SUBORDINATE LEGISLATION COMMITTEE

Tuesday 1 November 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
29th 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)
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

Bill Adamson (Food Standards Agency Scotland)
Campbell Evans (Scotch Whisky Association)
Dave Gorman (Scottish Environment Protection Agency)
Sandy McDougall (Food Standards Agency Scotland)
David Williamson (Scotch Whisky Association)

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 1 November 2005

[THE CONVENER *opened the meeting at 10:35*]

Regulatory Framework Inquiry

The Convener (Dr Sylvia Jackson): I welcome members to the 29th meeting in 2005 of the Subordinate Legislation Committee. Apologies have been received from Adam Ingram and Murray Tosh.

Agenda item 1 is our inquiry into the regulatory framework in Scotland. I welcome our witnesses: Bill Adamson and Sandy McDougall are from the Food Standards Agency Scotland; Dave Gorman is from the Scottish Environment Protection Agency; and Campbell Evans and David Williamson are from the Scotch Whisky Association.

I remind members that contributions to the debate should be made one at a time through me and that you can indicate to the clerk—Ruth Cooper—that you want to say something.

I thank the witnesses for their written evidence. Such evidence gives us a good basis for our questions and is always extremely useful. We have not received responses to some questions, but witnesses should feel under no pressure whatever to give answers if they think that a question is not appropriate to their organisation.

What is your experience of subordinate legislation and can you highlight particular issues that have impacted on your organisations?

Bill Adamson (Food Standards Agency Scotland): Thank you for inviting us to give oral evidence to supplement our written submission.

I will set the scene by outlining the status of the Food Standards Agency Scotland. The agency is a United Kingdom-wide Government department that operates at arm's length from ministers. It is governed by a board that is appointed to act in the public interest and its principal functions are to protect public health and to improve food safety and standards. We clearly have a regulatory role in carrying out that function, so we provide or draft subordinate legislation for scrutiny by Parliament.

In the past few years, we have become involved in drafting legislation in two main areas. We have principally become involved in the direct application of European legislation that is drafted in Brussels, and in giving effect to it by means of enforcement powers, provisions and penalties. Therefore, we often provide statutory instruments to give effect to such legislation.

The second main area in which we have recently been involved is the protection of public health by emergency control legislation. The committee's most obvious experience of such legislation would probably be the Food and Environment Protection Act 1985—or FEPA—orders that we occasionally have to put in place to protect the public from algal toxins from shellfish harvesting. As our written submission says, both areas present us with challenges, but the principal challenge lies in the timeframes for delivering legislation—quick, reactive action with emergency orders is clearly needed to ensure that the public are protected, so that obviously has implications for us. We must ensure that we act quickly.

Secondly, we are often driven and governed by a timetable that is set by Europe rather than by us. In managing projects, we must look back from the implementation date that Europe has set on a regulation that is to be directly applied and try to factor in everything that must be done to deliver it. Obviously, that will include scrutiny by Parliament and the Subordinate Legislation Committee. There is also the need for public consultation at statutory instrument level and at the level of European legislation. There are often difficulties; we can plan when we intend to fulfil all our obligations to consult fully, but it can be difficult sometimes to factor in all the elements to ensure that we deliver on the day from which the directly applying legislation is intended to operate.

The Convener: We will return to emergency orders because we are aware of suggestions that have been made about them.

Dave Gorman (Scottish Environment Protection Agency): There are both similarities in and differences between the Food Standards Agency Scotland and SEPA. We are an executive non-departmental public body that contributes to legislation but which does not produce it—our legislation comes from the Scottish Executive. Most of it is in the form of directives, so we have fixed transposition deadlines and quite a lot of scrutiny from Europe on meeting them.

Our legislation tends to come under either the affirmative or the negative procedure. Without pre-empting later questions, I say that timeliness is an issue for us. The process starts for us when we get the regulations. We tend not to have emergencies in the same way as the Food Standards Agency Scotland does. However, we need timely legislation because we need to turn it into permits, to develop charging schemes, and to consider our enforcement position. We also need to make industry aware of what is happening.

We support much of what the committee has said, but we are worried that our part of the process may be squeezed. There will still be a fixed timescale for legislation to be implemented. In much of our legislation there may be a first part that requires the United Kingdom or Scotland to have the legislation. However, the second part will require that the legislation be implemented by a certain date. One of our concerns is having enough time to do what we need to do in talking to industries so that they are aware of what is coming.

Campbell Evans (Scotch Whisky Association): Our perspective is different from that of the other two organisations. Our involvement starts when legislation is introduced that may affect our member companies and how they do business. That said, time is probably the most pertinent isssue.

Our experience has been in one specific area, but that has thrown up concerns about Parliament's opportunities to scrutinise legislation that is to be introduced and the timetable within which various committees can consider the effect of, and the reasoning behind, legislation. We would have concerns about the proper scrutiny of legislation and its implementation. That is probably all that we should say at this stage.

Mr Kenneth Macintosh (Eastwood) (Lab): I would like to ask Dave Gorman about the appropriateness of the type of subordinate legislation that comes before the committee. Is the affirmative procedure or the negative procedure appropriate to subordinate legislation? Are those procedures too complicated and time consuming? Do they provide sufficient room for scrutiny? I want to start with Mr Gorman because he has made a suggestion that is worth exploring about introducing a procedure that would allow the significance of an instrument to be debated later. In other words, matters would not just be laid down in primary legislation, but could be discussed and interpreted later. Will you expand on that?

Do you have any examples of procedures that the Scottish Environment Protection Agency has used that have either overscrutinised or underscrutinised?

10:45

Dave Gorman: Those questions raise many issues. We feel that measures such as the implementation of the water framework directive in Scotland are clearly significant, so it would not be appropriate to deal with the regulations for such measures under the negative procedure. However, a distinction can be made. For example, as our written evidence states, we felt that the level of scrutiny for the Pollution Prevention and Control (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/340), which mainly correct errors in previous regulations, was about right. We are on the 15th version of the pollution prevention and control regulations. The issue is about choosing the right level of scrutiny of instruments.

Because we do not produce instruments, we do not have the same amount of experience as the Food Standards Agency. Our point—which is made without prejudice to the constitutional implications or procedural issues—is that because a time lapse can occur between the introduction of an act and the regulations that are made under it, by the time the regulations are produced, what was felt initially to be a significant issue may not be, or vice versa. We should have flexibility to decide which scrutiny process is to be used and we should not always have to go back to the primary legislation for that. I admit that our written evidence does not give a lot of detail about how that might work, but we feel that flexibility is missing. Before we read the background papers, we had not realised how inflexible the scrutiny arrangements can be.

Mr Macintosh: We definitely acknowledge the point that judgments about the significance of measures in an act can change over time.

I ask the Food Standards Agency to respond to the question. The FEPA orders undergo a level of scrutiny that may be inappropriate given the number of them that come through. What is the FSA's view on the introduction of a new procedure to allow re-evaluation of whether the affirmative or negative procedure is called for?

Sandy McDougall (Food Standards Agency Scotland): The FEPA orders are a good example of instruments that are subject to excess scrutiny. In an average year, we have about 30 FEPA orders, so they have become largely a matter of routine. The key point about the orders is that they are put in place immediately to protect public health so, arguably, the scope for scrutiny is limited. It is important that risk assessments be conducted immediately and that orders be put in place almost overnight.

It is important to bring it to the committee's attention that we expect that the changes to the food hygiene legislation that are due to commence on 1 January 2006 will dramatically reduce the frequency of FEPA orders during 2006. Historically, the number of FEPA orders has been high. That reduction is related to a change in the regulations, under which we will not sample offshore and the controls will move onshore. If the existing number of orders was to continue, we would take the view that excess scrutiny takes place.

Mr Macintosh: I am glad that you explained the significance of that date, because I was going to ask about it.

Mr Gorman said that we must consider how to and who should define significance. It might be unfair to ask the witnesses to define significance, but would any of you be concerned that a power to alter the level of scrutiny might be used in reverse so that issues that were politically contentious were deemed to be significant when that was a political reaction rather than a reflection of the subordinate legislation's importance?

Sandy McDougall: The vast majority of the Food Standards Agency's work is on the implementation of European Union regulations. We are perhaps set apart by the widespread consultation that we conduct as part of the development of legislation and our clear input into European negotiations. A lot of scrutiny is carried out at the front end, or the development, of legislation. You might want to develop with my colleague the issue of how scrutiny can come in at a stage that could make a difference.

Bill Adamson: The only other thing that I would add is on the principles of openness and transparency. If the suggestion is that the importance of an issue is politically driven, the issue for the agency would be whether the public would perceive that to be counter to our principles of openness and transparency—whether we could be seen in some way to be influencing the outcome. As we said in our submission, in principle, we have no real problem with the idea of greater scrutiny or with the use of affirmative procedures. Our one caveat relates to when an issue does not fall under the category of an emergency—as we describe in our submission—or if an issue requires us in law to transpose regulations within a specific period.

If a matter is perceived to be important in terms of risk, it seems sensible that it still be given the necessary degree of scrutiny. However, I guess that we would be concerned about the suggestion that, instead of being used to add value, scrutiny had a political dimension.

David Williamson (Scotch Whisky Association): We can certainly see the benefit of greater assessment of how an issue is dealt with, for example through the use of the super-affirmative procedure. However, the difficulty arises in making the assessment. Words such as "contentious" are hard to define in terms of legislation. For example, if the Scotch whisky industry considered an issue to be contentious, would that be enough for the matter to be dealt with through the super-affirmative procedure or would a range of other sectors need to show that they had similar or different concerns before the procedure was used? The area is worthy of further exploration; certain issues will need to be looked at in the future.

The Convener: We will return to the super-affirmative procedure in a moment. I have one or two quick questions for the Scotch Whisky Association. Apart from what you said about the super-affirmative procedure, is there any other way in which Parliament's scrutiny of subordinate legislation can be improved?

David Williamson: As we said in our submission, our key area of interest is the affirmative procedure. By and large, our experience tells us that the procedure is unproblematic. However, our concern is that, when problems have arisen, time constraints have led to lead committee's having a lack of room to manoeuvre in dealing with instruments. Obviously, the lead committee has a busy programme. It is therefore difficult for any subordinate legislation to be brought before a lead committee in a timely manner. If the committee feels that it is necessary to examine an issue in more depth or to call for further evidence, its room for manoeuvre is limited. There are issues around the length of time that is made available to committees for scrutiny.

The other key issue is a lead committee's lack of room for manoeuvre in terms of amending legislation. We covered that point in our submission. We can see the benefit of a lead committee's being given the opportunity to recommend acceptance of legislation on the basis that amendments be made.

The Convener: Stewart Maxwell will address that issue. Before I bring him in, I have a couple of quick questions for SEPA. You made a point about trying to get more flexibility into the system. I am sorry—I am talking to the wrong person. Will you elaborate on that, Mr Gorman? Essentially, you seem to be saying that your role starts once you have regulations. Does SEPA consider it important to be involved earlier?

Dave Gorman: On flexibility, we largely agree with the Scotch Whisky Association that, with large and complicated pieces of legislation, the process would benefit from our being able to propose changes. We say that without knowing fully the impact on timescales—we always have one eye to that issue.

It is not right to say that we make no input. In practice, we work closely with the Scottish Executive; although we have no formal role, we work with varying degrees of closeness depending on the policy issue. On the whole, we are quite comfortable with that.

Mr Stewart Maxwell (West of Scotland) (SNP): Before we go into detail on whether things should be amended, I would like to ask you a general question about your concerns about the current

situation and the take-it-or-leave-it, all-or-nothing approach. Could you explain your concerns in that regard? Also, if you would like a change, what sort of change should there be?

Bill Adamson: To be honest, the majority of our instruments are subject to the negative procedure at the moment. We make subordinate legislation under two primary acts: the European Communities Act 1972, which relates to instruments that are driven by European legislation, and the Food Safety Act 1990, which relates to instruments that come forward as the result of a national provision. The 1990 act contains a requirement for annulment procedures. Therefore, all the instruments that are currently produced under that act are made under the negative procedure. To a certain extent, that is the procedure that will be followed, which will not lead us into a situation in which Parliament formally decides to make changes.

We already consult widely when we draft legislation, regardless of whether it will be subject to the negative or the affirmative procedure. We believe it to be appropriate to involve the Subordinate Legislation Committee, the Health Committee and, perhaps, other parts of the Parliament at the consultation stage so that we can hear their views before a final instrument is drafted. Even in respect of the negative procedure, that would enable Parliament and the relevant committees to make formal comments that we could consider before an instrument came to Parliament under the negative procedure. There is no reason why that should not happen. We are bound by European law to consult on all food law that we bring forward.

We have little experience of using affirmative procedures, apart from in relation to the FEPA orders, which were touched on earlier. With those, a binding factor arose from their emergency nature. However, were we to bring forward affirmative legislation that was not of an emergency nature or which did not have certain tight timescales attached, Parliament would have an opportunity to comment at the pre-emptive stage and to make changes at the parliamentary scrutiny stage.

Mr Maxwell: Your suggestion about the consultation stage is helpful. Does SEPA have a view on the general point?

Dave Gorman: It strikes me how much is still up for grabs, even when statute has been agreed and detailed legislation is being worked on, particularly in relation to the environment. We are always struck by how busy everyone is. Even when we consult well in advance, our industry liaison groups and some of our stakeholders say, "You are talking about something that is two and a half years away. We find it difficult to get our members' views focused on something that is so far away." To an extent, there is nothing like having a regulation to concentrate people's minds. To allow later amendment would give people another chance.

Furthermore, when we come to implement the law, if there is still enormous dissatisfaction with it from the parliamentary stage, that does not help us do our job pragmatically. Anything that can be done to get trade bodies or stakeholders on side would be welcome from our point of view.

As environmental regulators, we are beginning to realise that there is more than one way to skin a cat. We have tended to use a fixed model that involves testing against people's permits. However, there are different ways of working and it would be welcome if those different approaches could be suggested during the parliamentary process.

Mr Maxwell: Does the Scotch Whisky Association generally agree with that?

11:00

Campbell Evans: We certainly agree on the need for later amendment or further scrutiny. We have been involved in affirmative, rather than negative, procedures. The issues that arise affect a number of industries, not just ours. Various concerns have been expressed and taken on board by the committee, but it has felt unable to do much, because instruments have had to be passed in their entirety or fall.

It is not as though the majority of the regulations have been of concern. There have been problems with key areas and particular parts of instruments. Instruments are not going to be thrown out just because one or two areas might have benefited from amendment. There have been situations in which tweaking was required, rather than their being baby-and-the-bath-water situations.

Mr Maxwell: Mr Gorman, in SEPA's written evidence you referred to amendment at scrutiny stage. Could you expand on that? How would that work in practice?

Dave Gorman: We had the affirmative procedure in mind, when issues come up that can be dealt with in a better way.

I also want to point out that we have a problem with European lawmaking, when proposals come up at scrutiny stage. The European Commission has introduced an impact assessment for all new proposals, looking at the impact on society and business, which is welcome. However, we sometimes have a problem with late changes, the impact of which has not been assessed, or which create difficulties for regulators.

To answer your question, we were thinking of flexibility in the affirmative procedure, but we would be concerned about whether there would be time for the impact of any changes to be assessed, so that we did not end up with something that worked for one party but not for another.

Mr Maxwell: I wonder about the process. I think that the Scotch Whisky Association mentioned that if there were a policy change part way through the process, it would be helpful to be able to amend the instrument. However, if that policy change occurred late in the process, the point that Mr Gorman just made applies, because there would not be a chance to examine the impact of that policy change. How does the SWA think that it can balance those two issues?

Campbell Evans: Subject to anything that my colleague might wish to add, one problem that we have faced is getting the text of the legislation, because it is published late in the process. That makes proper scrutiny difficult, because the text may not be the same as that which people assume is moving forward. The important point is that we should be looking to get regulations right; scrutiny ensures that we produce the right legislation at the outset, rather than having to return to it after it has been passed because it does not work. We have found that the minister of the day will make a number of commitments to examine key areas of concern, which will be welcomed by the committee, but how is that taken forward and scrutinised and the impact assessed? It becomes a rather informal, rather than formal, process.

Mr Maxwell: Part of the problem is that it is difficult to get the balance right.

Do the witnesses—particularly the FSA, because it deals mostly with emergency orders that are made quickly—support amending an instrument after it is made, because effectively you are unable to do so beforehand?

Sandy McDougall: Virtually all our emergency legislation gives little scope to amend. As I said previously, emergency legislation is of two sorts. First, we have the imposition of a FEPA order, based on a risk assessment, to protect public health. It is a matter of fact that a FEPA order is laid when there are toxins, and there is no scope to amend that order. The other emergency legislation is mainly in the European context. I will illustrate with an example that the committee saw earlier this year—the Food (Pistachios from Iran) (Emergency Control) (Scotland) Amendment Regulations 2005 (SSI 2005/70). Iranian pistachios have been subject to control measures since 1997. As times move on—as science improves and procedures need to be amended—those control measures are amended. I think that the pistachio control measures have been amended six or seven times. It is critical that those amendments are made immediately, as they either improve or remove control measures, depending on whether the control needs to be reduced. In the case of Iranian pistachios, earlier this year administrative procedures needed to be put in place immediately to improve the control of imports into the EU; however, there was little scope for amendment of the regulations at that time.

Mr Maxwell: Do the other witnesses have any views on the Parliament amending instruments after they are made? I accept that there are problems with emergency instruments. Do SEPA and the Scotch Whisky Association have a view on the procedure in other circumstances?

Dave Gorman: Amendments are quite often made to legislation that relates to SEPA. In phase 1 of the committee's inquiry, we said that we do not think that that is terribly helpful. We agree with the Scotch Whisky Association that the legislation should be right the first time. It is not helpful for industry to have people coming in and out of the law, as we sometimes do. Much environmental legislation is based around thresholds, and there have been quite a few changes to thresholds over the years. That has meant that companies have come under regulation for a while and have then left it, although they may have the misfortune of coming under regulation again at a later date. If it can be done—and I recognise that it is difficult—it is much better to get the legislation right the first time. Our law does not seem to change in the same way as food safety law, for example; therefore, there is a need to get it right first time.

Mr Maxwell: I presume that Campbell Evans would agree with that.

Campbell Evans: I probably would.

The Convener: Sandy McDougall gave us the example of the pistachio control measures. I am very good with concrete examples when I can follow things through. If it is not too much work for you, I ask you to give us some examples of occasions when there has been a particular issue in relation to regulations or orders. You might do that in a flow diagram rather than a long explanation. If you could let us have that, that would help. The points that you have made are valuable, and it would be good to see them in the context of a specific issue—I know that there have been issues.

Campbell Evans: Certainly.

The Convener: Thank you. Gordon Jackson has a question on the consultation process.

Gordon Jackson (Glasgow Govan) (Lab): In a sense, we have already touched on the

consultation process, as the consultation process and the amendment process are connected. As Stewart Maxwell said, it is striking a balance that is difficult. We and others have toyed with the idea of placing a duty on the Parliament to consult on all instruments—a general duty to consult. However, some of you have been doubtful about that. The Food Standards Agency has suggested that some codes should be exposed to public consultation before their adoption, and the Scotch Whisky Association has referred to taking stakeholders' views into account. I want to tease out a wee bit more on consultation. Do you have any views on how we consult stakeholders and the public?

Bill Adamson: As I mentioned, apart from European legislation that has a degree of emergency associated with it, we are now required, under directly applicable EU regulations, to carry out a consultation. We do that anyway; it is part of the agency's principles to be open and transparent and to ensure that we consult. Normally, we try to do that for the three months that is the guide for a consultation period. As we touched on earlier, that consultation takes place in several different ways. We passively put a document out for comment from all key stakeholders and we attract comment from key stakeholders on the legislation during the drafting phase. However, we have discovered through practice that, rather than doing it passively, if we engage stakeholders directly we can engender more enthusiasm for giving us some feedback.

In particular, as Sandy McDougall said, we are about to put in place an instrument that directly applies European legislation on food safety and hygiene, which will apply from 1 January 2006. The SSI will, in effect, simply enforce that European legislation. One of our key stakeholder groups will be the enforcement agents who will deliver the legislation on our behalf. As well as giving those organisations the opportunity to comment, we undertook focus-group sessions with them, so that we could sit face to face with the regulators and discuss the shape that the regulations should take. We got feedback from that key stakeholder group and, to reflect its views, we amended the draft legislation before laying it before Parliament. We do that as a matter of course. The only situation in which we cannot do that, which we touched on previously, is when something must be urgently delivered to protect public health.

As I said earlier, we realised that our formal public consultations with stakeholders might be the best opportunity for the Parliament and parliamentary committees to give us their views, which we can try to factor in. Two areas would be involved. First, discussion about European legislation can help us with our negotiating position on legislation with the Commission. Secondly, consultation can give us the opportunity to consider any SSIs that we are bringing forward and take on board any technical matters—perhaps from the Subordinate Legislation Committee, in particular—to ensure that they are ironed out before the Parliament sees an SSI in its finalised form. However, we know that that would present you with a potential timescale problem.

Gordon Jackson: I want to hear SEPA's comments on that. In addition, I think that you had a concern about the difficulties of consulting when emergency regulations are involved or when there are European implications. Perhaps you could elaborate on that as well as give us your general comments.

Dave Gorman: Absolutely. We were more cautious about the imposition of a general duty to consult, because we thought that it could potentially be disproportionate. We listed the avoidance of infraction. I guess that, in the best of all possible worlds, we should not be in the position whereby we are up against infraction deadlines and so on, but that does happen. We do not tend to have many emergency regulations, but we can see that, when something must be introduced quickly, consulting will be difficult.

Our written evidence is aimed at issues around SSIs such as the Pollution Prevention and Control (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/340). We could not see the point of having a general duty to consult stakeholders about regulations that only correct errors and clarify matters for the industry's benefit. What we are getting at is that if there is a general duty to consult, people will come back and justify why they are not consulting in a particular case, which seemed to us to be disproportionate. We would have preferred the amendment approach that we talked about previously, which seems to us a better way to go.

I have a final point. We would always try to ensure that we have an industry group to liaise with particular parts of industry. When we know certain matters are coming, we will use that group to try to get views that we can feed in.

Gordon Jackson: Does the Scotch Whisky Association have a view on how we consult or should consult?

David Williamson: I certainly endorse what the SEPA representative has just said. There is already a great deal of detailed consultation between stakeholder groups, such as the Scotch whisky industry, SEPA and the Food Standards Agency, which generally works very well. Our written evidence focused more on whether earlier consultation in a parliamentary context would be helpful to all sides in identifying where there may still be problematic issues and building consensus

on them, so that problems do not crop up at the last minute in the lead committee. That is why we suggested that a greater use of the super-affirmative procedure may be useful, although how to judge the significance of a particular regulation would require careful consideration. It would be for others to look closely at that.

Gordon Jackson: You suggest in your written submission that a regulatory impact assessment and a policy statement should be placed before the Parliament six months before the SSI is laid, to allow for better scrutiny. Is that an arbitrary figure or is there some logic to it?

11:15

David Williamson: We are not wedded to a particular figure, but we believe that the Subordinate Legislation Committee should have an early opportunity to consider the RIA and policy statement so that the process is not simply a box-ticking exercise. That would be a helpful step forward in building consensus so that we all agree what the costs and benefits of subordinate legislation are.

Gordon Jackson: So you think that we do not get such scrutiny early enough.

David Williamson: There have been cases in which the RIA and policy statement have been published late and there has been no opportunity to give them the careful consideration that they require, whether that involves putting a range of options in front of the committee or whether it is a box-ticking exercise on a pre-determined policy choice.

Gordon Jackson: The Food Standards Agency and SEPA support the use of the super-affirmative procedure, which builds in extra consultation. Do the witnesses from those bodies want to elaborate on their views on that?

Sandy McDougall: It is difficult for us to comment on the procedure in detail because it is not likely to be used within the scope of the Food Standards Agency's work. For the super-affirmative procedure to be relevant to us would require a change in the environment or in the way in which we do business.

Gordon Jackson: Will you explain that further?

Sandy McDougall: Fundamentally, we deal either with emergency measures on which the scope for consultation or amendment is limited or with directly applicable European regulations. There is little if any—

Gordon Jackson: Room for manoeuvre.

Sandy McDougall: On a more positive note, I point out that when there is scope for national measures within directly applicable European regulations we take great care to consult stakeholders. For example, from 1 January 2006 the ban on the sale of raw milk in Scotland will be extended to more species. In that case, consultation on a directly applicable European regulation resulted in Scotland-specific legislation.

Gordon Jackson: Does SEPA want to comment on the super-affirmative procedure?

Dave Gorman: I am happy to comment within the limits of my knowledge and experience of the super-affirmative procedure. We are in a slightly different position because most of the laws that we deal with come from Europe as directives. It is up to each member state to transpose those directives and decide on the detail, whereas in the Food Standards Agency's work much of the detail has already been decided at the European level.

It seems to us that the super-affirmative procedure is valuable where new regimes—especially in environmental law—will have a considerable impact on industry or stakeholders. In our submission we refer to "significant impact", but we could have a debate about what that means.

Two examples are the water framework directive and the pollution prevention and control regulations. In those major areas of work, we almost need two bites at the cherry to make sure that we get it right. In such cases, the super-affirmative procedure could be valuable.

Gordon Jackson: Just to be clear, do you think that we are not using the super-affirmative procedure enough?

Dave Gorman: Yes. It seems to us that the procedure is a valuable way to try to flush out some of the issues that the Scotch Whisky Association raised.

The Convener: We move on to the definition of Scottish statutory instruments. In the consultation paper, we asked whether all instruments of a legislative character—including directives, guidance and codes—should be required to be made as SSIs. Neither SEPA nor the Food Standards Agency supported that. SEPA said that rules about rules are required, but, at the same time, codes of practice should be made clear. It stressed the importance of transparency in their use, balanced against the need for proportionality. Will you elaborate on that statement?

Dave Gorman: The paragraph to which you refer is possibly not the greatest one that we have ever crafted. Part of my job these days is to consider how regimes in other countries work. We have realised that when it comes to the environment we have taken a particular approach that says, "There will be a European directive that will issue regulations, which will require companies

to have a permit, and we will come and inspect against those permits." There are different approaches to take. In health and safety law, a general duty and improved codes of practice might be imposed on businesses.

We were trying to say that we felt that the rules about rules could be clarified, at least for the environmental sector. There is a pressure to move away from traditional approaches. We agree that there would perhaps be a hole in the scrutiny arrangements if we started to move away from the traditional approach towards new approaches—we wonder whether everything would be captured. We agree with the Food Standards Agency too. For some of the codes of practice it is not necessary to have such scrutiny. We agree in principle, but you should be aware that if you take a blanket approach you will end up capturing things that it is not necessary to put through the scrutiny process.

The Convener: That is helpful.

Bill Adamson: There is not much scope for the use of codes in the sense of imposing regulations on industry or in relation to businesses. Legislation is driven by Europe. There is an overriding requirement for a consistent approach throughout all member states. That is the whole point of the marketplace and the free movement of products. We would not be involved in producing codes of conduct or directions that were not pieces of legislation themselves. The only area where we have experience of that is in providing enforcement direction to the regulators acting on our behalf in terms of codes of conduct and practice for them, as opposed to their being regulated. We provide instruction and direction to the regulators as to how they should carry out their regulation.

There are codes of practice for enforcement under the Food Safety Act 1990. There is a requirement for the minister to sign off that code of practice officially and for it to be brought to the Parliament's attention, not from the point of view of annulment or affirmation, but simply so that it is in the domain of the Parliament. There is an element of scrutiny there, but it is all about providing direction on enforcement, rather than imposing informal burdens on industry.

We sometimes provide interpretive guidance to stakeholder groups to try to cut through some of the difficulties of interpretation that there might be, even with applying legislation directly. Such guidance does not really have any statutory basis. There is so much of it that it would be inappropriate for the Parliament to see every piece of it—I do not think that the Parliament would really want to. We try to provide as much of it as we can.

The Convener: Do the Scotch Whisky Association witnesses want to add anything?

Campbell Evans: I do not think so.

The Convener: The SEPA paper says that a central register and the availability of information on a regulatory package are important. Will you elaborate on that, Mr Gorman?

Dave Gorman: I will do my best. The use of directions is a slightly mysterious area to me, but it happens fairly often that, in addition to getting the regulations, we get directions from the Scottish Executive on how to implement certain parts of the law. It is my understanding that those are not necessarily collected anywhere or published in the way that the secondary instruments are. That seems like a bit of a gap to us. One needs to see all parts of the package to understand things properly.

The Convener: You are talking about a regulatory package on a particular area. Might it cover different sets of regulations?

Dave Gorman: Such directions tend to relate to the implementation of, for example, the waste incineration directive. A regulation will come out and we will probably also get a direction from the Scottish Executive and there might be some statutory guidance. The industry needs to see all three pieces in order to understand the puzzle.

The Convener: Does the Scotch Whisky Association think that such a regulatory package would be useful?

Campbell Evans: The important point for us is transparency. When we deal with SEPA and other bodies, we need to know what the rules of the game are and about the guidance that is given to bodies such as SEPA or to the industry on compliance. Transparency is where we start and finish.

The Convener: We will move on to existing parliamentary procedures.

Mr Macintosh: The Scotch Whisky Association has made clear several times already the difficulties of the timescale within which it must operate. The SWA made the helpful suggestion that the 40-day rule could be increased to a 60-day rule or, alternatively, that the 40 days could commence after the Subordinate Legislation Committee has finished its consideration of the instrument. Would that suggestion be only for affirmative or super-affirmative procedures, or would it be for all subordinate legislation?

David Williamson: Our suggestion is based on our experience of the affirmative procedure, as we have little experience of the negative procedure. It is focused on the procedure that we have dealt with most so far.

Mr Macintosh: What views do the other bodies have on the suggestion that the deadlines could be extended, in particular for the affirmative procedure but also for the negative procedure, for another 20 days, or that the 40-day rule could start after the Subordinate Legislation Committee has finished its consideration of an instrument?

Bill Adamson: Our only experience of the affirmative prodecures is in the context of what is almost an anomaly under FEPA, whereby we go through a form of affirmative procedure that allows the emergency process to take place before the decision is taken. Ultimately, in respect of that special affirmative procedure under class 3, it would not matter too much to us whether there is an extension from 40 days to 60 days as long as the instrument still has the effect that we want it to have right away. I guess that it puts extra pressure on to the Parliament to make a decision if it thinks that there is a problem with the piece of legislation.

On the negative procedure, we often have to break the existing 21-day rule because of the need to bring in a piece of emergency legislation quickly. We have no problem in principle with the 21-day rule being tied into the 40-day rule, as has been suggested, with the caveat that we mentioned in relation to measures for which there is a specific deadline for implementation, as there is for the directly applicable European hygiene legislation.

In the case of that legislation, we have had to work back from a 1 January 2006 deadline that was set by the European Commission. We have factored in all the necessary consultation processes and have tried to ensure that we have got the necessary instruments before the Parliament. That is fine, so long as the Commission has got its legislation in place in due time. To a certain extent, that is what happened with the principal piece of legislation in this case but, late in the day, the Commission came forward with a directly applying regulation to provide for transitional and implementing measures in relation to the directly applying legislation. That regulation has been approved and ratified by the Commission within the past few weeks. We must give effect to it in the statutory instrument that we have drafted to give effect to the legislation as a whole. We now do not have the time to go through the normal process for the minor amendments part of the legislation. In all honesty, I do not think that there is anything in the transitional measures to concern anybody but, as a matter of principle, we still require to ensure that the legislation is in by 1 January. We need to have given effect to that by a statutory instrument, yet the Commission has not given us the appropriate timeframe to allow us to do that.

The caveat is that if we have an overriding responsibility to implement legislation by a due date, we might have to come before the committee and the Parliament to seek flexibility because of matters that are outwith our control.

Mr Macintosh: There are issues of harmonisation with the UK Parliament and European regulations. Do you think that there should be more room to encourage stakeholders rather than official bodies to make their views known? If so, would such an approach apply only to a class of subordinate legislation or to all its forms?

11:30

Dave Gorman: Our views on this matter are finely balanced. I should point out that we are not a UK body, which means that we regularly diverge from England and Wales on the deadlines by which companies should make their applications. I am not sure about the views of industry, but I know that the environment agencies north and south of the border feel reasonably comfortable that the different approaches do not have a significant impact.

Although we feel in principle that there should be greater scrutiny and that more time should be available for scrutiny, and although we are certainly sympathetic with regard to the timescales that you have to work under in order to carry out such scrutiny, organisations such as the Food Standards Agency have their own job to do, and we are concerned about squeezing the time for putting regulations in place after they have been developed. I imagine that industry and stakeholders might not welcome more opportunity for scrutiny in the parliamentary process if other deadlines squeezed the time that they had to apply for licences, pay their fees, talk to us and understand our guidance.

As I said, our views are finely balanced; indeed, much of this is about striking a balance. What you suggest is a good idea in principle, but we worry about the knock-on effects for our job.

The Convener: Does the Scotch Whisky Association wish to comment on the question of increasing the time for scrutiny?

David Williamson: Like those of Mr Gorman, our views are finely balanced. We are not wedded to any specific approach, but we need to examine different ways of ensuring that the Parliament has adequate time to scrutinise subordinate legislation. I leave to parliamentary experts the question whether the period of time should be extended from 40 to 60 days or whether there should be a requirement to look at the legislation by a specified point within the 40-day period. There are different ways of skinning this cat.

The Convener: You have suggested that the 40 days could commence when the Subordinate Legislation Committee completes its consideration of an instrument.

David Williamson: Yes, that is one suggestion. Such an approach would help to avoid a situation in which, because the lead committee has to consider an instrument, say, on day 35 of the 40-day period, it feels unable to take further evidence from stakeholders.

Mr Maxwell: The FSA has clearly explained the problem of what happens to the 21-day rule with regard to emergency instruments. Mr Williamson said that there was more than one way of skinning this cat. Are there any other ways in which we could overcome the problem of continually having to break the 21-day rule?

Sandy McDougall: In our submission, we suggest that, under the very definition of emergency legislation, the 21-day rule is almost put to one side. We have thought long and hard about whether we can frame the matter in a more positive way, but the truth is that we need an immediate, fixed point in time at which the legislation can come into effect.

Mr Maxwell: Although your comment that the 21-day rule is put to one side is correct in practical terms, it is technically incorrect because the rule is still breached. Would you support the introduction of a special procedure for emergency instruments that would simply put the rule to one side?

Sandy McDougall: Yes, although we have not really thought through what such a procedure might entail. For example, instruments such as the various Iranian pistachio nut regulations will always breach the 21-day rule. It might be appropriate to introduce some other procedure to deal with them.

Mr Maxwell: I can see that such a measure might seem logical and sensible. However, are you concerned about how any such emergency procedure might be defined? After all, someone has to take that decision. Any quick route might be seen as an attractive route.

Sandy McDougall: The definition of an emergency would have to be given serious thought. We have been involved in that recently in relation to a piece of legislation. The definition of emergency legislation can in some circumstances be open to interpretation.

Gordon Jackson: I do not know, but I suspect that the Food Standards Agency deals with more emergency legislation than anyone else does. That is part of your work. I have some sympathy with the idea of having a totally new system. A breach of a rule is meant to occur only occasionally and, once a system is in place whereby a rule must always be breached, change is needed. You said that you were not sure what the replacement would be. Would it be asking too much to ask you to apply your mind to that and to tell us in writing what might be put in place?

Sandy McDougall: We could do that.

Gordon Jackson: Do you have any suggestions about that? I am interested in the subject.

Sandy McDougall: We intimated in the submission that one change would simply be to make subject to the negative procedure the form of EU emergency legislation that is currently subject to the affirmative procedure.

The Convener: I am particularly interested in what you said about the definition of an emergency and who would decide that a situation was an emergency. It would help if you thought about that.

Bill Adamson: Sometimes, a key issue is that a piece of emergency legislation is intended to be given effect at a particular time. Often, emergency legislation is intended to ban imports. It is important to impose that ban at the same time and consistently throughout the whole European Community; otherwise, somebody would—unfortunately—look for a loophole to introduce something potentially dangerous. None of us wants to be seen as the weak link in the chain. One question is whether a situation is an emergency, but another question is what the principle is on which control is being imposed. If the intention is to impose control at the point of import, consistent application is important.

The Convener: All such examples would be useful to us.

Mr Maxwell: SEPA said in its submission that it supported the extension of the 21-day rule. Will you elaborate on the thinking behind that, which I am not clear about?

Dave Gorman: Our thinking is the same as what has been said before. The aim is to allow adequate time. When we read in the background paper about the timescales to which committees had to work, we thought that the time did not seem adequate for the issues that committees could be dealing with.

The Convener: Does the whisky industry representative want to add anything?

David Williamson: No.

The Convener: Our final section, which has exercised our minds somewhat, is on the publication of SSIs. Previous witnesses have made the general point that we need easy access to up-to-date subordinate legislation. What are your views on that? How easy is it to access subordinate legislation on the internet? What changes to that are still needed?

David Williamson: Easy access to subordinate legislation is fundamental. We have had problems in accessing subordinate legislation, primarily because the text that is seen in a final stakeholder group meeting might be tweaked by the time that draft legislation is introduced. It can prove difficult to get hold of the text in a timely manner, not just to allow us to assess the changes that might have been made to what can be highly technical legislation, but to give us the opportunity to ensure that parliamentarians are aware of the issues that are at stake. We would support anything that could be done to make subordinate legislation more easily available through the Parliament's website.

The Convener: You mentioned the Parliament's website. How easy is it to access subordinate legislation at the moment?

David Williamson: At the moment we have to go directly to the Scottish Executive department to get hold of the text. Subordinate legislation is not available through the parliamentary website at the moment.

The Convener: That is correct.

Dave Gorman: I have very similar comments. We agreed with the phase 1 report, particularly about the consolidation of legislation and its being published in a form that people can understand. As we said the last time we were here, we are the regulator and we find it difficult when version 15 of the regulations amends the regulations that amended the regulations. We strongly support greater transparency in that regard. It is important for us to see the drafts that were proposed and then how they were changed, even if it is just for the historical record. That could be informative for all sides. It is important to have as much transparency as possible.

The Convener: Does the Food Standards Agency have any comments?

Bill Adamson: We are generally happy with the procedure. As others have said, the information should be in the public domain when the finished article is approved. It is also correct to say that there are occasional last-minute tweaks to legislation and that is not helpful to anyone.

The Food Standards Agency publishes and regularly updates a document called "Food Law in Scotland". That gives the necessary statutory instrument numbers and outlines all the legislation for which we have responsibility. That at least allows the stakeholder, whether it be an enforcement or industry stakeholder, to go to the HMSO website and get the instrument quite quickly. Obviously there is a time lag before the instrument is laid before and approved by the Parliament, then published on the HMSO system.

Once the instruments are published, we try to make sure that we are up to speed with the current legislation for which we are responsible, and that we put on our website any current drafts that are out to consultation and any updates at the point of drafting. That is done as a matter of course.

The Convener: What type of information does the SEPA website have on subordinate legislation in any context?

Dave Gorman: We try to highlight consultations. We might not always be able to do this, but we try to put on our website things that we think will interest stakeholders when the consultation is being carried out and the regulations are being drafted. We also tend to use the NetRegs project that we mentioned before and to try to interpret for companies what the legislation means for them. That site would also then refer to the HMSO site and the published regulations. We do not put masses of regulations on our site because they are of limited interest to some, but we try to point businesses in particular to the NetRegs site.

The Convener: That is useful. It allows us to see the bigger picture.

Are there any other questions?

Mr Maxwell: I have a small supplementary question for the Scotch Whisky Association. As a body representing an industry, would you prefer to see just the most up-to-date copy of the regulations, no matter how many amendments there have been? Are you particularly interested in the current version being freely and widely available or are you also interested in all the various stages that the instrument has gone through, even back to the draft? Does it make any difference to the industry if it is able to access what the regulation was at a particular historical moment, or is it just the current one that is most relevant?

Campbell Evans: It is always helpful for us to understanding the thinking behind the regulation, so it depends on how the changes are presented. If one has the historical documents to refer to, one might be able to make some interpretation and understand the direction of the thinking, which helps when one has to engage with other parties or to give guidance to one's members about where policy or regulation might be going. More is better.

The Convener: That has been very useful for us. I hope that you do not mind if we communicate any follow-up questions to you. We look forward to receiving those examples that you promised to send; they would be useful.

11:44

Meeting suspended.

11:52

On resuming—

Delegated Powers Scrutiny

Management of Offenders etc (Scotland) Bill: as amended at Stage 2

The Convener: Any minor points that arise during our scrutiny of bills and instruments will be picked up together and put in an informal letter.

First, we come to the Management of Offenders etc (Scotland) Bill, as amended at stage 2. Members will remember that we raised two matters with the Executive. The first of those related to section 7(2), on the transfer of functions to the community justice authorities. The committee noted that the bill had been amended at stage 2 to include a duty on ministers to consult relevant local authorities and community justice authorities before laying a draft order before the Parliament. We suggested that that should be so and the Executive has said that it will do it, but we wondered why there had been a turnaround. The Executive's reply states that it had regard to the comments that we made and to other feedback, and considered that a turnaround was appropriate.

The second point related to section 11(1B), which seeks to introduce new section 1AA, on the release of certain sexual offenders, into the Prisoners and Criminal Proceedings (Scotland) Act 1993. Stewart Maxwell raised a point of clarification on that last week.

Mr Maxwell: There seemed to be some dubiety about which section of the bill would be affected by what we had in front of us. I was concerned that it would affect the part to do with home detention curfews. However, on further examination, and with the helpful explanation from the Executive, it is clear that that is not the case and that it is a policy issue, which does not apply to this committee's work. I am happy with that now.

The Convener: Members will see a letter that we received from Cathy Jamieson on this week's stage 3 debate on the Management of Offenders etc (Scotland) Bill. She has given us advance notice of an amendment about a new power. Does the committee have any concerns about that?

Mr Maxwell: I have no particular concerns about the power that has been suggested. I am slightly concerned, however, about the late notification of the amendment. The stage 3 debate is this Thursday afternoon, and we have been handed the letter on the matter only now. That does not give us any time to examine the new proposal in any detail—or at all. Having inspected the proposal briefly, I think that the power looks okay, apart from that.

The Convener: I am assuming that negotiations on the matter were on-going in the course of stage 2. I welcome the proposal in as much as we have found out about it before the stage 3 debate. I see your point, however. I am assuming that the need for the power was established very late in the day.

Mr Macintosh: I, too, suspect that the Executive did not know until recently that it needed the power. It presumably thought that the inspectors could co-operate without such a specific power. Having discovered that it was required, the Executive was forced to take action speedily.

The Convener: Absolutely. We can certainly listen to the stage 3 debate on the power. I am sure that any one of us can jump up and ask relevant questions.

Mr Macintosh: In any case, I think that we can say that we welcome the power.

Human Tissue (Scotland) Bill: Stage 1

The Convener: Members will recall that we wrote to the Executive to clarify a number of points. The first of those related to section 15, which deals with restrictions on transplants involving live donors. The committee considered that, because of the wide power taken under section 15(3) and the sensitivity of the issue, affirmative procedure rather than the negative procedure was appropriate. The Executive has now agreed with the committee. I am sure that we are pleased about that.

Members *indicated agreement.*

The Convener: Section 16 is headed "Records, information etc.: removal and use of parts of human bodies for transplantation etc.". The committee questioned whether the powers in section 16(1)(a) would provide sufficient vires for any relevant confidentiality provision in regulations made under section 16. The Executive has indicated that it is currently considering the issue of confidentiality in relation to the bill generally and that, if it considers that a specific confidentiality provision should be included, it will lodge a suitable amendment at stage 2. I suggest that we simply keep an eye on the situation and await developments at stage 2.

Members *indicated agreement.*

The Convener: There are two further issues that came together, concerning section 35(2)(c), on the use of organs no longer required for procurator fiscal purposes, and section 43(2), on the use of organs removed before the day on which section 35 comes into force. We were concerned about the width of those powers.

The Executive response confirms that the only bodies that it currently intends to specify in regulations made under those provisions are research ethics committees and that it is not aware of any other body that could be specified, either at present or in the foreseeable future. Are members content with the information that has been provided, or do you still think that the power is rather wide, and that the issue should be reported to the relevant committee on that basis?

Mr Maxwell: I am split between two thoughts on this. I accept the Executive's argument about flexibility, which is entirely reasonable. The name of the type of body might change. Things do change over time, and it is not unreasonable to have some flexibility to cover that. There is no doubt that the power is very wide, and that point still holds good. Our previous concern was that there was effectively no barrier to self-approval of research. Our legal brief states:

"there is no requirement in the bill for the body approving research to be at arm's length from the person seeking to carry out the research."

That is a relevant point. We should at least make the lead committee aware of our concern.

The Convener: Yes. We have asked for information but we still think that there is some concern. We can pass on the relevant information from the Executive. Is that agreed?

Members *indicated agreement.*

The Convener: There is a general point on part 3 of the bill. We were unable to ascertain what, if any, sanctions exist for failure to comply with the requirements of part 3. We also asked about parts 1 and 2. From reading the Executive's response, the position on what sanctions will apply for the retention and use of body parts in the circumstances that are described in part 3 does not seem clear. I do not know whether other members of the committee share that view.

12:00

Mr Macintosh: I think that we should draw the matter to the attention of the lead committee. Part 2 of the bill relates specifically to the removal of tissue or body parts during a post mortem that a procurator fiscal has instructed to be carried out but, as many of us will know, it was the retention of body parts after a post mortem that caused concern prior to the introduction of the bill. There is no doubt that the Executive wishes to address the issue, but the bill will give rise to an anomaly. I have no wish to over-penalise someone who may breach the law as it is described in part 3 of the bill, but it seems inconsistent or anomalous to have quite severe sanctions for failure to comply with parts 1 and 2 of the bill and to have none for failure to comply with part 3.

The Convener: Is it agreed that we highlight the matter to the lead committee?

Members *indicated agreement*.

The Convener: Section 47 concerns the "Power to prescribe forms and descriptions of persons who may act as a witness". We were unclear whether it would be mandatory for forms to be used when they were prescribed or whether their use would be optional. The Executive has accepted that the bill does not accurately reflect the policy intention and will ensure that the necessary amendment is made at stage 2. I think that we are happy with that.

Our concern on section 48(13) related to the new sections 8A(2)(a) and 8A(2)(b) that it seeks to insert in the Anatomy Act 1984. The Executive was asked for clarification of the intention behind the drafting of section 48(13) because it implies that failure to observe the provisions in the code of practice could be an offence. The Executive has explained that although there is no statutory duty to observe any provisions in the code, failure to do so may be important to other civil and criminal proceedings. Are we content with that?

Members *indicated agreement*.

The Convener: Section 50(1) is on the power to give effect to Community obligations. We asked the Executive why it was decided to take a specific power for that purpose, rather than to rely on section 2(2) of the European Communities Act 1972. The Executive's explanation is that although it accepts that the inclusion of a power to make regulations under section 50(1) is merely a confirmation of the general power, in the light of the on-going issues surrounding the tissue and cells directive, it considers it appropriate to make specific provision for that power and to provide that it is to be exercised using the affirmative procedure. Are we happy with the explanation that we got?

Members *indicated agreement*.

Executive Responses

Regional Transport Partnerships (Establishment, Constitution and Membership) (Scotland) Order 2005 (draft)

12:02

The Convener: Agenda item 4 is Executive responses. We asked two questions on the order. We were not clear whether the provision in article 3(5) was compatible with the enabling power in section 1(2)(e)(iii) of the Transport (Scotland) Act 2005. Does the Executive's explanation mean that members are now okay about the vires issue?

Mr Macintosh: Yes. I think that the Executive recognises that a recent judgment by the European Court of Human Rights raised vires issues and has agreed to withdraw the instrument.

My second point is a general one, which could be raised informally or formally. I am not sure about the process by which the Executive ensures that its subordinate legislation complies with the European convention on human rights.

The Convener: Ah. I think that you have moved on to the next instrument.

Mr Macintosh: Have I?

The Convener: There is no problem; we will come back to it in a second.

The first point was about a vires issue. We can draw the lead committee's attention to the fact that we have received a satisfactory explanation.

Mr Maxwell: I am sorry, but I am confused. Which response are we dealing with?

The Convener: I am talking about the response on the regional transport partnerships draft order.

Mr Maxwell: That is okay; that is the response that I thought we were on.

The Convener: The first point was that we were not sure whether the provision in article 3(5) was compatible with the enabling power. That was a vires issue. Are we happy with the explanation that we have received?

Members *indicated agreement*.

The Convener: We will pass that on to the lead committee.

The second question was about the meaning of "they". In response, the Executive has conceded that it is a grammatical error but that it believes that it will not affect the legal or practical application of the order. You will remember that it had been using "partnership" in the singular throughout the whole document, before suddenly changing to "they". We shall report that point again, if that is okay. Do members agree to that?

Members *indicated agreement*.

Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2005 (draft)

The Convener: Now it is over to Ken Macintosh. Fire away, Ken.

Mr Macintosh: I refer you to the remarks that I made a few minutes ago. [*Laughter.*] I am happy with the explanation that the Executive has given, because it has agreed on the general point that there are vires issues, and it is redrafting the order.

The point that I wanted to make is of less consequence. It is to do with understanding the process by which the Executive checks that its subordinate legislation complies with the European convention on human rights. It assures us that it is compliant, but I would like a greater understanding of how it goes about checking that and of how the process by which it checks its subordinate legislation compares with the process by which it checks its primary legislation. I assume that the process for primary legislation is thorough and I would like to be assured that the process is equally thorough for subordinate legislation.

The Convener: There are two points there. One is to do with whether the instrument is compatible with the ECHR, and the Executive has said that it will withdraw the draft and re-lay an amended version, which we are obviously happy about. The second point is a general issue about how the compatibility check is actually done, particularly in relation to subordinate legislation. Shall we send a letter about that?

Mr Maxwell: I accept the fact that the Executive has agreed to withdraw the order and come back to it again, but it seems to be concentrating on article 12 of the convention. However, it seems to me that there are other articles that come into play. Article 8, on the right to private life, and article 14, on prohibition against discrimination, taken in conjunction, would also apply. There may be some debate about that, but the idea that the re-laid instrument would deal only with breach of article 12 and might go ahead ignoring articles 8 and 14 is not acceptable. I am of the opinion that, if the Executive were to do that, it would be in breach of those two articles, and I think that we should raise the wider issue of the whole area dealt with by the legislation. It is not just about marriage between a man and a woman; there is a wider issue because we are dealing with civil partnerships.

The Convener: Absolutely. The clerk has suggested, quite usefully, that we can pass on the specific remarks to the lead committee, in addition to the response that we have already received from the Executive, and also raise in our general letter the issue of extending any revision to include the other articles. Is that agreed?

Members *indicated agreement*.

Tryptophan in Food (Scotland) Regulations 2005 (SSI 2005/479)

The Convener: We asked first of all why the relevant provisions of the Food Safety Act 1990 (Consequential Modifications) (Scotland) Order 1990 (SI 1990/2625) have not been revoked by the regulations. The Food Standards Agency Scotland has explained that express revocation of spent provisions does not affect substantive changes. It does agree, however, that such revocation is good practice. Accordingly, at the next suitable legislative opportunity, it will rectify that omission. Are members content to pass that on?

Members *indicated agreement*.

The Convener: We also asked whether the drafting of the equivalent UK regulations affected the drafting of the instrument. Stewart Maxwell raised a question about that.

Mr Maxwell: Yes, I did, and I think that the answer is that it did affect the drafting of the instrument. We have received a response from the FSA that is not unreasonable, and there seem to have been different debates going on with its English and Northern Irish equivalents. I am not sure that the answers that it has sent to everybody have been entirely consistent, but as far as we are concerned its answer is not unreasonable, as I said. However, the original point was that to slavishly follow the regulations that have been made down south can lead to problems of that kind, and that fundamental point remains.

The Convener: Is it agreed that all those points will be passed to the lead committee?

Members *indicated agreement*.

Food Hygiene (Scotland) Regulations 2005 (SSI 2005/505)

The Convener: We requested an explanation of the legal basis of regulation 24, given that it provides for a code of practice to be issued by Scottish ministers that has legislative effect. I do not know what you think of the reply that we got, but there may be some cause for concern still.

Mr Maxwell: I agree. It is clear that the code of practice is legislative in character. I do not understand why the Executive takes a different view. To use a phrase that we learned last week, it has a "horizontal effect". We should report the regulations on the basis that there is a difference of opinion on the matter.

The Convener: Should we refer the matter to the lead committee and Parliament?

Mr Maxwell: Yes.

The Convener: As I understand it, the doubt is whether regulation 24 is intra vires with respect to the enabling act. That could cause difficulty.

Mr Maxwell: It is not simply guidance; it seems to be more powerful than that.

The Convener: That is right.

Secondly, the Executive was also asked to confirm that all necessary consents required under EC legislation have been obtained. The FSA has given an assurance that they have. Are we okay with that one?

Members *indicated agreement*.

The Convener: Thirdly, the committee asked the Executive to confirm that regulation 23 was sufficient to achieve its stated purpose, as members noted that, where it has been desired to attract section 9 in other regulations, a fuller adaptation has been required.

The FSA confirmed that it was satisfied that regulation 23 will meet the policy objectives. Are we happy that the explanations, along with the other point, go to the lead committee and Parliament?

Members *indicated agreement*.

Smoking, Health and Social Care (Scotland) Act 2005 (Commencement No 1) Order 2005 (SSI 2005/492)

The Convener: We asked the Executive why section 43(4) of the Smoking, Health and Social Care (Scotland) Act 2005—the parent act—had not been cited as an enabling power. The Executive in its response accepts that it is normal practice to refer to a provision such as section 43(4) when making a commencement order that appoints different days for the coming into force of different sections of the parent act.

However, although accepting that it might have been preferable to refer to section 43(4), the Executive considers that it was not strictly necessary to include the reference.

I wonder whether we should just report this to the lead committee and Parliament as not following proper legislative practice.

Members *indicated agreement*.

Draft Instruments Subject to Approval

Civil Partnership (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2005 (draft)

12:12

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

Victim Statements (Prescribed Courts) (Scotland) Revocation Order 2005 (draft)

The Convener: Although there are no comments on the substance of the order, the explanatory note does not fulfil the requirements of the guidance on the drafting of statutory instruments in that the effect of the order is not clear. We might want to raise that.

Mr Maxwell: I agree that we should. Although the Executive note, which contains more detailed information, is available on the HMSO website, not everyone has access to the internet. Therefore, that is not a reasonable explanation. The explanatory note should have contained a better explanation.

The Convener: Will we make those points to the Executive formally?

Members *indicated agreement*.

Instrument Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 13) (Scotland) Order 2005 (SSI 2005/520)

12:13

The Convener: No points have arisen on the order.

Members *indicated agreement*.

Instruments Subject to Annulment

Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2005 (SSI 2005/514)

12:14

The Convener: We have received legal advice on six points about which we should ask for further information. Most of them concern vires, although there are other issues. Do members have other points to make? Do we agree that we should ask for information from the Executive about them?

Members *indicated agreement*.

Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005 (SSI 2005/515)

The Convener: The regulations make provision for deeming confirmation of a placing request or an education authority's decision on a placing request in circumstances that are specified in the regulations. It has been suggested that we should ask the Executive about regulation 4, which states that if the prescribed conditions apply, an appeal committee will be deemed

"for the purposes of paragraph 6(6)(b)"

of schedule 2 to have confirmed a decision of an education authority on a placing request. The question is whether the phrase should be "for the purposes of this Act". Do members agree that the Executive should clarify matters?

Members *indicated agreement*.

Education (Additional Support for Learning) (Scotland) Act 2004 (Transitional and Savings Provisions) Order 2005 (SSI 2005/516)

The Convener: The order makes a number of transitional and savings provisions that are necessary on the coming into force of certain provisions of the 2004 act. Are members content to do as the legal briefing suggests and ask the Executive for an explanation of article 3(2), as it is not terribly clear? Was the drafter attempting to reproduce the effect of article 7(4)? It is thought that that was aimed at, but things are not clear.

Members *indicated agreement*.

Gordon Jackson: A serious number of minor points on the order have arisen that can be dealt with by informal letter. We should at least flag that up. I agree that, cumulatively, they do not come to

anything because they are simply minor points, but it is worth saying that there are many of them.

The Convener: I said earlier that we would deal with all the minor points in one letter, but you have made a valid point. A number of minor points have arisen on the order. Obviously, what we are saying will appear in the *Official Report*, but do you want to—

Gordon Jackson: I do not know how we should deal with the matter.

The Convener: We could mention it in the letter that we will send to the Executive.

Gordon Jackson: The number of errors suggests that something is not quite right with the—

Mr Maxwell: Quality controls are lacking.

Gordon Jackson: Indeed. Call it what you like.

The Convener: Do members agree that we should mention those minor points in our letter to the Executive?

Gordon Jackson: We should do so because there are so many of them. We could make a serious point that is based on many minor points.

The Convener: Do members agree?

Members *indicated agreement*.

Education (Additional Support for Learning) (Scotland) Act 2004 (Consequential Modifications of Subordinate Legislation) Order 2005 (SSI 2005/517)

The Convener: No substantive points have arisen on the order.

Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005 (SSI 2005/518)

The Convener: The Executive undertook to bring forward an amendment in respect of the regulations before commencement of the parent act in order to take account of the committee's criticisms of the instrument. As the original regulations were not yet in force, the Executive has chosen to replace them in their entirety.

There are two points to make on the new regulations. Why does the title of the regulations not follow the usual form for such instruments? The words "Amendment Regulations" are particularly confusing.

Secondly, have the regulations been made available free of charge to all known recipients of the original regulations in accordance with the guidance on statutory instruments? If so, why is there no italic headnote to that effect? Do members agree that those questions should be asked?

Members *indicated agreement*.

The Convener: We are thorough.

Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 (SSI 2005/519)

The Convener: No substantive points have arisen on the rules.

National Assistance (Assessment of Resources) Amendment (No 2) (Scotland) Regulations 2005 (SSI 2005/522)

The Convener: No substantive points have arisen on the regulations, but members will see that the 21-day rule has been breached; you will also have seen the letter about why that has happened. Do members want to make any points about the breaking of the 21-day rule or are they quite happy with the explanation that has been given?

Gordon Jackson: It is a bit strong to say that we are quite happy.

Mr Maxwell: I would not say that we are happy. I am not sure that we should not ask for further information about that, given the dates that are involved. Regulations that were laid in Westminster came into force in September.

The Convener: We could ask what went wrong with the liaison.

Mr Maxwell: Yes.

The Convener: We will ask for an explanation about why the 21-day rule had to be broken.

Victim Statements (Prescribed Offences) (Scotland) Revocation Order 2005 (SSI 2005/526)

The Convener: This order also raises a point regarding the adequacy of the explanatory note, as we discussed earlier. Shall we refer the point to the Executive?

Members *indicated agreement*.

Instruments Not Laid Before the Parliament

Act of Sederunt (Rules of the Court of Session Amendment No 8) (Miscellaneous) 2005 (SSI 2005/521)

12:19

The Convener: No points have arisen on the act of sederunt.

Act of Sederunt (Sheriff Court European Enforcement Order Rules) 2005 (SSI 2005/523)

The Convener: No points have arisen on the act of sederunt.

I remind members that at our next meeting, on Tuesday 8 November—which is next week—we will hear evidence from four committee conveners.

Gordon Jackson: I was told by Ruth Cooper the other day that the committee is still a member down.

The Convener: I have not closed the meeting.

Gordon Jackson: I am sorry, but I wanted to ask about that before the meeting closed.

The Convener: I am sorry—fire away.

Gordon Jackson: As I said, I was told by Ruth Cooper the other day that the committee is still a member down. Is anything happening about that?

The Convener: The committee is a member down, but we are trying hard to bring the number of members back up.

Gordon Jackson: So the matter is being processed.

The Convener: Yes.

Gordon Jackson: All right.

Mr Maxwell: That was very diplomatic.

The Convener: I thank members and close the meeting.

Meeting closed at 12:20.

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