suggestions.

I am not sure about delegating the work. I wonder whether the fact that the questions to the Executive come from the committee focuses the Executive's mind a little better in fixing the instruments. I do not suggest that official to official communication becomes too cosy—or perhaps that is what I am suggesting—but, eventually, the pressure might go off in that situation.

Murray Tosh would agree that, in the past few months, we have seen a huge improvement in the Executive's drafting of subordinate legislation. I like to think that that is partly because the committee keeps pushing. I wonder whether, if we took the committee's name off the letters, there would be a downside. However, I agree that, in practice, we simply rubber stamp what an official says.

Murray Tosh: The committee's hits are in areas in which a minister has signalled willingness to move, for example, to produce better explanatory notes. That may arise because of repeated complaints. We need to sort out the strategic issues—the complaints that arise on issue after issue or instrument after instrument—and not get bogged down because a reference to footnote 3(f) should have been to footnote 3(g). Such matters sometimes illuminate a more general issue, but, by and large, the general issues are timescales, the quality and level of information that is given and the observation of general practices. We need to focus more on how things are done and the quality of the legislation that is passed rather than on nit-picking, although I do not like to call it that, as it is important for the people who are affected. However, an awful lot of the suggestions are approved here and then go to the Executive and we then worry about timescales. I have made the point before that an awful lot of the work could be cleared out of the way so that we can focus on the more strategic issues that arise from instruments, rather than just on the details.

Dr Aileen McHarg (University of Glasgow): The suggestion of having a parliamentary official as a statutory examiner of rules is interesting, although I am a little concerned about it. There is a danger of equating technical scrutiny with merit scrutiny. With technical scrutiny, there are specific grounds on which an instrument can be said to be good or bad, rather than somebody just saying

that they do not like it. However, some of those so-called technical grounds might involve quite a delicate judgment, especially if the grounds of technical scrutiny were expanded in the ways that are suggested in some of the papers.

For instance, Chris Himsworth suggested proportionality as a technical ground for scrutiny, but proportionality is not technical in the sense that there is a right answer—it requires a judgment to be made. You may look for unexpected or unusual uses of the law-making power or for inappropriate uses given the level of scrutiny. Those matters are not necessarily neutral and they require a judgment to be made about importance. If they are not neutral, the relative authority of an independent official versus the committee is crucial. On some issues the independent official might be more authoritative while on others they might be less. There might be a role for an independent official, but as a supplement to the committee, rather than a replacement for it.

The Convener: That is useful. We should not forget that we also deal with bills and examine whether the balance is right between what is in a bill and what is delegated. I do not want the committee to lose sight of that aspect of its work.

Jonathan Mitchell (Faculty of Advocates): I agree with several of the points that have been made. There is a fundamental problem in the way that subordinate legislation is defined or conceived. We see that when we look at the list of statutory instruments that go through this Parliament every year, of which something in the region of three quarters are very trivial indeed. We made the minor point that a large proportion are not even thought important enough to be worth publishing in any form at all.

We treat the painting of new lines on a lay-by off the A1 as important enough to justify a statutory instrument, because the A1 is a trunk road. We have the deluge of statutory instruments about the uniforms that parking attendants can wear in South Lanarkshire or the fares that are to be charged for parking across the road in Holyrood park. On the other hand, we have what any lay person and many lawyers would call very important delegated legislation that never goes through that procedure at all, examples of which we give in our submission. It is peculiar that just because the parent act classified the process in that way, a minister can—without telling or asking Parliament—change the practical effect of primary legislation on issues such as which listed buildings require which forms of consent.

The example of the Social Work (Representations Procedure) (Scotland) Order 1990 (SI 1990/2519) is particularly interesting, because it addresses the point that was made in the committee last week—constituents do not come along and ask about such things. There were local authorities in Scotland that had no knowledge of the fact that, for many years, they had had to have an independent complaints procedure that people could activate before going to court. They were unaware of that because the order was buried deeply on the Scottish Executive website. It did not even come before the Parliament for information. We must stand back from the vast mass of delegated legislation in its widest sense—not just subordinate legislation in its narrow sense—and ask what are the things that do not matter much, such as lay-by painting, and what are the things that matter. We must then try to concentrate the limited amount of time on the things that matter.

I take the point that, ultimately, the process has to be parliamentary, but for minor matters it could be a rubber stamp. I get the impression that too great a proportion of the committee's time is spent on things that just do not matter and with which you are swamped. You do not have the time for the major matters.

One aspect of that is the way in which the parliamentary timetable works. Our submission gives the example of the Mental Health Tribunal for Scotland (Practice and Procedure) Rules 2005 (SSI 2005/420); I flagged them up because they were drafted by Lorna Drummond, so she comes here with special knowledge. As someone who was not involved in that process, it seems to me to be unfortunate that something as important as those rules—they were an enormously complicated set of rules for a new tribunal and represented a major change—was presented to Parliament in such a short timescale. If anybody had had a major issue with the rules and had pointed out that an enormous error was hidden in them, or if they had found something implementing a policy that they did not like, the riposte would have been, "That's tough," because the timetable would not have permitted them to do anything about it. The Parliament either passes such sets of rules as they are or not at all.

There seems to be a need to extend the timetable—not just the amount of time that is given to considering such instruments, but the timetable from beginning to end—for certain important measures. To allow such a change to become real, it would be good for better explanation to be provided beforehand about the important measures, why they are needed, and why things in them that might be thought to be doubtful are being done in the way that has been chosen. Stewart Stevenson touched on that point.

I refer to our suggestion of flow charts and the example of the mental health tribunal rules. I do not see how the language of something as complicated as that set of tribunal rules could be

made much simpler. However, when something like that is just slapped down in front of us, we find that it is impossibly difficult to follow and we need some explanation of why the rules work in a particular way. It would help if that could be put in graphic form, using a flow chart, which said what to do first, what happens next or, if something else is the case, what happens then.

Since phase 1 of the inquiry, the Scottish Executive has published explanatory notes on its website. That is good, but I was quite taken aback by how limited the notes are. I skimmed through a few of them and I was quite surprised: I did not see a single explanatory note that really explained the difficult issues. The notes are all presented in what some people might say was a rather patronising way; they just tell the committee in broad terms what the instrument is about, rather than covering what might be called the fine print.

That was a bundle of related general comments. One specific suggestion that I thought was very good was made in Aileen McHarg's paper, which proposed having something like the *Official Journal of the European Union*. It would be valuable to bring together in one regular periodical document everything that matters and to provide one source for people to look at. That would get over one of the major hiccups—the things that never come to Parliament at all.

The Convener: That covered a huge number of issues. We must be careful not to creep into other areas. I will try to do this smoothly. We might not answer all those points at this stage, but we hope to have done so by the end.

Mr Macintosh: I welcome Jonathan Mitchell's comments. We all welcomed Aileen McHarg's suggestion of having a publication to make subordinate legislation more accessible, possibly through categorising all guidance as Scottish statutory instruments, but we can go on to discuss that.

The central question that you have pondered is the importance of different things. You have done so in two senses. First, there is this committee's work, which Chris Himsworth also explored. Sometimes we cannot see the wood for the trees; we spend so much time discussing paragraph (g) of some regulation or other that we do not make a strategic comment to the Executive about what we are considering. That is a downside for us and it means that a recommendation that we make can be lost, because people say, "Oh, it's just the Subordinate Legislation Committee again." We can end up undermining our own role.

Secondly, there is the wider point about the role of the committee and what Chris Himsworth described as the balance of legislation. The levels of procedure are classified in such a way that they do not necessarily match the political importance that we give to them. The fact that an instrument is subject to the super-affirmative procedure probably means that it is important. However, many things that are dealt with under the negative procedure are equally important.

The two examples that the Faculty of Advocates gave of instruments that ended up being highly important predated the establishment of the Parliament. I am not saying that they are not good examples, but my original question was whether there had been any examples of cases in which we have made such an error since the establishment of the Parliament in 1999. I do not mean cases in which we have failed in our duty, but those in which a piece of subordinate legislation had an importance far beyond that which we attached to it.

11:00

Jonathan Mitchell: Although the examples that I gave predated the setting up of the Parliament, they concern matters that would not have been dealt with differently under the present parliamentary structure. The point is that the Social Work (Representations Procedure) (Scotland) Directions 1996 and the planning circulars would not have come before Parliament in the first place.

Mr Macintosh: We would never have seen them.

Jonathan Mitchell: You would not see them even now. It is a matter not of the Parliament falling down, but of the Parliament being sidelined.

There has been an improvement in planning circulars, which has been driven by the rolling programme of publication on the internet. Nowadays, a circular is at least published electronically; old circulars might not be on the internet, because the publication of old material has been patchy. That is the only difference.

I cannot think of a really good bad example of the Subordinate Legislation Committee falling down or of an appalling statutory instrument that should never have got through. It is my impression that the quality of drafting has improved substantially in recent years. Comparison between a snapshot of statutory instruments now and a snapshot that was taken 10 years ago, before the Parliament was set up, would show that that was the case.

Stewart Stevenson: I want to pick up on a few of Jonathan Mitchell's interesting comments. First, I have a small point about finding things. Draft SSIs can come to the Parliament to be consulted on. At that stage, they are not allocated a number and, as a result, they are often difficult to find.

They are allocated a number only once they become SSIs. That sounds trivial, but I have driven myself demented by looking on the website of the Queen's printer for a draft SSI, but not being able to find it because I did not realise that it was a draft rather than an actual SSI. That is in cases in which I have known that an SSI existed.

I will use some of the instruments that are subject to the affirmative procedure and which appear in today's *Business Bulletin* to exemplify some of Jonathan Mitchell's points. There are seven such instruments, three of which are emergency food protection orders: the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 9) (Scotland) Order 2005 (SSI 2005/421), the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 10) (Scotland) Order 2005 (SSI 2005/431) and the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 11) (Scotland) Order 2005 (SSI 2005/455). The orders all deal with a subject in which I am keenly interested but, to put it bluntly, once one such SSI has received approval, all the matters of substance have been covered. When the Executive says that there is another bit of the sea off the west coast where, for health reasons, we must stop people fishing, that is in essence an administrative matter. The fact that those orders are paradoxically subject to the affirmative procedure means that, even though they are described as emergency prohibitions orders, they cannot be emergency because we need to wait for them to be dealt with through the affirmative procedure. To complicate things even further, when someone wants to annul a negative instrument, they can do so at once. Is that not extremely odd? Surely it tells us that the Parliament should not be wasting its time dealing with such legislation. Every time that such instruments come up, we have to vote and we have the same debate because some of us think that they are not a good thing.

Reference was made to flow charts and that opened up the subject of the language that is used in drafting SSIs and primary legislation. As an experienced lay reader, I think that the drafting of legislation could be improved by adopting a drafting rule that said that there should be no forward references to things that have not yet been read or one that said that there should be no backward references that qualify what has already been said. When they draft legislation, our draftsmen use forward and backward references in a highly confusing way. I have tried to flow chart some legislation, but I assure the committee that it is not possible to flow chart some of it under conventional flow chart rules because the flow chart would have to cross itself in a way that would make it very confusing.

The more general point about drafting is beyond the scope of what the committee is trying to do—we cannot solve every problem in the world—but perhaps the legal eagles could consider the issue. It might be a good academic study for the next PhD student who passes by.

Lorna Drummond (Faculty of Advocates): As a former parliamentary counsel, I have some experience of drafting and I must say that it would be difficult to draft a piece of primary or secondary legislation without making a backward or forward reference. The legislation must contain a cross-reference at some point.

Stewart Stevenson: I am saying that the draftsman should choose between those protocols and use only one of them.

Lorna Drummond: I understand that. My understanding is that a Scottish parliamentary counsel now tries to do one or the other. When they make a reference either forwards or backwards to another section in the bill, they put in brackets beside the reference an explanation of the section to which they are referring, so that the reader can tell in advance the subject matter that is being referred to. That is the ideal. I am not saying that it is done in every piece of drafting, but it makes it easier for the reader to understand what is being referred to. The same drafting convention is used when the reference is not to another section in the bill but to another act. An explanation is given of the provision to which it refers. I would welcome the use of that convention in subordinate legislation.

The question was asked whether there has been any difficulty with the passing of subordinate legislation in this Parliament. The examples that we have cited happened prior to the establishment of the Scottish Parliament and the Subordinate Legislation Committee. However, I have personal experience of the mental health tribunal rules, which—given that they extend to more than 70 rules—are very large. My understanding is that those rules will be scrutinised by the committee, but probably after they have come into effect. That is highly undesirable for such a set of rules, which will be read not only by lawyers or the tribunal but by mental health officers, medical officers, social workers, individuals, patients and named persons who act for patients. All those people were consulted on the draft rules, but they may wish to have some involvement in the scrutiny of the rules. I suggest that it is highly undesirable that they do so after the rules have come into effect.

The Convener: Thank you. That is very helpful.

Mr Adam Ingram (South of Scotland) (SNP): I am interested in the notion of sifting, which is the work that we must do to identify the important issues and important pieces of legislation on which

we should focus our attention. I understand why Lorna Drummond is particularly concerned about the mental health tribunal case.

The question arises as to why we deal with the subordinate legislation that comes before the committee in the way that we do. Part of the issue is that, essentially, all that we can do is to pick up with the Executive the points that Murray Tosh mentioned about drafting and the like. We do not have the ability to suggest amendments or changes to the legislation. If we were to take a different approach and have a more proactive role, we might be able to identify the important legislation and focus on it rather than take a blanket approach to all the legislation that comes before us. I would like to get some feedback on that suggestion.

The Convener: Much of that is covered by what Jonathan Mitchell said about fast-tracking in his evidence and paper.

Stewart Stevenson: Following what Adam Ingram has said, I give the example of a small SSI from some while ago. It changed the licensing fees for casinos and bingo halls, incorporating two issues into one SSI, as is quite proper. Although I was happy to support the change in licensing fees for casinos, I was unhappy at seeing the fees changed for bingo halls. However, the whole thing had to stand or fall as one SSI. That was a political and policy matter, not a subordinate legislation matter for this committee. However, the two issues were separate and could have been dealt with separately in two SSIs. It would have been difficult to effect a change to just one bit of the one SSI.

Mr Macintosh: I want to ask Lorna Drummond about the subordinate legislation on the mental health tribunal. It was a very good piece of subordinate legislation. I should know this, but what procedure was followed? Was it the super-affirmative procedure?

Lorna Drummond: It was certainly affirmative, but I am not sure whether it was super-affirmative.

Mr Macintosh: When the parent act was passed, there was concern that an awful lot of detail had been left for regulations. That was considered important, so its subordinate legislation was given more time than other pieces of subordinate legislation. With any piece of complex legislation, the more time that can be allowed, and the more people who can put their minds to it, the more confidence we can have that we have got it right.

Under our current system—or even under any improved system—instruments such as the mental health tribunal rules get pretty much the maximum amount of scrutiny that they can get. Such instruments are probably at the top of the spectrum in terms of the amount of parliamentary time allowed for them.

Mr Ingram: The Health Committee gets the opportunity to delve into details on policy, but I am not sure that the Subordinate Legislation Committee really gets the opportunity to look into the regulatory framework and the quality of regulations. I do not think that we have the opportunity to judge whether a set of regulations is good or bad; we just pick up on what the legal advisers tell us is legally right or wrong. Lorna Drummond spoke about the quality of regulations. Do we make a judgment on that? I do not think that we do.

Mr Macintosh: Is that not a policy matter?

Mr Ingram: No. It is a subordinate legislation matter. Our job is to encourage best practice and better quality in legislation.

Jonathan Mitchell: While agreeing with that, I feel that we already have a system in which the clarity of an instrument and the drafting method used are matters for this committee. Obviously, the instrument could also be considered by the lead committee.

I think that it would be a healthy exercise if, every now and then, this committee were to say of a draft instrument, "This is unintelligible. We do not understand it." I suspect that a lot of people sometimes feel that but do not want to say it—perhaps it is like the emperor's new clothes.

In our submission, we discuss the timetable for the mental health tribunal rules. The rules were laid before Parliament on 29 August 2005 and were to come into force—unless annulled—on 5 October. It was important to keep to that timetable, because the rules were tied in with a lot of other things that were happening.

The problem was that the rules could not be considered by this committee until 13 September. To be honest, they did not get any full consideration then, as the committee can consider only technical issues. The Health Committee could consider policy issues but—to take one example of a policy issue—it could not say, "We think that it is totally wrong that these rules provide for, in some circumstances, tribunals to be heard in private with no public right of admission." At no stage could anybody say that. No option was available short of the nuclear option, which would have meant having no rules at all, with everything being sent back to the drawing board and the whole house of cards falling in.

Of the SSIs that go through every year, probably not more than a dozen or so raise genuinely important issues that might be dealt with by way of amendment. The exception to that are SSIs such as the table of fees that Stewart Stevenson mentioned, which I think belong to a doubtful class. There are quite a few of those. For example, earlier this year, the Justice 1 Committee

considered whether it was right that fees for shorthand writers should go up by 3 per cent.

11:15

Stewart Stevenson: That was my fault again.

Jonathan Mitchell: That may have been so. However, that committee had no power to say that, for instance, it thought that shorthand writers were overpaid and should not get any rise.

The underlying fact is that not many SSIs call for committees to delve into details and consider whether amendment is necessary. It should be possible—within the powers and time available—for this committee and lead policy committees to do that kind of thing if they could get rid of the stuff that does not matter.

The Convener: I think that we are coming on to the area of Stewart Stevenson's next question.

Stewart Stevenson: In a sense, whether SSIs should be capable of amendment is an extremely big issue, on which we could spend a lot of time. Jonathan Mitchell said that, by and large, few SSIs deal with big policy issues, but just such an example—paradoxically, it involves not an SSI but a code—is provided by the Scottish outdoor access code, which was made under part 1 of the Land Reform (Scotland) Act 2003. From memory, that document is something of the order of 80 pages, if not rather more. The access code was considered by the Environment and Rural Development Committee and, as a result of that consideration, the minister was persuaded to withdraw the code after the committee pointed out that last-minute changes that had been introduced had changed the sense of some important provisions.

That committee was able to persuade the minister to withdraw the proposal only because the minister had extended a courtesy to us, not because of any power that the committee or the Parliament had. It would be useful to hear whether people think that the Parliament should have more power in that regard or whether we should continue to rely on the ability of the Parliament and its committees—which have a track record of success where it matters—to make comments that persuade ministers. Should members of Parliament be able to lodge amendments to SSIs, as they would to primary legislation? Alternatively, should we be able only to persuade ministers to withdraw a draft proposal and require that it be re-presented in the minister's name?

Professor Reid: Several issues are perhaps being mixed together. On the scrutiny that should be given to codes and guidance, I see an absolutely fundamental distinction between legal rules and non-legal rules. As soon as we start blurring that distinction, we will run into all sorts of problems. If we start considering non-legal rules, we will find that such things begin to tail off for ever towards the bottom end.

For important rules that should be scrutinised, the power to require that scrutiny is decided on in the primary legislation. That means that the Parliament must accept what its predecessors did. If a code of practice is important and should be scrutinised, we should say so in primary legislation, with the appropriate phrasing and design. We should not try to squeeze everything into the form of an SSI, because SSIs are legal documents. SSIs have a legal purpose and affect legal rights, so they should be treated differently from other things.

For example, although the shellfish orders that were mentioned earlier deal with administrative matters, they also set the boundaries of the criminal law. If people breach the orders, they can be prosecuted. SSIs mean not only that legal status is conferred, but that a system that involves publicity and accessibility—although that system may be flawed—is plugged into. People know where they are and know what version they are looking at. They can easily trace amendments and so on. All those things get mixed together. It would be nice to be able to look at guidance and change it a bit, but there are traceability issues.

Professor Himsworth: I am grateful to Colin Reid for that clarification. I want to pick up on one or two points. We are dealing with different borderlines. In some cases, ministers give powers through circulars to local authorities, for example, to change the law. In such instances, there is a clear case for saying that there should have been an SSI all along, as there would have been if the Scottish Parliament had got its hands on the legislation in the first place.

We may accept the distinction between what becomes delegated legislation—the law—and codes of practice, but the question of amendment within the domain of SSIs also looms, never mind the codes of practice and so on beyond that territory. My inclination was to think that the matter should simply be on the agenda for consideration in this sort of review of the future of subordinate legislation; indeed, it would be strange if it were not. If the balance is to be restruck, one aspect of restriking it may be to incorporate down the line the capacity for the Parliament to amend instruments at the later stage.

I have had a few thoughts on that matter. I would like to hear the arguments against what I have described. I am not sure exactly what those arguments are—they might be said to derive from the Scotland Act 1998 as formal categorical objections, perhaps—but I think that they are included in the committee's papers. Of course,

there are related questions, which might become a bit more uncomfortable, about ownership of the instrument, but there have been instances of the bridging of responsibility for instruments. Indeed, I would be surprised if no devices were available to enable that to happen in a Parliament that is committed to participation and accountability.

On withdrawing and reintroducing instruments, it would be interesting to see what would happen in practice with an amended instrument. Would it remain throughout in the gift of the Scottish ministers to withdraw it, in effect? They may say, "If you're going to do that to it, we're not going to run it at all." What might have been cast originally as a power to amend an instrument may turn out to be a reinforced power to withdraw an instrument and to return with a new version that would then run through the process.

Party politics in the Parliament has not yet been mentioned. If the Scottish ministers made it clear that they did not want an instrument to be amended, I presume that it would be difficult for members who wished to amend it to have their way in the chamber against a majority that is sufficiently whipped. However, I am straying beyond my territory; obviously, I know nothing about party politics in the Parliament.

The Convener: You can learn.

Jonathan Mitchell: I understand Colin Reid's point that there is a fundamental distinction between legal rules and non-legal rules, but the problem is that, in reality, things are extremely blurred. The immigration rules are the best example, because they constantly arise in the courts. The legal theory is that the minister simply tells the Parliament what his or her policy is. There are many other examples; the access codes are one. They confer legal rights and impose legal duties. They will be discussed in court and litigations, even criminal prosecutions, will depend on what is said in them.

It is an historical accident that the amnesic shellfish poisoning orders are dealt with by the Scottish Parliament at all and not by a local authority. I would have thought, to come back to one of Stewart Stevenson's points, that there would be much merit in dealing with such matters locally. An amnesic shellfish poisoning order may be important to scallop fishermen, but it is not a matter for the Parliament and should perhaps be dealt with by a councillor.

That is no different from Network Rail's traditional power to pass byelaws. Just as eating scallops from off the coast of Skye may be a criminal offence for which one can be fined, so one can be prosecuted and fined for trespassing on a railway line. I remember many years ago when I was a sheriff hearing the prosecution of someone who had trespassed on a railway line, but no one could find the provision to criminalise such trespass. Eventually a copy of the byelaw—it was an old British Rail byelaw—was found, only for us to discover that the method of publishing the trespass was by putting a poster in Waverley station, as that was the nearest railway station. Because nobody could establish whether there was such a poster, the prosecution collapsed.

That is just ludicrous; it is the sort of thing that people make jokes about. However, the reality is that there is no clear distinction between legal rules that come before the Parliament to get a parliamentary stamp and things that are not legal rules and that do not come before the Parliament. We come back to the need to look at the importance of provisions and at the extent to which they justify parliamentary scrutiny. That is more important than a legalistic distinction between things that are law and things that are not—as a lawyer, I do not recognise that distinction.

Dr McHarg: My first point concerns definitions. There are three aspects to what counts as an SSI. The first is the effect on legal status; the second is the effect on potential scrutiny; and the third is the effect on publicity and accessibility. Scrutiny and accessibility of codes of conduct or practice can be dealt with in other ways and arguably should be dealt with in other ways. However, the question of legal effect and legal status is what makes the definition of an SSI crucial; forcing a choice to be made could clarify many of the problems that arise.

It is not appropriate that one should be unsure about whether something that calls itself a code of conduct in fact has some legal effect. It should be clear whether or not it has such effect. The process of having to choose whether to label a code as an SSI at the beginning could be valuable. It could have implications for scrutiny and publicity, but those things do not have to follow.

My second point concerns amendment. There is a case to be made that the Parliament should have a power of amendment, certainly on policy matters; it seems unacceptable that the Parliament should have no power to amend the large instruments that fill in the detail of a framework act, as has been mentioned.

The question of detail is more difficult when there has been an error in the drafting, for example. Should there be a power to amend in such cases? Colin Reid suggests in his paper that such a power might be undesirable, because it could encourage sloppy drafting. Perhaps that is a counsel of perfection: errors will always slip through and perhaps we should have a means of amending them as well.

In principle, the two situations are distinguishable. One could save the power of amendment for particularly important matters—those matters would be subject to what I call in my paper the super-affirmative procedure, which carries with it the power of amendment—or it could be applied more generally. There is a more pragmatic judgment to be made about what the effects would be.

11:30

Mr Macintosh: Many of my comments relate to what Chris Himsworth says in his paper on the balance between Executive rule and parliamentary scrutiny. The question is whether we should first make up our minds about what the balance should be and then change our procedures accordingly. We could consider the situation the other way round, as we have an existing set of procedures and mechanisms for governing and legislating. The issue is whether the balance is right.

I return to the examples given by the Faculty of Advocates that predate 1999. Those examples are important, because Scottish government has enjoyed a greater level of scrutiny since the Parliament was established, not just through the Subordinate Legislation Committee but in general. The fact that we have a devolved Parliament means that everything to do with Scottish politics—every piece of legislation and every administrative decision—is subject to greater scrutiny. Few issues can escape that scrutiny now, whereas before 1999 many slipped through the net.

Colin Reid states in his paper that we should not get hung up on this committee being the sole source of subordinate legislation scrutiny. There are any number of ways to hold the Executive to account; this committee is not the only one. The important issue is whether the current balance is right.

So far, I have yet to hear an example of exactly how we have got things wrong. Jonathan Mitchell gave the example of the mental health tribunal rules, saying that whether a mental health tribunal should meet in private is the sort of thing that we should debate in greater detail than we have done. That is an important point, but it is a question of policy. It is not something that this committee would decide on. I am not saying that policies should not be examined; I am saying that they should go to the Health Committee, for example, whose responsibility it is to examine them.

The fact that we did not debate the mental health tribunal rules at great length does not mean that we did not look at them; it just means that we did not pick up on many issues. Those rules probably got as much parliamentary time as any instrument would. There may be room to change the situation but, given the current parliamentary timetable, I do not think that much additional time could have been given to those rules. Even if we conclude from our deliberations that we are not categorising legislation correctly and that we are paying far too much attention to relatively inconsequential instruments and not enough to important instruments, the mental health tribunal rules would have come at the top end anyway and I doubt that we could give such instruments any more time.

Professor Reid: The first issue is the categorisation of SSIs. There are many examples of wrong categorisation. One of the functions of this committee could be to examine practice and experience and ask, "Does this need to be done by this procedure?" For example, perhaps the shellfish orders should become local authority byelaws. A proposal should be made to change the primary legislation. We will not get round the problem by blurring the borders between the categories, although we may want to move things between categories. The immigration rules are the textbook example. They currently have an ambiguous status, but they should undoubtedly be full legal rules.

The other issue is amendment, about which I have practical concerns. If instruments are made and are to be amended, at what stage should they be published? At what stage do we ensure that the amended version is the one that is supplied? How do we deal with an instrument that has had to come into force in an emergency but which is then amended? Amending draft instruments seems fine and perhaps we should encourage more important instruments, such as the mental health tribunal rules, to be laid in draft. Perhaps a timetable could be provided, so that instruments must be laid in draft at least so many weeks or months before coming into force. That would give time for a bit of ping-pong to enable changes to be made if necessary, so that we do not find ourselves up against the timetable.

In a sense, all those matters are in the Parliament's control, through its power to create new legislation or to amend existing legislation. Thinking forward about how things will work out may be a way of avoiding some of the worst problems.

Gordon Jackson: A power to amend SSIs has an attraction for me. I have often thought that I would love to amend an SSI, but I had no choice, because the system is all or nothing. However, I tend to think that it would not be practical for the Parliament to have a power to amend SSIs, not for the tracking reason that has been mentioned, but because of the practicalities of how the system would operate. Normally, such a system would

make no difference, because the Executive would whip the votes and any proposed amendment that it did not like would be lost.

I am also trying to think of the reality. Given all the parties and interests in the Parliament, we could not constantly amend SSIs, as there are not enough hours in the day. The problem is the sheer impracticality of amending SSIs in the Parliament. As members have their own wee pet agendas or themes, we could have hundreds of amendments going through at any one time. I have no idea of how the system would work in practice. It is suggested that we categorise the SSIs that need to come in draft form, but I am not entirely sure who would decide on the categorisation. We certainly could not have a power to amend them all—not in the real world.

Jonathan Mitchell: Two independent problems have been raised with a power to amend: the tracking issue and the issue of parliamentary time. On the first point, the problem is not different in principle from the problems with primary legislation. There would be no real practical problem with allowing amendments. At present, if an SSI is passed because it is felt to be necessary, even though members would have preferred to amend it, an amending SSI is often introduced six months later or whatever. There would be no real difficulty with amending instruments, one would hope before they came into force, although there may be cases in which an instrument had been in force for a week or a month or two before an amendment could become operative. Tracking would not ultimately be a terribly big problem—we should be capable of noting on the margin that there are two different editions, as we do in plenty of other situations.

Gordon Jackson's point about practicality is much more important, if I may say so. My impression is that people would not want to amend that many SSIs, although Gordon Jackson knows about that far better than I do. I would have thought that controls could be introduced. At present, you have one control: the nuclear option of saying to ministers that you will not pass the instrument at all unless an amendment is introduced. However, there might be a system under which an amendment has to be certified according to particular principles by the convener of the committee or, as we suggest, by one third of the committee members. That would get away from the hobby-horse problem of people who want to make small changes. There are methods of controlling the number of amendments.

The procedure might be introduced first as an experiment in a particular subject area, such as for health SSIs or, more narrowly, for mental health SSIs, to see how it works. We would see whether people abuse the system and spend far too long debating the amendments. It is fundamentally wrong that, at the moment, the Parliament and the Executive have the game of who blinks first with SSIs. If the Parliament does not like something, it has to throw it out and the Executive dares the Parliament to do that.

Murray Tosh: It is difficult to see how we could cope with a full system of amendment—outside organisations would scrutinise texts minutely and suggest all sorts of probing amendments to try to get at the real meaning of a proposal and members would lay political amendments, as happens, which would clog up the system. However, Jonathan Mitchell makes the good point that few SSIs are likely to arouse a sufficient volume of interest or concern to generate a desire to change the instrument substantially.

An example that I have used before is the Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 (SSI 2003/1). I cannot prove this, but my perception is that a majority in the Parliament felt that the proposed boundaries of the national park were probably wrong and should be changed. There was a vote at decision time, where the nuclear option existed. If the majority had wanted to assert their opinion, they would have had to reject the instrument, which, in effect, would have meant that, even if only for the time that it took the Executive to produce a fresh proposal, they would have voted against the creation of a Cairngorms national park. Nobody wanted to do that, but the Parliament felt quite strongly that it did not want or like the proposal—it wanted something different.

If we cannot operate satisfactorily with a yes or no system and we cannot go for full amendment scrutiny, perhaps we should use another method, such as a referral-back mechanism. Such a mechanism exists for primary legislation, although the issues of who can use it and in what circumstances are carefully circumscribed. If the Parliament were equipped to say, "We do not like this as it stands; think again and bring it back," there might occasionally be a desire to do that rather than to press the nuclear option. That would give the Parliament more power and would allow more external involvement in the process. All round, it would give a more satisfactory experience that might result in better law, or, at least, law that was better grounded in the wishes of the Parliament and the community at large.

The Convener: On that note, we will have a 10-minute coffee break.

11:41

Meeting suspended.

11:59

On resuming—

The Convener: Murray Tosh has a few questions on existing parliamentary procedures.

Murray Tosh: All the witnesses—I am not sure whether they are witnesses or participants when there is a round-table set up—are aware of the table in our consultation paper that shows that there are currently eight forms of parliamentary control. I know that some of you have made points about the matter already, but it would be helpful if we could establish consensus on whether the eight approaches are all useful or whether we should amend, streamline or abolish any of them. I would welcome any pertinent comments on the different approaches that are taken to subordinate legislation. Perhaps Aileen McHarg could comment on the matter in her proposed official journal of the Scottish Parliament, particularly the seventh approach on the list when the instrument is not even required to be laid before the Parliament—I presume that nobody sees it.

12:00

Dr McHarg: I confess that the official journal comment was made off the top of my head when I wrote that sentence in my submission last Tuesday morning.

Murray Tosh: A politician would never admit to that.

Dr McHarg: I have not missed my vocation then.

I have no particular expertise on how to streamline procedures, but there are many—some of which are variations on a theme. The consultation paper said that some of the procedures are not used, so why keep them? Why make matters more complex than necessary? Essentially, three levels of scrutiny are available. Those are to give the instrument no scrutiny, to throw it out or to actively have to agree to the instrument. Those are conceptually different so they should be the basic choices.

You might want to add an emergency procedure because the idea of an instrument coming into force before it has been scrutinised is, for the reasons set out in the background paper, a bit of a nonsense. If time is of the essence, the instrument should be dealt with by an emergency procedure that is specially designed to allow for that situation and has different types of controls built into it, such as sunset clauses or review clauses.

A possible fifth option would be a super-affirmative procedure that goes further than the Parliament merely saying yes. That procedure might involve prior consultation, although I am not wholly in favour of that, or there might be a power of amendment.

Jonathan Mitchell: The Faculty of Advocates has discussed the matter quite a bit. A fundamental problem is when the procedure that is to be used should be determined. There is contrary evidence on the matter. Both Colin Reid and Aileen McHarg suggest that it is right that that decision should be made at the point of the parent act. Lorna Drummond and I do not agree with that. We think that at that stage it is not possible to tell what level of scrutiny an instrument might need. We see the consequences of that in some of the problems that arise over the unimportant stuff when a decision made many years ago in a parent act that something needed to be subject to the affirmative procedure is still being followed through.

Before we get to the eight forms of parliamentary control, our preliminary suggestion is that it would be healthy if we moved to determining the form of procedure on a draft SSI when it came before Parliament. At that point one could tell more readily whether the instrument was important or complex and required debate and possible amendment. If you make that change you move away from the rigid system in which the parliamentary bill draftsman must determine which procedure would be appropriate for a draft SSI that they have never contemplated but which may or may not be presented in 20 years' time.

Murray Tosh: But who could make that decision at that time?

Jonathan Mitchell: We run into the problem that the current system of having the Subordinate Legislation Committee on the one hand and a lead committee on the other works well in the existing structure, but there may need to be an initial scrutiny committee that combines the current functions of the two. To be honest, we do not have a detailed suggestion for how to make the improvement, but we feel that it ought to be made. We must move away from parent acts determining the procedures to Parliament doing that in some way when it sees the draft.

If we consider the eight forms of procedure as a spectrum, there are really only about three forms; but the glaring omission is a form of emergency procedure.

The Convener: When you say that you would have a draft SSI system, do you mean Parliament being in charge of that through the committee? Or do you mean a parliamentary rubber-stamping in the chamber?

Jonathan Mitchell: That is a question for MSPs rather than for an outside witness such as me. However, I would say that a committee ought to deal with draft SSIs. I would have thought, though, that a scrutiny committee could do the vast bulk of screening without much difficulty at the initial stage.

Stewart Stevenson: I have a few observations about decision-making timetables. Emergencies will occur, of course, during recesses and we certainly would not want to get ourselves into the position of having to recall Parliament during recess because of such an emergency. Curiously, when the negative procedure is available to ministers, it gives them an emergency power because an instrument comes into force more or less immediately, once they have laid it. That goes back to Jonathan Mitchell's point, which is that the emergency power is not available to ministers if the primary legislation says that the SSI must be an affirmative instrument. There is something for us to consider there.

A point that nobody has made so far—with my background, I would raise this—is that there is no process for making collective decisions without us all physically being at the one location. However, in the electronic age, communications technology means that we can reach the relevant people wherever they happen to be. It is perhaps time for us to ask whether there is a way to allow emergency decisions to be made electronically without people being in the same room. I am succumbing to the temptation that Aileen McHarg succumbed to of thinking off the top of my head—even politicians do that from time to time.

Professor Reid: If the procedure is not laid out in black and white to begin with, all sorts of problems will be created, particularly in relation to the Executive's timetable. For example, the Executive may need a measure to be ready for a particular time or may need to give a measure time to get through parliamentary procedures. The Executive may also have to meet a deadline for implementation of a European Communities measure or may want to co-ordinate a measure with measures elsewhere in the United Kingdom.

The committee and the Parliament should be willing constantly to scrutinise and to refine parent act provisions if it is felt that certain measures are going through under the wrong procedure. In that case, one must recategorise and go back and amend primary legislation. It is true that we cannot predict what will be the best way of dealing with something in 30 years' time. However, the way to deal with that is not to leave it as a grey area so that nobody knows what the procedure will be. There should be reflection on practice and adjustment of the parent act.

Professor Himsworth: I would make a similar point, but I would probably not cast it as a point of deference to the Executive's convenience, although I recognise that as one of the arguments. It is perhaps counterintuitive to make that point, because much of the papers' content has focused on changing systems, particularly systems that have run at Westminster for years. One can think imaginatively to change things here, and I am all in favour of that. I would certainly be in favour of Jonathan Mitchell's suggestions in so far as they would have an impact on the way in which issues are distributed across the Parliament—on whether they are addressed by a committee or are discussed in the chamber or whatever.

I take Colin Reid's point that, at certain points, we must know what the law is. The Executive must know what the law is, and the Parliament must know what the law is as it has laid it down in the past, and it must know what it has the power to do to an instrument. It would be rather alarming for the Parliament to recreate rules post hoc. It would find it difficult to do that. It has, after all, spoken in the form of the parent act. That is tricky.

One possible response would be to say that, under a future statutory instruments act, separate legislation would authorise the Parliament to handle, on a modified basis, the scrutiny of instruments as they come up. That would mean running into practical differences, as Colin Reid described. My sense is that it would be better to look back to parent acts for guidance and instruction as to the limits of the Parliament when instruments or draft instruments require to be made.

Dr McHarg: I agree with that approach. It is wrong to say that we cannot ever determine in advance which procedure will be appropriate. Certain types of things, by their nature, have certain procedures attached to them. For instance, I have been dealing with sunset clauses recently. Provisions that are subject to sunset clauses will end at a specific time, but they may be extended by order. It is quite clear that the affirmative procedure is appropriate for such orders, because they cover the extension of primary legislation. There is no question of importance or otherwise. I liked Colin Reid's approach: if the choice turns out to be wrong, change the choice; do not leave it up in the air.

Murray Tosh: The question then arises how to change that choice. Chris Reid suggested that the appropriate mechanism could be built into a future statutory instruments act. Would it be possible or desirable for all primary legislation containing delegated power provisions to contain a section allowing ministers, by delegation, to amend the delegated scheme within each act? That would leave the initiative with the Executive but, in reality, any proposal to change the scheme of delegation in an act would come from the Executive. Would that be a competent thing to do? Would it be a safe thing to do? It would be like using a Henry VIII power to control Henry VIII.

Jonathan Mitchell: This is very important. It has been said by a couple of people already—and I will say it too—that we are thinking on our feet as

we talk about this. This goes right back beyond the time when we first saw the papers for the inquiry at phase 1 and were thinking about what the inquiry was about. Underneath that, it seems that a major shift of political power is being contemplated, from the Executive to the Parliament. We are talking about a substantial increase in the democratic powers of the Parliament to control Executive actions. That is a preliminary, general point.

I will explain something that I think is not in fact a problem. Colin Reid and others have spoken about timetabling. Everybody works to deadlines—we all do that all the time. At the moment, the Executive will produce something for the Parliament according to what it knows to be the parliamentary timetable. We gave the example of the timetable applying to the mental health tribunal rules. Those rules were laid on 29 August and have to come into force on 5 October. Although she will not admit it herself, I know that Lorna Drummond was instructed far too late in all this. Everything should have been done much earlier. It was the same for the whole bundle of provisions.

There would have been no particular difficulty in the drafting timetable being brought forward quite a few months. The difficulty was created by the fact that the timetable was so short. I would have thought that the proposal to cut out the emergency procedures and Stewart Stevenson's suggestion that some system of electronic voting could be used may merge into an issue about giving more powers to committee conveners. Leaving that aside, many of the problems are driven by the short timetables and the extremely late deadlines for putting material before Parliament. If we could get away from that by lengthening the timetables, many of the issues would fall into place.

12:15

Murray Tosh: Could we take the views of the other guests on that? Colin Reid has mentioned the presence of external constraints, such as the need to respect a European directive or to co-ordinate the introduction of legislation in Scotland with the introduction of United Kingdom legislation in other jurisdictions. Ministers should work back from such external requirements, rather than use them as a reason for insisting on implementation within 40 days. When such a constraint exists, should we be much more relaxed about the timetable? Should there be a limit at all and, if there should, should it be more generous than the 40-day limit that we operate at the moment? After all, that is an historical accident—it is the result of a decision that someone took. The timetable could be changed if there were good reason to set a different target. I wonder what the other guests think. I see that Aileen McHarg's pen is rising, so she might have something to say.

Dr McHarg: There should be a limit, but it is up to Parliament to decide what that limit should be. As we do not operate the procedure, we have no way of saying whether 40 days—or any other period—is appropriate. It is necessary to have a cut-off date. There is a cut-off date for primary legislation, which is the lifetime of the Parliament. If consideration of legislation is not concluded in that time, the process must start again. It is necessary to have some sort of deadline to work to.

Professor Reid: It would be possible to require drafts to be produced a certain amount of time before they could come into force. As has been said, it is human nature to work towards a deadline. The Executive is as busy as all of us; it has a heap of things to deal with. Human nature means that we always work to the end of a deadline. That will create pressure for other people, unless there is a way of persuading the Executive to do things early. I suspect that the Executive will never want to squeeze the Parliament by producing subordinate legislation late—it just happens that way. Unless a formal deadline is created earlier, the situation will not change. Extending the deadline would only exacerbate the problems of annulment and amendment. If drafts had to be available a certain amount of time before they could come into force, that would extend the timetable.

Professor Himsworth: I agree with those comments. It is easy and rather bland to say that some of the matters in question remain within the Parliament's control in the first instance. Of course, Parliaments are driven by those who drive them. It is possible to anticipate in advance that the proposed timetable for the implementation of legislation once it has received approval or royal assent is just too tight, but it is difficult to do much after the event. One can jump to and be more alert in handling the subordinate legislation, but at that point the problem has been created. It is at the earlier stage that time has to be secured.

Lorna Drummond: I will return to the issue of whether the parent act should specify which procedure should be used. It seems to me that there is a problem in predicting whether the use of a particular procedure would be appropriate in 30 years' time. The mental health tribunal rules, which I think are subject to the negative procedure, are an example of another problem with the parent act setting out which procedure should be used.

A statutory instrument might only set out a period of notice, which is fairly uncontroversial, and it might not need really thorough scrutiny. On the other hand, an instrument might have 70 clauses and very detailed procedure, which might require a different level of scrutiny. It is very

difficult for the parent act to prescribe different procedures depending on the content of the statutory instrument. That was one of the problems that we foresaw that might mean that it would be better for the Parliament to decide on the appropriate procedure.

The Convener: Kenny, when you ask your question, could you move on to the consultation issue?

Mr Macintosh: There seems to be a problem with timetabling. There is the question whether the 21-day rule is appropriate because it is a difficult time constraint to meet and we are not meeting it. That is quite simply addressed; if we are not meeting the deadline then we need to amend the procedure. I agree with Colin Reid that it is arbitrary whether the time limit is 40 days or 60 days, but work expands to fill the time available. The Executive could end up giving us less to work on within those 60 days and that would not be enough time, because we would be working against the clock over 60 days rather than working against the clock over 40 days. There is no huge advantage there. If greater scrutiny is needed, we should have a pre-consultation phase or get more information at the draft stage, rather than change the timetable.

We are addressing the different types of parliamentary control. It strikes me that, for most subordinate legislation, there is no issue about whether we give it enough scrutiny. There are not that many bills that have created problems, although there are the mental health tribunal rules that Lorna Drummond talked about. Those were a problem because of the deadline set by the Executive or Parliament—that created the problems that we are dealing with. It is not that bills are not getting enough scrutiny; the major problem is that some bills are getting an enormous amount of scrutiny that they do not really deserve. The problem is therefore not that there is too little scrutiny but that there is too much on relatively unimportant matters. Most of the procedures for subordinate legislation were laid down years ago. To return to the devolution context, we are subjecting pre-devolution legislation to the level of scrutiny that we can give it now, and finding that that is not appropriate. We are giving some legislation too much parliamentary time, and thereby giving it a political and parliamentary importance that it does not really merit. When we give some things parliamentary time, other things have to be demoted, but that does not mean that those issues are not getting enough time, if that makes any sense.

There is a problem with timetabling. If we legislate in haste, we repent at leisure and we have difficulty in squeezing all the legislation into the parliamentary time that we have available.

Murray Tosh: Just to help, Kenny, what is it that we are overscrutinising?

Mr Macintosh: We are overscrutinising subordinate legislation made under acts that were passed before devolution. There are numerous examples, such as the food protection orders. I believe that the parent acts were made a long time ago and they give us a burden of subordinate legislation that is inappropriate. I do not think that the Scottish Parliament has passed many acts or is passing subordinate legislation at the moment that is not getting the amount of attention appropriate to its parent act.

The Parliament decides how to categorise subordinate legislation and how much importance we give it. The decision is taken when the bill goes through Parliament.

The Convener: I do not really want to stop you Kenny, but I am very aware of time.

Mr Macintosh: I want to know whether people agree with me. When a bill goes through Parliament we decide that the delegated powers are a matter for the Executive. We are saying at that stage—the Parliament is saying—that the decision is for the Executive. We are leaving it to the Executive to use those regulatory powers. Therefore, the decision on what form they take, what kind of SSI they are, is a matter for the Executive.

Murray Tosh: The final decision is ours.

Mr Macintosh: We have to approve them.

Murray Tosh: We pass them.

Mr Macintosh: We have to scrutinise them and approve them or send them back. Ultimately, however, whether they are in an SSI, or what form of SSI they take, is definitely a matter for the Executive. If it is not, then when the Subordinate Legislation Committee looks at bills, we should say that we do not think that a particular delegated power is the right one.

The problem that we are dealing with is an historic one. I am not sure that our current practice is not repeating the problems of the past. The amount of attention that we give bills now is such that we are avoiding the issue.

However, I should talk about consultation. Many people suggested that the scrutiny process would be improved if we had time to give bills and subordinate legislation greater attention while they were in draft stage before they were laid before Parliament and if we were consulted on them. There were several comments on that. Dr McHarg suggested that we should differentiate between consultation, and a parliamentary procedure that is not consultation.

The Faculty of Advocates said that bills and subordinate legislation should be available so that it can see them, but that such legislation should be put through a parliamentary process. I would like comments on how we could improve the consultation process.

Stewart Stevenson: Much primary legislation enables but does not require secondary legislation. I give you the example of the Executive passing the Local Government in Scotland Act 2003, which created the power of well-being, in essence saying to local authorities, "You get on with it. You can now do everything that you are not forbidden to do." Previously, it was the other way round.

For example, an SSI was introduced under previous legislation—the Executive was entitled to do that—to set out the planning application fees that local authorities must charge. I challenged that at the time. I asked why the Parliament was doing that and why local authorities could not set their own fees, as they could then compete with one another. There is a political issue there, but there is also a practical issue. It is an example of where primary legislation allows but does not require that fees be set. We are still doing it. I am sure that it is time for a systematic look at whether we are actually doing a great many things that we do not need to do at all. That is one example that I have come up against.

The Convener: Could I ask Dr McHarg how we might introduce consultation on draft SSIs? She had reservations that further consultation might demean the original consultation.

Dr McHarg: I can see the argument for saying that Parliament should be consulted at the draft stage, if that is the best that one can get. It is a way of ensuring that concerns are taken on board at an early stage. In the absence of a power of amendment, which means that the only option is the nuclear option, that might be the best way forward in practice.

I was uncomfortable with the idea of reducing Parliament to being a consultee, or just another interest group whose views, although they must be taken into account, can be ignored. That would be wrong in principle. If that is the best that can be achieved, that is fair enough, but it is not what should be aimed for. It misrepresents what the relationship between Parliament and the Executive should be.

The Convener: Was it you who made the point that the Executive might not have as full a consultation if it knew that there would be another consultation later on?

Dr McHarg: That was Colin Reid's point.

12:30

Professor Reid: If the Parliament is to be consulted, who will be consulted and what function will they fulfil? The danger is that effort will be duplicated or spread, which would weaken the Parliament's role, especially if it were seen just as one consultee. I return to the general point that, when consultation papers are made available, nothing prevents an individual MSP, a group of MSPs or a committee from responding, formally or informally. I am not sure whether a formal process that would eat up more parliamentary resource would be the best use of effort.

Jonathan Mitchell: I will make a short point on the edge of that. I return to an earlier comment by Stewart Stevenson. One gap is the lack of an emergency procedure. The problem is that everything is treated as a bit of an emergency—everything is urgent and must be dealt with in 21 days. Much of that pressure might be relieved if genuine emergencies could be identified—I do not know whether that would be by a form of electronic voting, as was suggested, or by conveners. That would enable non-emergencies to be identified, which could be dealt with at leisure.

Stewart Stevenson: In my professional life, we had three categories for projects: top priority, urgent and desperate. I think that the Executive works on the same basis.

Mr Macintosh: Super-affirmative procedure is the only one that builds consultation of the Parliament on a draft into the legal process. If the Mental Health (Care and Treatment) (Scotland) Act 2003, for example, had specified super-affirmative procedure, more time would have been available to discuss the mental health tribunal, because a draft stage and a laying stage would have been used. For some bills, is super-affirmative procedure the solution that we are looking for? That would have to be decided in scrutiny of the bill. Is that the answer?

Jonathan Mitchell: Not if it is done during consideration of the bill.

Professor Himsworth: Perhaps I misunderstand the point, but any procedure, including class 1—laying in draft subject to an affirmative resolution—provides an opportunity for discussion and approval. Of course, super-affirmative procedure adds procedures for comments to be supplied and so on.

I did not respond on the issue because I am not completely sure whether much of a problem exists. Unless the Parliament feels that it is being left out—I might not use the word "consultation", because it muddies the waters slightly—I am not sure whether there is much to add. I say with respect that a real worry would exist if the outside world felt that it was not being adequately

consulted on instruments, but I suspect that that is not a broad problem. Indeed, the word in Scotland since devolution has been a bit to the contrary; the suggestion is that the population is overconsulted, although the procedures still might not fully accommodate some interest groups. I realise that that is not directly under the Parliament's control and that consultation with such groups is left to the Executive.

Mike Pringle (Edinburgh South) (LD): Super-affirmative procedure has been used only once since devolution. I was involved in that. The people who draft bills and civil servants dislike the procedure, because it imposes the extra layer of consultation to which Professor Himsworth referred. I thought that the procedure was a good idea, but people tried to persuade me to drop it.

Mr Macintosh: I will give an example of where consultation was used in a different context. The code of practice under the Education (Additional Support for Learning) Act 2004 was not subject to super-affirmative procedure, but it was subject to a similar procedure. The act is fairly straightforward, but it leaves an enormous amount of detail to the code, so the Executive agreed to consult on a draft code, which was then amended considerably after consultation.

However, an interesting point is that the Parliament could not amend the code at the final stage other than by rejecting the whole caboodle—

Mike Pringle: Was the Parliament unable to debate the final version of the code?

Mr Macintosh: We were able to debate it in committee, but the final draft was subject to negative procedure. That meant that, if we did not like one tiny item, our only option was to kick out the whole thing. Obviously, that is very unsatisfactory.

However, the consultation on the draft code resulted in a far better final document. Between the initial publication and the final publication, there was a huge improvement. That is what we are aiming for with a super-affirmative procedure.

The Convener: However, I agree with Chris Himsworth that we perhaps need to think of a different term, given that the kind of consultation to which Ken Macintosh has referred is different from the consultation that needs to take place earlier on in the process. The issue is how we can introduce into the process some sort of amending system so that, in cases where it is helpful, we can amend a proposal rather than throw it out completely. I think that we are all agreed on that.

Before we finish, I will give everyone a final chance to raise any important issues that have not been covered this morning. I could have guessed that Stewart Stevenson would have such an issue.

Stewart Stevenson: One power that is worth thinking about in relation to amending SSIs would be the power simply to delete things. In many, albeit not all, instances in which Parliament is uncomfortable with an instrument, a power of deletion—which would be well short of amendment, as the Parliament could not simply substitute its own words—would be a useful addition.

The Convener: Do our guests want to make any further points?

Professor Reid: One issue that has not been touched on—although Chris Himsworth mentions it at the end of his written evidence—is the way in which rules are made under the European Communities Act 1972. The co-existing powers for UK ministers and Scottish ministers to make such legislation can run a coach and horses through the divide between reserved and devolved matters. That may be a separate issue, but it is important because the procedures that we have discussed can often be bypassed completely when an issue has an EC dimension.

The Convener: That is an important issue, and we are aware of it.

Before I allow Jonathan Mitchell to speak, I should mention that we have not had time to consider a number of questions, so we may write to our guests about those. It would also be helpful if they could write to us with any additional points that they want to make on the issues that have been raised.

Jonathan Mitchell: I want to flag up the issue of publication and accessibility, which has not been mentioned. One suggestion that seems to have been left hanging from phase 1 of the inquiry is the idea of a rolling consolidation of statutory instruments. The idea is taken up in Colin Reid's submission, which mentions it as "a personal hobby-horse" but it is shared by many others. We do not want any more statutory instruments that involve an 18th set of amendments for which one requires scissors and sellotape to put the whole thing together. Instead, we should move to a system in which the norm is that, when draft statutory instruments are presented, they show what the end result will be if they are accepted. At the same time, it could show what amendments are being made. That is the norm in any other field of life. I would not like that suggestion to be dropped simply because it was only an issue in phase 1.

The Convener: I can assure you that it will not be dropped. It is quite a big issue.

Professor Reid: As so many of us who have to work with delegated legislation find out, the absence of consolidation can make things almost impossible. There are huge areas of law that I

regard as impossible to teach because there is no way that students can find it. If I set them work for a seminar in a week's time, by the end of the week, they might not even have found the up-to-date text of the law, far less had any chance to think about it.

There is then an issue about how to resource consolidation and to ensure that the procedures do not stand in the way of it. As I understand from previous work, there is a fear that, if bigger chunks of legislation than just the few words that are to be changed are put forward for scrutiny, old debates and arguments could be reopened. We want to ensure that the Executive gets given some sort of comfort blanket to reassure it that that will not happen.

Various techniques can be used. It is possible to go the whole way and have complete regulations, or a minimum chunk might simply be amended—rather than inserting individual words, it might be necessary to deal with a whole article or paragraph. That would be an improvement on inserting odd words here and there. Replacing a schedule might be easy in some cases, if it is short, but in other cases, the schedule might go on for pages and pages because of the way in which the legislation is drafted. I should think that there are ways to improve the situation short of the ideal, which would be to have complete consolidation all the time.

Dr McHarg: I have one fairly technical issue to raise. If the committee recommends a significant streamlining of or change to the procedures that are used, it is easy to see how that could work for subsequent acts of the Scottish Parliament and for existing delegated powers conferred by Westminster statutes within devolved competences. More problematic is the extent to which the committee can change the scrutiny procedures that are laid down in UK statutes that are outwith devolved competence. You do not want to have to operate two parallel sets of procedures.

The Convener: I think that I heard that point being raised informally earlier.

Lorna Drummond: On publication and accessibility, I want to highlight one of the matters that is raised in our paper. We are concerned not only with new SSIs that are published but with previous SSIs and their accessibility. At the moment, they are published on the office of public sector information's website. The Faculty of Advocates is aware that statute law databases are being produced by the Lord Chancellor's department. Our understanding is that the proposal is for those to contain SSIs. However, there is an issue about the level of public accessibility to that database. We are told that it is to come online and be open to the public, but we have not been told of any policy decision on the cost to the public of access to it. That issue is very much at the forefront of the faculty's mind.

The Convener: Thank you for raising that point. We are very much aware of those issues.

Professor Himsworth: I encourage the committee to keep an eye on Wales. I do not want to confuse the issue further, and I cannot speak with authority on Wales, but it strikes me that, although its procedures came from a completely different starting point, the National Assembly for Wales might end up in the same situation as that in which the Scottish Parliament finds itself now, although Wales has the benefit of having done things differently—necessarily—in the intervening period. It would be useful to add its experience to that of this committee. In addition to a white paper, a very informative report by a committee of the National Assembly for Wales has now been published, containing that committee's view of the future of legislation in Wales. It includes some useful material for developments here.

The Convener: I thank all our guests very much, and I look forward to getting any extra information. We will write to you with a few questions that we have not had time to deal with today.

12:45

Meeting suspended.

12:46

On resuming—

Delegated Powers Scrutiny

Environmental Levy on Plastic Bags (Scotland) Bill: Stage 1

The Convener: The committee asked for an explanation of the drafting approach that had been taken. The non-Executive bills unit's response indicates that the approach is intended to minimise reliance on Scottish ministers for the bill's implementation and operation.

First, we asked whether consideration had been given to extending the power in section 2(4) to allow ministers to add to the list of exemptions. NEBU has confirmed that, as we thought, the provision reflects the member's policy to restrict the power's scope.

I am sure that Mike Pringle will be able to comment on the matter.

Mike Pringle: I am happy to answer members' questions.

The Convener: Are members content with the response?

Members *indicated agreement*.

The Convener: On section 6(3), the committee sought clarification of why the requirement for record keeping was set at five years and of the kind of records that suppliers would be expected to keep. The non-Executive bills unit has provided quite a bit of explanation on that matter. Basically, the member felt that the six-year requirement for record keeping that was introduced in Ireland was too long and that five years would be a better option.

Are members happy with the response?

Members *indicated agreement*.

The Convener: On section 8, the committee noted that guidance to be issued under the provision would be binding on local authorities and asked whether it would be more appropriate to incorporate it in a statutory instrument. According to the response, the flexibility offered by guidance was considered to be preferable, because in different local authority areas, different criteria might apply and different projects might be operating.

The response also indicates that there is an intention to amend the provision to make it clear that ministers are required to issue guidance. We would be happy with that.

Are members happy with the response?

Members *indicated agreement*.

The Convener: Section 10(4) allows ministers to make further provision on the exercise of various powers that are conferred on authorised officers. The committee asked for clarification on how the power might be used in practice, and we have received an explanation on that matter.

Are members happy with the response?

Members *indicated agreement*.

The Convener: Excellent.

Executive Responses

Mental Health (Certificates for Medical Treatment) (Scotland) Regulations 2005 (SSI 2005/443)

12:49

The Convener: Item 3 is consideration of Executive responses. On the regulations, the committee requested clarification of whether the reference to page 3 of form T2 in column 2 of both schedules was deliberate or a mistake. It has been pointed out that the reference should indeed be to page 3. However, although we have received the updated, clearer version of form T2, page 3 is not mentioned anywhere on it. I suggest that, for the sake of clarity and to allow people to understand the regulations, we report to the lead committee and Parliament that the fact that the page in question is actually page 3 could be made clearer.

Are members agreed?

Members *indicated agreement*.

The Convener: It seems to me that we should make the regulations accessible and understandable.

Murray Tosh: Members indicated assent.

The Convener: We will move on then.

Mental Health (Care and Treatment) (Scotland) Act 2003 (Transitional and Savings Provisions) Order 2005 (SSI 2005/452)

The Convener: The committee raised three points on the order. We asked whether the reference in articles 20(4)(a), 25(2)(a) and 29(4)(a) to

"any period of 12 months"

ought to be changed to "the period of 12 months". Although the Executive agrees, it has not indicated when it will undertake to amend the provision. As a result, I suggest that in our report we say that it would be good to know that it will be amended. Likewise, to our question about the use of "if" in article 34(8)(b), the Executive has said that the word should be "of", but it has not said when it will amend the order.

Murray Tosh: The response was particularly poor, as the Executive has not indicated its intention to put the matters right.

The Convener: Those points should be included in our report to the lead committee and Parliament.

We also asked whether the reference to "care plan" should be a reference to a "part 9 care plan". According to the Executive, the reference should be to "care plan".

Murray Tosh: However, that rather proves our point that the reference is not very clear. If our excellent legal advisers were not clear about its meaning, how are users, practitioners and those who read the order supposed to be clear about it?

The Convener: We should pass those points on to the lead committee and Parliament. Are members agreed?

Members *indicated agreement*.

Instrument Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 11) (Scotland) Order 2005 (SSI 2005/455)

12:52

The Convener: No points arise on the order. Are members agreed?

Members *indicated agreement*.

Instrument Subject to Annulment

Food Labelling Amendment (No 2) (Scotland) Regulations 2005 (SSI 2005/456)

12:52

The Convener: No points arise on the regulations. Are members agreed?

Members *indicated agreement*.

Instrument Not Laid Before the Parliament

Act of Adjournal (Criminal Procedure Rules Amendment No 4) (Mental Health (Care and Treatment) (Scotland) Act 2003) 2005 (SSI 2005/457)

12:52

The Convener: Although no substantive points arise on the instrument, there are a number of minor points that we could raise in an informal letter. Are members agreed?

Members *indicated agreement*.

The Convener: I thank comrades—sorry, colleagues—[*Laughter.*]

Murray Tosh: What if Mr McLetchie reads that?

The Convener: I thank members for attending the meeting.

Meeting closed at 12:52.

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