SUBORDINATE LEGISLATION COMMITTEE

Tuesday 8 November 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
30th 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

Sarah Boyack (Edinburgh Central) (Lab)
Roseanna Cunningham (Perth) (SNP)
Iain Smith (North East Fife) (LD)

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 8 November 2005

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

Regulatory Framework Inquiry

The Convener (Dr Sylvia Jackson): I welcome everyone to the 30th meeting in 2005 of the Subordinate Legislation Committee. We have received apologies from Gordon Jackson.

For agenda item 1, I welcome Sarah Boyack, the convener of the Environment and Rural Affairs Department; Roseanna Cunningham, the convener of the Health Committee; and Iain Smith, the convener of the Education Committee. The three conveners are here to help us with our inquiry into the regulatory framework in Scotland, which is now in its second phase. Before I open our questioning, I thank you for your extremely helpful submissions.

Our first question is a fairly general one; some of our later questions may be covered by your answers. We will try to be clever and not ask the same question twice.

What are your comments on how the Parliament currently considers subordinate legislation and on the roles of the Subordinate Legislation Committee and the lead committees? We are looking for an overview of the process from the perspective of your respective committees. Iain Smith is looking up; perhaps you want to start, Iain?

Iain Smith (North East Fife) (LD): I will remember not to look up again, convener.

The Subordinate Legislation Committee should be congratulated on the work that it undertakes in scrutinising Scottish statutory instruments. From my experience in a previous life on the Local Government and Transport Committee, I can say that the Subordinate Legislation Committee's covering notes were very helpful in assisting us in our determinations on the instruments that came before us. My experience as convener of the Education Committee is that we have not dealt with a great many statutory instruments until now. That said, I think that five or six instruments are on this week's agenda. Most of my experience of dealing with subordinate legislation comes from my time on the Local Government and Transport Committee.

A difficult balance must be struck by lead committees in determining the extent to which they can get involved in the policy of a statutory instrument. The role of the committee is to give effect to instruments that have already been determined by primary legislation and, at times, the balance can be difficult to get right. By and large, the biggest problem that committees have—the Subordinate Legislation Committee in particular—is the timescale for processing subordinate legislation. The number of statutory instruments that come before some committees, and the relatively short time that committees have in which to consider them, makes it difficult for us to give instruments the time that some of them deserve. We need to look at the timescales. Perhaps instruments could be graded; in that way, we would know which ones needed more time. I am thinking in particular of instruments that introduce regulations for the first time, following the passage of primary legislation, not instruments that renew existing provisions.

The Convener: Thank you. We will come to timing later on in the session.

Sarah Boyack (Edinburgh Central) (Lab): The Environment and Rural Development Committee deals with many statutory instruments, as a result of both Scottish primary legislation and the requirements that come from Europe. Our general view is that we could do better in managing that process. It is partly a question of timing—of being able to anticipate what is coming up—and also of the ability to take evidence on an instrument if we consider that its implementation is crucial. The key question is how that process is managed. We have some ideas about how we could improve timing.

It is quite tough for a lead committee to identify the degree of controversy that may be attached to an instrument. Quite often, people make their representations only at the point at which we are meant to be drafting our report. That links into the issue of timing and our inability to flag up in advance to external people the controversial nature of the instrument—if that is the case. We need to allocate time to the important statutory instruments and nod through those that are uncontroversial or those that are well written.

We also need to work out the relationship between the Subordinate Legislation Committee and the lead committee. There are times when the Subordinate Legislation Committee has strong views on how a piece of subordinate legislation has been drafted, but the lead committee has no policy questions. How do we resolve that? For example, an instrument will come before my committee—usually under the negative procedure—and we will not have a problem with the policy, but the Subordinate Legislation Committee will have flagged up a problem in how the instrument is drafted. In those instances, we

tend to let the instrument through, but with a comment that the minister should replace or amend the instrument at the first available opportunity. We then end up having to scrutinise the instrument all over again at a later date. We feel that there must be a way to make the system work better.

The Convener: Okay. Thank you.

Roseanna Cunningham (Perth) (SNP): I endorse what Sarah Boyack said about the slight difference in how the Subordinate Legislation Committee and the subject committees look at subordinate legislation. She is right in saying that there is a gap and that it needs to be addressed.

I apologise for the size of our submission. Members who have looked at it will know that it is so large because we wanted to put forward the Welsh example, which we think sets a very high standard. The Health Committee commends how the National Assembly for Wales deals with subordinate legislation; we think that it offers a potential way forward.

Our estimate of the subordinate legislation that comes before the Health Committee as part of our workload shows that we deal with about one third of all subordinate legislation. That poses considerable problems for the timetabling of our workload, particularly because we get very little notice of what is coming and when it will come. That makes it hard to assess in advance how we will handle subordinate legislation alongside our on-going workload, which may be heavy.

The length of time that the lead committee is given to scrutinise an instrument is inadequate for proper scrutiny to take place. Under the current system, if a lead committee wants to take evidence on a particular piece of subordinate legislation, it is placed in some difficulty. I suspect that committees tend not to bother to think about taking evidence, unless it is unavoidable.

The Health Committee believes that the Subordinate Legislation Committee should consider the possibility of amending subordinate legislation, although perhaps not in every circumstance. If the National Assembly for Wales is capable of doing that, I do not understand why the Scottish Parliament cannot do so. We are also very critical of the quality of the accompanying information that we receive from the Scottish Executive. One committee member described the explanatory notes as "models of obfuscation". They rarely explain anything very much at all; committee members are left in no better state of knowledge than a reading of the instrument would give. By comparison, the committee will see from our submission that the Welsh Assembly committees receive extremely clear information about the subordinate legislation that they scrutinise. Again, I commend that model to the committee.

The Convener: Thank you. We went to the Welsh Assembly and found it a very useful experience.

Murray Tosh has a couple of questions on the nature of supervision by the Parliament.

10:45

Murray Tosh (West of Scotland) (Con): My first question picks up on the point that Sarah Boyack made about controversy.

In general, the responses to our questions have accepted a division between negative and affirmative procedures. However, the Environment and Rural Development Committee made an interesting suggestion, which has also come up in other responses. It suggests that the division between negative and affirmative is based on the power under which an instrument is made, rather than on the content of the instrument. A negative instrument may raise matters of considerable significance. The example that you gave was of the regulations governing the less favoured area support scheme. They are very sensitive, involving as they do the allocation of a lot of money.

You suggested that there should be a way of amending or deepening scrutiny if the instrument in question was significant. I would like to probe a bit deeper into that suggestion to find out whether there was a general feeling in other committees that there should be a way of flagging up an important instrument, even if its importance is in the decision on the allocation of resource, rather than in the power that is being used.

How might we provoke such deeper scrutiny? Should the Executive, as the Environment and Rural Development Committee suggests, flag up the instrument as significant, or should the committee have the power to say, "We think that this is significant; the procedure is wrong; this should be affirmative; we should have longer to look at it"? Or should it be laid down in the parent act that there is a way of triggering significant decisions so that the scrutiny is greater than that normally given to a negative instrument?

Perhaps we could start with Sarah Boyack, since it was her committee that made the suggestion. We could then ask the other conveners for their views.

Sarah Boyack: The committee debated the Subordinate Legislation Committee's request and reflected on how we had done things over the past few years. It occurred to us that we had had affirmative motions that gave rise to very little controversy or discussion because everyone on the committee agreed that the proposal was inherently sensible and a good idea.

We are allowed to timetable up to 90 minutes for a debate on an affirmative motion and the minister has to attend the committee to move the motion. However, we could think of other statutory instruments, subject to the negative procedure, that were infinitely more controversial. Once we had dug into them—or had been avalanched by representations—we were able to see that the issue needed a bit more time. Sometimes it is a matter of being able to tell the people who will be affected why an instrument has been made and laid in a particular way and how we expect it to be implemented. We then debate whether we think that the Executive's approach is right.

The committee had a sense that we were not allocating time proportionately. That relates to your first question about information from the Executive. Sometimes, although rarely, we get an analysis of the consultation that the Executive has carried out on a statutory instrument. It tells the committee that all the people who were consulted were happy. On other instruments, however, we find sharply different views from different industrial sectors; the fishing or agriculture industries, for example, where different interests would be affected. We feel that it is better to discuss those views, although timetabling is an issue.

In principle, the negative or affirmative procedure will attach to an instrument according to its importance. In practice, however, our committee has found that some of the negative instruments can be wide-ranging and instigate a huge amount of spending. We have had to ask the Executive, in respect of several instruments, exactly why it was implementing them at that time and exactly how much money would be spent. That information was not clear from the accompanying documents.

More effort up front would help us when we come to decide how much time we should spend on instruments. The Executive could give us more information.

Murray Tosh: Is it simply a matter of having more information and proper programming? Does something have to be built into the system to allow the committee to judge whether the Executive has not consulted properly or provided adequate information? Should the procedure allow a committee to treat a negative instrument as an affirmative instrument?

Sarah Boyack: We did not come up with that solution. I think that we wanted to hear the Subordinate Legislation Committee's thoughts in light of our reflections on what it feels like for a subject committee to deal with such issues. I suppose that we believe that some negative instruments should have the level of scrutiny of an affirmative instrument.

We have a particular issue with instruments that have been laid and are already in force by the time that we debate them. If a negative instrument that has been laid under the 21-day rule has already come into force before we debate it, we find it difficult to knock back the instrument because it would cause such confusion to the industry or people affected by it. When all those issues arise together, the matter becomes really difficult. It is even worse when we are required to consider just before the summer recess a difficult statutory instrument that has been laid and is about to come into force. At our last meeting before the summer recess, I think that we had to consider nine statutory instruments. In those circumstances, it becomes really difficult to carry out the kind of scrutiny that we all believe is necessary.

Murray Tosh: I appreciate that your committee is returning the issue to us to see what we think, but we need to recognise the difference between our committee's role, which is technical, and that of a subject committee, which deals with policy.

Even the exercise of a relatively straightforward ministerial power can raise substantial policy, financial or other discretionary implications. It would be difficult for our committee to devise a procedure that would allow subject committees in effect to rewrite the parent act by treating as affirmative an instrument that was planned as negative. To see whether we should pursue that, we are trying to assess the views of committees on whether such problems arise frequently. We want to know whether committees believe that such problems could be resolved, as the Health Committee's paper suggests, simply by better programming and the provision of better information or whether some kind of procedural or legal amendment is required to empower committees more effectively to deal with instruments that have important policy implications, but are negative because they are procedurally relatively straightforward.

Perhaps Roseanna Cunningham has some thoughts on that.

Roseanna Cunningham: I hear what Sarah Boyack is saying, but our committee did not take quite the same view because, I suppose, our experience is that most subordinate legislation goes through quickly. For the most part, we deal with rafts of amnesic shellfish poisoning orders that do not generate much of the kind of discussion that Sarah Boyack mentioned. However, we consider many other instruments for which such issues arise. Most notably, we recently had to consider statutory instruments made under the Mental Health (Care and Treatment) (Scotland) Act 2003. For those instruments, we had to deal with a lot of important stuff on timescales and in ways that we felt were not

appropriate and that did not allow us to dig deeply into the issues.

Some of our difficulties could be dealt with by timescale changes, but many of them could be resolved if we had the kind of pre-notification listings that are used in the National Assembly for Wales, where the dates on which SIs are expected to be made are flagged up well in advance. Such a change would require, in our case, the Scottish Executive Health Department to be sufficiently organised, but one would hope that it would not be too difficult for the department to think along those lines. Every subject committee would benefit from being able to see well in advance the relevant department's schedule for laying various instruments before Parliament. That would allow us to consider whether we wanted to scrutinise particular instruments in greater detail than the current timescales allow for.

The issues that Sarah Boyack mentioned did not arise in our committee in the same way. Our perspective is that we need more advance notice and as much time as possible to put items for scrutiny on our agenda. We did not consider the more technical issues that Sarah Boyack has raised.

Murray Tosh: I want to put a related but slightly different question to Iain Smith. I appreciate that he has not been dealing with statutory instruments for very long—although, of course, he might want to suggest a procedural change to us—so I ask him to comment on this question. If we took it as a given that there should be some way of putting a spoke in the wheel to allow an instrument to be treated in a different way from that which was anticipated, should such matters be for the subject committee or for the Executive to determine? For example, the Executive might say, "We recognise that this negative instrument flags up significant issues, so we wish it to be treated using a different procedure."

Iain Smith: That is not an easy question to answer.

Murray Tosh: That is why I asked it.

Iain Smith: When Parliament agrees the parent act, it decides what the correct procedure is for a particular issue. The problem is that the Parliament might not envisage major policy changes. For example, as part of the less favoured areas scheme, powers were given, I presume, to deal with annual uprating and minor changes to the scheme, but the procedure in the parent act is perhaps not appropriate for wholesale changes to the scheme. Obviously, many procedures have been inherited from acts that the Parliament did not pass, which leads to problems.

The issue comes down to the timetable. If the Executive wants to make a significant policy change using the negative procedure, it should allow a longer timetable and a longer lead-in time to ensure that the committees are aware of what is happening, rather than just running up to the buffers, which often happens with subordinate legislation. If a committee feels that it has not been given sufficient time to consider an instrument, the Executive should be asked to defer its coming into force to allow the committee further time. That may require a procedural change so that, if a committee requests, say, an extra 20 days to consider an instrument, the measures will not come into effect until that time has passed. That would apply to instruments that are considered under both the negative and affirmative procedures. However, some instruments will have to be laid and come into force immediately to deal with emergency situations.

Murray Tosh: I ask the other conveners if they favour that suggestion, which is not about changing the procedure from negative to affirmative, but about bidding for extra time.

Sarah Boyack: We certainly support that, as it is one way round getting involved in whether the affirmative or negative procedure should be used. We usually have time for one committee meeting on a negative instrument, which is not long enough. For the committee to call for external evidence and to reflect on it, we probably need two meetings. In the timescale, we need to put an instrument on the agenda, do the preparation work and get the Subordinate Legislation Committee's view. By the time that we have processed all that, we are usually at the end of the 40 days and there is little time left. With controversial statutory instruments on which we have had an evidence session, the fact that the measures have not slid through at the last minute has helped key stakeholders, because they have aired their views and we have had Executive witnesses along to debate the issues with members. We would not want to do that with every statutory instrument, but if we had advance notice from the Executive, we could flag up controversial or significant instruments that we felt needed more time for consideration.

Roseanna Cunningham: The Health Committee's experience has always been that instruments arrive at the last minute. If we are confronted by serious issues, the capacity for organising at such short notice witnesses and/or a sensible discussion in the committee is vanishingly small. It is a constant worry of all subject committees that measures go through without the scrutiny that they require. From speaking to a number of members, I know that there is a real fear that some of the issues will come back to bite us. I assume that you will ask separately about the possibility of amendment, which might deal with some issues. The fundamental problems that face

us are the lack of advance notice and the short timescales. Those are at the root of our difficulties.

11:00

Murray Tosh: I move on to my second question. Sarah Boyack referred to instruments that raise no policy problems, but which raise procedural problems for the Subordinate Legislation Committee. In essence, we could do three things. First, we could accept the status quo; secondly, we could abolish the committee and pass our scrutiny role to each subject committee to consider the vires of instruments; and thirdly, we could empower ourselves to act on our own in relation to instruments that we see as procedurally flawed, which is the suggestion from the Environment and Rural Development Committee.

Are the conveners happy to retain the current split in technical and policy scrutiny between the Subordinate Legislation Committee and their committees? What do they think about the proposition that we should be able to move against an instrument? Would they feel that our tanks were on their lawn if we suggested that instruments that came within their policy ambit should be annulled because they raised vires issues for us? Sarah Boyack has made her pitch about that already, but she might have something more to say. I also want to broaden the discussion to the other conveners.

Sarah Boyack: I will explain why we made our suggestion. We generally found the process quite frustrating. After the Subordinate Legislation Committee carries out detailed technical scrutiny of whether an instrument is likely to work and identifies points that need to be amended, the instrument come to us, but we do not do the same work on it. When we have no problem with the instrument from a policy point of view, what do we do with it at that point? The objective might be right, but there might be technical issues that the Subordinate Legislation Committee has felt strongly about. I do not think we have ever knocked back an instrument at that point. We tend to say that we would like the minister to come back to us with a replacement instrument as soon as possible.

The Subordinate Legislation Committee had big issues with how the Registration of Establishments Keeping Laying Hens (Scotland) Amendment Regulations 2004 (SSI 2004/27) were drafted, but we had no problem with the policy. That put us in a really odd position. We flagged the instrument through and did not stop it; I think we dealt with it under the negative procedure. That felt like the wrong way to deal with such an instrument. The Subordinate Legislation Committee had done a piece of work that failed the instrument and the Environment and Rural Development Committee did a piece of work that passed it. It did not seem appropriate that it was going to come back to Parliament X number of weeks later with amendments. The Environment and Rural Development Committee said that we are almost doing different jobs on the statutory instruments and asked whether, if the Subordinate Legislation Committee had serious concerns about the competence, vires or drafting of an instrument, it could kick it back to the Executive before it came to us for a policy review.

This is a bit like the discussion that we had about wanting more time to deal with negative instruments. If we spent more time on everything the whole system would grind to a halt. There were one or two instruments that the Subordinate Legislation Committee had, in effect, failed but which we had to pass in policy terms.

Murray Tosh: Do the other conveners agree?

Roseanna Cunningham: We did not discuss that particular issue in the Health Committee, which probably means that it did not really exercise our concern. However, Sarah Boyack made a fair point. I recall from my time on the Environment and Rural Development Committee a number of occasions when there were serious issues with drafting that gave rise to concerns. In circumstances where the fundamental problem with an instrument is a drafting or procedural issue, it must be possible for the subject committee to pass it in terms of policy but pass it back to the Subordinate Legislation Committee to consider whether it wishes to refuse it. Sarah Boyack is right: it makes no logical sense for one committee to say yea and another to say nay, and the instrument to go forward anyway.

Iain Smith: We will discuss this more when we come on to amendments, but the problem for subject committees is that they have to decide whether the policy must be implemented in the timescale of the statutory instrument or whether it can be delayed by being sent back and annulled because of technical deficiencies. It would be preferable for the technical issues to be dealt with through technical amendments, while the instrument was going through, which clearly falls within the remit of the Subordinate Legislation Committee. Policy issues are about overall policy, rather than the technical merits of the instrument.

The Local Government and Transport Committee had the same instrument before it three times before it was approved, because of the drafting flaws in it—I think it was to do with legislation on disabled people and taxis. The fact that the instrument was flawed wasted everyone's time—the Subordinate Legislation Committee's time, officials' time and the Local Government and Transport Committee's time. The instrument could have been amended before it went through the

first time. That would have been the sensible way to deal with the technical problems with it.

The Convener: Before we continue, I should add that we are trying hard, through the clerks and legal advisers and through our liaison with the Executive, to get a lot of those technical difficulties cleared up during the process. We can often operate a twin-track approach, with slight amendments being made along the route. We hope that that process is improving, so that there will be less technical difficulty to deal with when committees consider subordinate legislation.

There is another issue that you might want to raise. Des McNulty is not here today, but he raised a number of issues to do with the fact that subordinate legislation might bring into being something that has considerable financial implications. He also said that, where there is a code of practice, there is no onus on the Executive to produce a report about the financial implications of such a code.

That brings you a bit more up to date, in case you want to comment on that at a later stage. I now turn to Ken Macintosh, who is going to talk about existing parliamentary procedures.

Mr Kenneth Macintosh (Eastwood) (Lab): All the conveners have given their views on the importance of improving the timetable by which committees deal with subordinate legislation and on the idea of giving advance notice.

I would like to ask specifically about the timeframe that we are working to at the moment. In particular, I would like to start with the 40-day rule. There are informal mechanisms in the relationship between the Parliament and the Executive, but the 40-day rule is a formal mechanism. Do the committee conveners think that 40 days is long enough, or do they think that the period should be made longer or changed in certain circumstances? If so, in what circumstances, and what criteria would apply?

Iain Smith: It is a bit of both, actually. At the moment, we have a nuclear option for all subordinate legislation, and a committee must either approve the whole thing or not approve it within a fixed timescale. There are circumstances in which it is appropriate to say, "Why delay this legislation? It's fine and nobody has any problems with it." In those circumstances, we just let it go through, and the timescales are fine. However, a committee may wish more time to consider the policy or financial implications of other pieces of subordinate legislation. In those circumstances, it should be possible to request that an instrument does not come into force until a further period has elapsed, to allow that further consideration to take place. It is a horses-for-courses thing, to some extent, and there should perhaps be a minimum period and a maximum period. It would then be up to the Subordinate Legislation Committee and the subject committee to determine whether to take the minimum period or the maximum period to deal with an instrument.

Mr Macintosh: Do you think that it would be possible to work out in advance the criteria for delaying—perhaps delaying the wrong word—or building in an extra period for scrutiny?

Iain Smith: There are always difficulties in putting too many things into rules; the rules will become extremely complex and they will be subject to interpretation. To some extent, it has to be left to the discretion of the committees, although if the Executive did a better job of providing advance warning of what is coming, and if it consulted properly on statutory instruments, the flagging up of instruments that were likely to fall into the maximum period rather than the minimum period could be done at an early stage and with the agreement of the Executive.

Sarah Boyack: I agree with Iain Smith. It is a question of judgment and of spotting issues that we know are likely to be controversial or to need parliamentary scrutiny. Let me give a couple of obvious examples of such instruments that the Environment and Rural Development Committee has dealt with over the past couple of years.

We knew that the water regulations that followed the passage of primary legislation were going to be an issue, and we ended up just managing to take evidence and have the minister at the committee, because we could see that one coming. A committee should have a programme for the issues on which it wants to take evidence and which it wants to discuss. We will have to know what is in ministers' diaries. It will not be easy for a minister if we say, "We want you next week." A bit of give and take will be required.

Being able to track issues will also be important. For example, the Nature Conservation (Scotland) Bill dealt with snaring, which was a very controversial issue at the Environment and Rural Development Committee. The bill has now been enacted but we are still waiting for the subordinate legislation that will follow. The committee is also about to start work on new piece of primary legislation on animal health and welfare.

If people phone the clerks to ask what is happening with a particular piece of legislation, the clerks have to say, "Speak to the Executive." It would be much easier if we had more up-to-date information on where the Executive was with statutory instruments and on when they were likely to come to the committee. That would allow us to have a programme.

Having up-to-date information is especially important when a committee has a heavy

programme of primary legislation to deal with. The Environment and Rural Development Committee will be dealing with one bill after another this year, so slotting in meaningful discussions on statutory instruments will be difficult for us.

As Iain Smith said, advance notice is important. Judgment is important too, but if we were to exercise judgment on every statutory instrument the process would grind to a halt. I know that we are talking about only a few statutory instruments, but we have to be able to identify them and programme them in so that we can scrutinise them effectively.

Mr Macintosh: It sounds as if you are saying that, with improved timetabling, the 40-day rule is manageable—tight, but manageable. In other words, you would not necessarily want an extra power to change the 40-day deadline, but what you really need is advance notice. Is that a fair comment?

Sarah Boyack: Yes, but with something like an exemption for the few instruments that are genuinely difficult to programme within the 40 days.

Mr Macintosh: So you want an exemption.

Sarah Boyack: Forty days can be a problem. Witnesses who are invited to come to a parliamentary committee may not be based in Edinburgh and may not be able to drop everything immediately. If an issue is important, people will come, but we would still want to give them—and ministers—sufficient notice.

Roseanna Cunningham: Members of the Health Committee were unanimous in feeling that longer timescales were required—although not, obviously, in every single case.

I keep coming back to this point. If we could get information on what is planned for when, many problems would be resolved because we would be able to put things into our forward work plan. At the moment, we hear vaguely that a set of regulations will arrive at some point in the autumn—that is as much as we get. We might know that regulations to do with mental health will arrive in autumn, but we do not know the details of the regulations and we do not know whether they will arrive in September, October or November. None of that is known, but it could be.

Even with the timescales that are set down at the moment, members of the Health Committee felt that we had to have extra time if it was required. We would never need extra time for statutory instruments on amnesic shellfish poisoning, but we might for other, more substantial instruments. For example, the regulations arising from the Smoking, Health and Social Care (Scotland) Act 2005 will deal with exemptions to the smoking ban. They will be substantial regulations and will require serious discussion. They will not be the kind of regulations that can just be nodded through. To apply the same timescales to such regulations as are applied to others seems crazy to me. Committees have to be able to flag up the importance of specific issues.

Mr Macintosh: I wonder whether—

The Convener: I want to bring in Stewart Maxwell who has a question on the same point.

Mr Macintosh: Of course.

Mr Stewart Maxwell (West of Scotland) (SNP): Iain Smith suggested minimum and maximum limits of, for example, 40 and 60 days, and there seems to be general agreement that the maximum would be used only in exceptional circumstances and that using it in all cases would not be desirable.

When you expect difficulties or extended discussions or that witnesses will be required, do you want the subject committee to have the power to agree to a motion to extend the time limit from the norm of 40 days to 60 days? Could something as simple as that resolve the issue?

11:15

Iain Smith: That would be simplest, if it was practical to do so, which would depend on the instrument in question. The earlier that such an extension is flagged up to the Executive, so that it is aware that the committee is likely to want extended time and can build that into the timetable, the better.

Roseanna Cunningham: It must be said that committee timetables are so congested that it is highly unlikely that a committee will embark on extensive evidence taking on a statutory instrument when it is in the middle of taking evidence at stage 1 or is about to embark on stage 2. Most committees would take such action only on rare occasions when they felt that it was necessary. However, from time to time in the life of this Parliament, there have been occasions when taking such action would have been advisable, instead of sticking to the original time limits.

Mr Macintosh: You all suggest that it should be possible to make exceptions for difficult cases. Deadlines are frustrating, but they are also useful, particularly when managing business. Instead of creating a mechanism where each committee has to choose the exceptions, would it not be better to extend the deadline for all instruments to 60 days? If that extension applied across the board, all committees would have enough time, particularly if the extension was married to the giving of advance notice and proper timetabling by the Executive. Would it not be better to have a flat

rate, if I may use that term, rather than single out individual cases to which different criteria apply?

Roseanna Cunningham: My instinctive feeling is that such a flat-rate increase across the board might be resisted in some quarters, whereas taking a more reasonable approach through negotiation—which we all do anyway with stage 1 deadlines and so on—might be better received. We are talking about what is likely to be achieved, rather than a flat-rate increase across the board to 60 days which would be wholly unnecessary in the case of the amnesic shellfish poisoning orders. I am sorry that I keep going back to those orders, but they are a good example from the Health Committee perspective of the kind of instrument that does not need much scrutiny.

Mr Macintosh: We heard evidence on those orders last week. It is interesting to note that they are emergency orders to which timetables do not apply because they come into force immediately. Perhaps we will have to think about how we deal with emergency orders. Although we have some time to think about the amnesic shellfish poisoning orders, they come into force the moment they are laid, so they are a slightly different kind of subordinate legislation.

Roseanna Cunningham: Perhaps there needs to be greater delineation, so that we do not treat emergency orders in the same way that we treat other orders. Perhaps the simple division between negative and affirmative is not the best way to designate orders; there may be better ways to proceed.

Mr Macintosh: Indeed. Does Iain Smith want to say anything about applying a 60-day rule across the board?

Iain Smith: I tend to agree with Roseanna Cunningham that if the Subordinate Legislation Committee made such a proposal there might be significant resistance from other quarters. The vast majority of instruments are non-controversial and there is no need to delay their coming into force. You should bear in mind the fact that most instruments have administrative effects on other organisations, which will need as much time as possible to implement them. Delaying the approval of instruments is unnecessary if there is no need to do so. However, in certain circumstances—for example, where a statutory instrument brings into force the detail of a piece of legislation that has recently been passed by the Parliament, or where existing legislation is being changed—more time may be required to ensure that the Parliament is satisfied that the Executive is using its powers correctly.

Mr Macintosh: I have a final question on the 21-day rule, which Sarah Boyack commented on in her evidence from the Environment and Rural Development Committee. My question touches on a point that Roseanna Cunningham made. Effectively, negative instruments are already in force before committees get a chance to consider them under the 21-day rule. Should we extend the 21-day period in such situations, because it is effectively meaningless? It has been suggested that members are reluctant to change powers that are in place.

Sarah Boyack: I think that our submission mentions the example of an instrument under the 21-day rule that had financial implications for others. I am thinking of an instrument that deals with grants and which is already in force by the time we consider it and decide to annul it. Members will see that many complex scenarios would arise from such situations. To what extent do we have an effective opportunity to annul such instruments? It is as if they are given to us just for information. That is certainly what it feels like to the committee. We would have to think very carefully before we annulled an instrument that was already in force, which is something that we have never done. We think that it does not help the scrutiny process if we are scrutinising instruments that are already in force.

Mr Macintosh: So, on the 21-day rule, you agree with Roseanna Cunningham's view that emergency measures should have different criteria applied to them.

Roseanna Cunningham: I do not think that Sarah Boyack is talking about emergency legislation. This is the nub of the argument. I agree that the amnesic shellfish poisoning orders are emergency instruments and that they, and similar instruments, ought to be designated as such. However, on Sarah Boyack's point, one might say that the relevant Executive department has never imposed any deadlines on itself, so it has never bothered to meet the necessary deadlines to ensure that committees can deal with legislation before it is already in force.

It seems extraordinary that Executive departments are not under some of the same deadline rules. They do not impose deadlines on themselves, but they hand statutory instruments to the Parliament that are already in force or which will come into force before the end of the period for parliamentary consideration. I must question what is going on with the management of statutory instruments before we get them.

Mr Macintosh: You are right that emergency instruments are different.

Iain Smith: In general terms, the rules should be such that instruments, whether negative or affirmative, should not come into force until the timetable for the Parliament to approve or annul them has passed. However, there should be

exceptions, such as emergency instruments. There may also be occasions when regulations are laid that must come into effect immediately to prevent evasion. Therefore, in exceptional circumstances, instruments would come into force immediately they were laid, but the general rule should be that Parliament should be able to have its say first.

Sarah Boyack: I want to give a particular example that we put in our submission. In the period running up to the summer recess every year, we tend to have to deal with many statutory instruments in our final two meetings. This year, we had five instruments at our second-last meeting and nine at our final meeting before the summer recess. We did not have the time to scrutinise any 21-day instruments. We asked questions about some of them, but by the time we got the minister's responses and considered them in committee, the instruments had been laid for two months. The matter involves real time-management issues.

It comes back to how much information we get with an instrument. Some of our questions were relatively straightforward to answer and we felt that the information that they sought should have been in the initial package of information that came with the instruments. There is an issue about getting things right up front; if that happened, it would help with many of the problems with which we have to deal as a committee.

The Convener: You will be pleased to know that we were not terribly happy either with what happened before the recess, so a strong letter—or perhaps it was a verbal comment—went to the Executive to say that what was happening was not good practice.

Does Stewart Maxwell want to move on to amendments now, or does he have a question on the National Assembly for Wales?

Mr Maxwell: I have a quick question on the Welsh Assembly, which Roseanna Cunningham raised in the Health Committee's written evidence. The Welsh Assembly clearly gets detailed advance notice of subordinate legislation. Do you think that such a system should be replicated here, or should we simply strive to achieve a higher standard? Further to that, do you think that the reason why committees of the Welsh Assembly get that level of detail is that the Assembly does not deal with primary legislation? Do you agree that it tends to concentrate on detailed work on subordinate legislation because it does not have primary legislative powers? When we visited the Welsh Assembly, we were taken aback by the level of detail and the amount of energy that went into dealing with subordinate legislation. Do you agree that the Assembly does that work in such detail because that is its primary purpose?

Roseanna Cunningham: Possibly.

I apologise for my BlackBerry going off earlier. Sarah Boyack advised me of a foolproof way to turn it off completely, but it is clearly not all that foolproof. I hope that I have silenced it, at least.

I see no reason why the National Assembly for Wales model cannot be replicated in Scotland. The pre-planning grid states in simple terms the working title of the statutory instrument, its purpose, the month in which it is intended to be brought forward and the standing order or other procedure under which it will be considered. It is therefore clear to the committees exactly what instruments they can expect, when they will arrive and the nature of the procedure. I do not understand why that approach cannot be replicated here.

I am aware that the Welsh Assembly's committees are different from the Scottish Parliament's committees. In Wales, ministers sit on the committees, which creates a different dynamic, and committees deal only with secondary legislation, although I understand that they will get powers to deal with primary legislation—next year, I think. It will be interesting to see how their processes develop as a result of that.

We get detailed paperwork on SSIs, but it is impenetrable. That problem would be solved if the Scottish Executive took on board some of the Welsh Assembly's processes. I see no reason why the clarity of the information that is provided in Wales cannot be replicated here in Scotland. That need not be done in exactly the same detail or style, but if such clarity is possible in Wales I see no reason why it cannot be expected in Scotland. In the main, we all speak the same language; indeed, I dare say that the crystal-clear information is available both in Welsh and in English. As such clarity is possible, it should be available in Scotland.

We cannot replicate the Welsh experience, because the Welsh Assembly deals only with secondary legislation, which is like housework, in that it will expand to fill the available time. In the Scottish Parliament, we try to push subordinate legislation through faster because we have already had the big, substantive policy debates on the primary legislation that creates subordinate legislation. However, in comparison with Wales, I do not think that we handle secondary legislation well. Where possible and appropriate, we should either replicate the Welsh model or attempt to achieve a far higher standard than we have at present.

Mr Maxwell: The Subordinate Legislation Committee has asked why we cannot see

Executive departments' timetables for subordinate legislation. They must have such timetables.

Roseanna Cunningham: One would hope so, but I sometimes wonder.

Mr Maxwell: Perhaps I should move on to our questions on amendments. We received a cross-section of opinions on whether the Parliament should have the power to amend SSIs. The Justice 2 Committee does not think that we should have such a power, but the Health Committee thinks that we should. The Health Committee gives the Smoking, Health and Social Care (Scotland) Act 2005 as an example because of the detailed and significant nature of the regulations that will stem from that act. The Environment and Rural Development Committee does not support the power of amendment, which it says would be

"a huge and unmanageable responsibility."

However, it goes on to discuss the possibility of amendments to correct minor technical flaws.

Is there any way to bring the committees' views together? One suggests that committees should be able to accept amendments of a minor and technical nature that do not hold up the statutory instrument, whereas another suggests that it should be possible to make major amendments to statutory instruments. However, other committees have said that there should be no power to amend. Given that, except the Justice 2 Committee, everybody believes that we should not leave things as they are, will you each express your views on how that change could happen in practical terms? Obviously, there is a difference of opinion among the committees.

11:30

Sarah Boyack: In principle, the Environment and Rural Development Committee did not want the power to amend all statutory instruments. This partly goes back to Roseanna Cunningham's point about our responsibilities in relation to primary legislation. I am not sure how we would cope with the ability to use such a power; we would certainly require expertise to back us up, and we do not have that expertise at the moment. Given the number of statutory instruments that are regularly before the committee, the power to amend them would have significant implications, and we did not want the power to amend policy. We feel that if we are really unhappy with the policy of an instrument we will knock it back.

On where we thought that there was scope for amendment, I go back to the points that I made earlier. The Subordinate Legislation Committee regularly feeds us information about what you consider to be drafting errors. Anyone who reads an instrument would notice drafting errors, but it is your job, not ours, to spot them and to answer the question whether an instrument is competent or unworkable. The Environment and Rural Development Committee feels that by the time we consider an instrument the Subordinate Legislation Committee has done that job. If an instrument contains such errors, it is not efficient for it to be recycled several months later as a new, amended instrument. We think that there should be a power to make technical amendments but we did not want the responsibility of having to get the policy of statutory instruments right. In such cases, we would rather knock an instrument back than amend it ourselves.

Mr Maxwell: You are suggesting a restricted power to amend. Would it be fair to go one step further and say that because the power to amend is in effect technical in nature, as it deals with typographical errors and so on, it should rest with the Subordinate Legislation Committee and no one else?

Sarah Boyack: That was our view.

Roseanna Cunningham: There was a unanimous decision by the Health Committee that it would like the power to amend, although I would not anticipate using it often. We flagged up the regulations stemming from the Smoking, Health and Social Care (Scotland) Act 2005 because the detailed nature of some of them raise policy discussions that would mean that, although we might not necessarily want to annul an entire instrument, there might be significant debate about one or two aspects of it. We felt that in such circumstances it would be preferable for us to have the power to amend rather than simply the nuclear option of annulling completely. The nuclear option will be rarely used—I think I am in right in saying that it has been used only once or twice in the history of the Parliament. Had the power to amend been available, one wonders whether there might have been a few more occasions on which committees were more proactive about statutory instruments than they are at present. I appreciate that that raises significant timetabling issues, but if some of the issues that arose from the timetabling discussion were dealt with, it would be possible to give more consideration to the idea of amendment.

Mr Maxwell: Do you not think that if a committee had the power to amend what is effectively a serious policy, that would enable the committee to undermine a decision that the Parliament had already taken? A statutory instrument may bring into force a policy intention of an act that has already been passed by the Parliament. If we go back to your example—

Roseanna Cunningham: It depends on whether you consider that the Parliament has already taken the decision. The problem with a lot

of statutory instruments is that that is where the detail comes in. Arguably, who is acting as the Parliament in considering that detail?

We are often told, during the passing of primary legislation, that the detail will emerge in the statutory instruments that will follow. However, when we get the instrument, it may not actually do what we thought was intended. At the committee level, we do not have the capacity to deal with that, other than by simply annulling the instrument.

I appreciate that a committee's decision to amend a statutory instrument might trigger a return to the chamber of the issue concerned, which, in its specifics, was probably not part of the debate on the primary legislation. I would have thought that the Procedures Committee and the Subordinate Legislation Committee might want to consider that situation.

Iain Smith: I would like to make a comment about the difference between the Welsh Assembly and the Scottish Parliament. It is important to remember that the Welsh Assembly is a different statutory beast to the Scottish Parliament. The Welsh Assembly has delegated responsibility for secondary legislation in Wales and, in Scotland, we delegate our secondary legislation to ministers. Secondary legislation has a different status in the two bodies because of the way in which they were set up. The reason why the Welsh Assembly can amend its statutory instruments is because, effectively, it makes its statutory instruments while, in Scotland, it is the ministers who do so.

On amendments, I tend to agree with Sarah Boyack's point. In situations in which the Subordinate Legislation Committee has identified a technical flaw in a statutory instrument and the Executive has accepted that that flaw exists, I see no reason why that flaw cannot be corrected before the statutory instrument comes into force. It makes no sense that a separate statutory instrument has to be laid to correct something that everyone agrees is wrong. There should be an opportunity for those statutory instruments that have not come into force before they have completed the parliamentary procedure to be amended to correct technical drafting errors that have been identified by the Subordinate Legislation Committee and the Executive. That would be a sensible and straightforward way of dealing with the situation and would avoid situations in which instruments come back to committees two or three times.

Mr Maxwell: Effectively, that would mean that the instruments would circulate in the Subordinate Legislation Committee until such a time as we had agreed—

Iain Smith: At the moment, the Subordinate Legislation Committee sends a report to the Executive saying that it thinks that certain things are wrong with a statutory instrument, and the Executive writes back and says whether it agrees. However, if it agrees, why cannot those instruments simply be corrected? I would not have thought that any further action, other than reprinting the instrument with the correct wording, would be required. That would not be a major problem; it is a more straightforward approach than having to lay another statutory instrument to correct something that is only a drafting error. I find it extremely frustrating that the same instruments keep coming back to us simply because there has been a drafting error.

On the broader issues, the Parliament has made a decision to give powers to ministers to make the policy changes. In some instances, those powers are too wide and leave the Parliament only with the power to agree with the whole thing or throw the whole thing out. If a committee disagrees with the Executive's interpretation of a small part of the policy that the Parliament has approved, there is no opportunity to amend that. For example, when the Health Committee receives the instrument listing the places exempt from the ban that will be brought in by the Smoking, Health and Social Care (Scotland) Act 2005, the committee will have no opportunity to say whether certain places should be in or out.

In order to change that situation, we would have to change the standing orders of the Parliament to allow for another type of affirmative resolution that would apply to amendable secondary legislation, and the Parliament would have to agree, when passing the primary legislation, to allow the secondary legislation to be amendable. That would be the only way in which we could do it. We should not play around with existing definitions of affirmative and negative resolutions to make instruments amendable if a committee wants to amend them. Either the Parliament agrees that an instrument should be amendable or it does not. However, the Parliament has reached no such agreement, which means that no instrument can be amended. I think that the committee should be able to say to the Executive that it does not agree with an aspect of an instrument and that it would like the Executive to come back with an amended instruments. That might be the way forward.

The Convener: I want to mention two areas in which we occasionally disagree with the Executive. First, we may think that a power is particularly wide and communicate that to you because the Executive has come back to us saying that it thinks that the power is perfectly acceptable and is close to what the original bill said. Secondly, there are various examples in today's papers of subordinate legislation that we do not think has kept close enough to what the enabling act said that the subordinate legislation

could do. That is a vires issue. Sometimes there are bigger issues than purely technical ones, albeit that we are trying hard to get rid of technical errors. What is your reaction to those bigger issues?

Roseanna Cunningham: I would find it surprising if one committee had the right—however matters were sorted out procedurally—to amend on a purely technical basis while the subject committees were not given the same right in dealing with the policy areas that are within their remits. That would be an anomaly, which I suspect would soon create difficulties.

Iain Smith is right about the Scottish Parliament—we delegate powers relating to secondary legislation to ministers, but they must bring that legislation back to the Parliament. We are talking about the proper parliamentary scrutiny of secondary legislation. The process cannot negate the ministerial right to create secondary legislation or our right to find a better way of dealing with and scrutinising secondary legislation.

The Convener: I am trying to say that in much of our work—members of this committee are also members of other committees—we can see issues, and sensitive issues in particular, in which the vires question might arise and in respect of which there might be wide powers. I support much of what has been said, but we are flagging up issues that are important for the subject committees to—

Roseanna Cunningham: We are still left with a decision about annulling or passing legislation. There is no middle ground to take or intermediate position that we can adopt on any statutory instrument—that missing middle ground often creates difficulties.

Mr Maxwell: The debate is interesting. The issue of amendment is crucial to where we should go with statutory instruments. I wonder what the logical outcome would be if all committees had the power to amend statutory instruments. I do not necessarily disagree with what has been said, but would the Parliament have to debate, approve or vote on amendments? How much time would the procedure take? The issue is interesting and I do not suggest that there is an answer that can be given here and now, but it is obvious that there would be consequences for timetabling in the chamber if we went down that route.

Roseanna Cunningham: That is right.

Iain Smith: I tend to agree. There is a serious danger of drifting into treating secondary legislation as quasi-primary legislation and ending up essentially having stages 2 and 3, although probably not stage 1, for it. That would defeat the purpose of having secondary legislation, which is to avoid members having to come to the Parliament every time that measures have to be implemented.

I return to what I said earlier. The Parliament has already decided to go for the super-affirmative procedure in certain circumstances—for example, when it wants a longer process for secondary legislation that is the flesh on the bones of an enabling act and is coming to the Parliament for the first time.

I am simply saying that perhaps the Parliament should have the right in certain circumstances to say that some policy aspects of super-affirmative instruments should be amendable by committees. However, the Parliament should make such a decision in the primary legislation. It should say that the legislation is so important that the drawing-up of the secondary legislation should be shared, in a way that is impossible under the current regulatory framework.

That should be the exception rather than the rule. Most secondary legislation should be subject to the current procedure and not be amendable for policy issues, although the committee should be able to say to the Executive, "We are passing this, but we are not happy with X or Y. Come back with changes." The Parliament has a responsibility to ensure that legislation is properly drafted. I do not see why, when we discover that it is not properly drafted, it cannot be corrected if that does not affect the policy aspect.

I see no dichotomy between the subject committees and the Subordinate Legislation Committee in that respect. If the Subordinate Legislation Committee says that it does not think that an instrument is properly drafted and asks for it to be corrected and the Executive agrees that it is not properly drafted, it should be possible for that correction to be made before the instrument comes into effect. That strikes me as much more sensible than having three or four pieces of subordinate legislation going through the system in order to get things right.

11:45

Sarah Boyack: Stewart Maxwell is right. If we had the power to amend statutory instruments—currently, that power is delegated to the Executive—we would exercise it. That would put the Environment and Rural Development Committee up there with every other committee and people would lobby us in the expectation that we could change statutory instruments.

What would also change is our scrutiny at stages 1 and 2 of primary legislation. A lot of what the subject committees do involves negotiating or setting marker points for the Executive, especially on things that we know will be an issue after the primary legislation is passed, such as codes and

statutory instruments. At the moment, committee members extract commitments on such things from the minister at stage 2. We would probably end up doing less of that if we knew that we could change the legislation subsequently. There is an advantage in being able to have that up-front scrutiny of primary legislation, which effectively gives subject committees the power of veto when the legislation comes back to us.

If the subject committees had the power to amend statutory instruments, our scrutiny would take longer and there would be different expectations outwith the Parliament about whom to lobby and when. The nature not just of our scrutiny but of our committee debates would change dramatically. The Environment and Rural Development Committee's view is that we do not want that power. We think that it is the job of the Executive to amend statutory instruments. However, when we make a lot of comments on bills, we expect to see those comments reflected in the statutory instruments that subsequently come to us.

Mr Maxwell: I do not want to take up the whole morning on this point, but there is an interesting debate to be had. In the light of Iain Smith's comments, I wonder exactly how and where the line would be drawn. If the subject committees accept the technical stuff, that is fair enough. However, the convener was talking about something that is not technical in nature—she referred to vires and the width of powers—that goes to the committee and becomes, in a sense, policy. We are saying, "This is wrong. The Subordinate Legislation Committee can amend it." We might also think, "This is wrong. Let's pass it to the subject committee." However, if the line is drawn there, the subject committees still cannot do anything about the instrument. Where would you draw the line? Is it that either we allow everybody to amend or this committee does not?

Iain Smith: The issue about vires clearly relates to policy; if the Executive appears to be drawing up a statutory instrument that is outwith the powers of the parent act, that is about policy. In those circumstances, the only option open to the subject committee is to annul the instrument or to refuse to approve it. That has not happened often, perhaps because committees are not taking enough time to consider the views of the Subordinate Legislation Committee on whether a statutory instrument is within the powers that are granted by the parent act. I am not suggesting that the subject committees are not doing their job properly, but they are perhaps not giving enough consideration to that aspect.

Roseanna Cunningham: That goes back to the issue of timescales.

Iain Smith: Perhaps if the committees chucked one or two statutory instruments back, the Executive might consider the issue of vires more carefully before it introduced further statutory instruments.

Roseanna Cunningham: One of the difficulties for the Health Committee is that we often get the report from the Subordinate Legislation Committee only on the Tuesday morning or, after the statutory instrument has been discussed by this committee, it goes straight to the Health Committee at 2 o'clock in the afternoon. In those circumstances, what are we to do? Detailed scrutiny is an impossibility.

The Convener: Stewart, are you content to leave it there?

Mr Maxwell: There is a lot to mull over. This is difficult territory and I am not sure that we would get any further down the line with it.

The Convener: You have raised a lot of interesting points. Thank you very much. You have obviously looked into the matter in great detail. Ken Macintosh will now address the issue of consultation.

Mr Macintosh: I have two questions that are addressed to all our witnesses. First, do you agree that the Parliament should be consulted formally when the Executive is consulting on draft instruments? In particular, should the Executive consult the individual subject committees? Secondly, and drawing on a suggestion made by the Environment and Rural Development Committee, should the Subordinate Legislation Committee comment on the standard of consultation when we look at instruments? If we think that consultation has not been sufficient, should we flag that up? Should we make that one of the criteria that we apply? My general question is whether there should be a draft consultation process, in which committees are included. That would, in effect, be a bit like the super-affirmative procedure.

Iain Smith: If we go by the Executive's improved timetabling option, under which a clear programme is provided for dealing with statutory instruments, we should be consulted when a draft instrument is out to consultation with the relevant people. That would appear on the relevant committee's timetable, so that the committee was aware that the consultation was under way. The committee would have the option to be involved at that stage, if it wanted to be. That would probably be a better way of proceeding than having a formal requirement to consult committees on a large number of statutory instruments, some of which would not be worth showing on the committees' radar screens.

Roseanna Cunningham: I agree with that.

Iain Smith: Ken Macintosh's other point is important. The explanatory notes accompanying statutory instruments should be clearer and should indicate who was consulted; they should cover any concerns that had been raised in response to the consultation. That is already required for primary legislation and I do not see why the standards for secondary legislation should be any lower.

Sarah Boyack: We were particularly keen for that to be the case. We have not had reports on the consultations that were carried out on the instruments that have come to our committee, which are sometimes fairly substantial. We often receive a list of consultees, but that is not the same thing as knowing what they said. The information that comes to our committee lacks that quality. If fuller information were factored into the timing and into the notification that the committee is given, so that we know what is coming in advance, that would help us a lot.

Another difficult issue for us relates to cases in which the Executive is running late on the transposition of European Union directives. The Executive is running to deadlines; if it is very close to meeting a deadline and the statutory instrument comes to us at the point when, if we knock it back, the Executive is in breach of EU obligations, that is problematic. There is an issue around timescales and how effective we can be in scrutinising legislation.

The main issue is about giving us more information in advance, both in a quality sense, as has been proposed, and simply through notifying us. We do not want to be double-consulted; we do not want to be consulted about a consultation and then have to go through the scrutiny process. We want to get information and then be allowed to scrutinise the statutory instruments.

The Convener: Is there anything else that the conveners want to say about the super-affirmative procedure? I know that Iain Smith has said quite a bit about it, but you may have other comments.

Iain Smith: When legislation is introduced whose policy and implementation will rely heavily on the regulatory framework, the Executive needs to adopt a much higher level of consultation and involvement with the Parliament on the initial instrument than would be the case with an ordinary SSI or with the renewal of an instrument. The extent of the initial consultation should be determined when the primary legislation is considered.

Mr Adam Ingram (South of Scotland) (SNP): I want to raise the subject of how guidelines, codes of conduct and codes of practice are treated. Should all instruments of a legislative character be SSIs? Guidelines and codes of practice are commonly not SSIs, yet they can play a vital role in the implementation of acts. As Iain Smith will be aware, that is the case with the Education (Additional Support for Learning) (Scotland) Act 2004. A code was also central to the Mental Health (Care and Treatment) (Scotland) Act 2003. The Finance Committee made some criticisms with regard to the code of practice for the 2004 act. It pointed out:

"there was no requirement for the Executive to provide costing information."

Should we issue codes of practice and guidelines as formal SSIs?

Iain Smith: There is no easy answer to that question. The danger is that, if we make them formal SSIs, they might operate in a different way from normal codes of practice. I realise that some guidance and codes have statutory backing, but they are to an extent advisory in nature and we must be careful about creating a whole new body of legislation by turning them all into statutory instruments. Indeed, one would have to agree in primary legislation that any codes of practice and guidance would have such legislative impact before they were turned into SSIs.

Sarah Boyack: The Environment and Rural Development Committee agrees that not all codes of practice should be issued as formal SSIs. However, the Executive might choose to implement some measures in a bill through statutory instruments and deal with others in codes of practice. We will be consulted only on SSIs, which means that we might get the chance to scrutinise only a small part of a package of measures. For example, on scallop fishery management, our committee had what might be called a robust discussion on one aspect of the process, but we did not have the chance to discuss the rest of the package. It would have made a lot more sense to bring in all the stakeholders and really scrutinise what the Executive was doing.

The Environment and Rural Development Committee would like to be able to scrutinise codes of practice. However, we do not think that codes should automatically be issued as statutory instruments. The point is that the Executive should be required to let us know what it is doing, otherwise we will find out about these things only in press releases or when someone writes to us about them. As I said, such matters do not really come before the committee.

Roseanna Cunningham: The issue did not really register with the Health Committee. However, I was interested to read about it in the evidence from other committee conveners; indeed, I can see exactly why Des McNulty has raised specific concerns on behalf of the Finance Committee. Sarah Boyack's point is more

appropriate for the subject committees. The issue is not so much the nature of the beast before us as the opportunity for us to talk about the whole of the beast. That is not happening at the moment.

Mr Ingram: On Sarah Boyack's point that codes of practice do not come before her committee for scrutiny, how can we change the procedures that we are adopting just now if we do not flag such codes as statutory instruments? How do we ensure that we maintain in the system a level of awareness of the various codes, guidelines and so on? Moreover, how do we ensure that they receive the proper scrutiny that she suggested they should receive?

Sarah Boyack: The minister in question could write formally to the committee, informing it that a code of practice is about to be published. The committee could then discuss the matter. I believe that several committees were able to discuss the access code, which touched on justice, environmental and rural issues. However, we believe that, after lengthy debate as a result of a petition that came before the Environment and Rural Development Committee, we had some influence in persuading the minister that he should, through primary legislation, publish a code of practice on sewage treatment works and odour issues. That code is about to be published, but it will not automatically come back to us for scrutiny. Indeed, we will not even be automatically notified of its publication.

I said earlier that we should not have to go through the process of making statutory instruments every time a code of practice or set of guidelines is issued. The issue is partly about squaring the circle and ensuring that we are kept in the loop on the issues that our committee has raised. That is not simply a courtesy; we want to ensure that our committee can see what the Executive is doing and can scrutinise the Executive's policies if we think it important to do so.

The Convener: In their written evidence, committees have also raised the issue of clarity. The witnesses this morning have mentioned explanatory notes, Executive notes and so on. How much jargon is there in statutory instruments?

12:00

Roseanna Cunningham: My deputy convener once used the phrase "models of obfuscation". Someone suggested that we should bring an example to this meeting, but we thought that it would be more difficult to find an explanatory note that did not obfuscate than it would be to find one that did. The fundamental problem is that the legal jargon that is churned out is replicated in the accompanying notes, which are not much better than the statutory instruments.

The legal terminology in statutory instruments must be precise, but the explanatory notes do not have to replicate that jargon; they could be far more straightforward and simple and state exactly what is proposed and why, what the timescales are, what the arguments are, what the consultation was and what people's views were. There seems to be no reason why such documents must be produced as they are currently, although I have a sneaking suspicion that they are produced in that way in the hope that nobody will bother to read them and, by that means, legislation will go through without much scrutiny. I fear that that is what is happening.

Sarah Boyack: I strongly agree that we need plain English and good writing practice in the documents. We have had to write to the Executive about several instruments to say, "We are not clear about the significance of this. Can you give us more information on X, Y and Z?"

That takes us back to the 40-days issue. If committee members and clerks combined are not sure about the significance of a statutory instrument and we have to ask the Executive about it even when we have the explanatory notes, that is not good practice. We should be able to work things out from the information that comes with the instrument. There is a need to improve the quality of information. It is not that we want longer papers; we want papers that are more to the point and clearer about the intent and effect of legislation that we will have to scrutinise at high speed.

Iain Smith: Part of the problem is that there does not seem to be a standard way in which the Executive presents such information to committees. The explanatory notes and policy memorandums come in a slightly different format for every statutory instrument.

It would help if the Executive were to look at the information that committees find useful and provide a clear guidance template for the people who put that information together. Policy memorandums for short statutory instruments can be very long; conversely, they can be short for long statutory instruments. That does not make a lot of sense.

Sarah Boyack: Sometimes the accompanying information is excellent and tells us exactly what we need to know. That is almost more frustrating, because it makes us ask why we cannot have excellent information for all statutory instruments. However, we receive some good information—I do not mean to say that everything is dreadful. There needs to be a culture of being helpful about explaining what we are about to scrutinise rather

than giving us bare information in impenetrable language or too much information without cutting to the chase.

The Convener: Thank you for coming along today and for the written information from your committees. This has been a very interesting conversation, which has taken us a little further down the road.

Annabel Goldie from the Justice 2 Committee was meant to be with us this morning, but she is obviously busy with other things and could not be here.

12:03

Meeting suspended.

12:13

On resuming—

Delegated Powers Scrutiny

Licensing (Scotland) Bill: as amended at Stage 2

The Convener: Members will wish to note that the stage 3 debate on the bill will be held next week on Wednesday 16 November.

The committee raised some concerns in its stage 1 consideration. The Executive responded to our concerns with amendments at stage 2. Since then, there have been several other amendments that either modify delegated powers or introduce new powers.

We will look at the delegated powers first and deal with sections 136(4) and 136(5), on orders and regulations. The Executive amendment changes the procedure in three sections of the bill from negative to affirmative, which reflects the committee's views at stage 1. Are members content with that?

Members *indicated agreement*.

The Convener: The Executive introduced seven new delegated powers at stage 2 that relate to matters of detail or that clarify existing powers in the bill. All of them will be subject to the negative procedure. There appears to be nothing in the provisions to give us any concern, unless members have seen anything different. Are members happy with the powers?

Members *indicated agreement*.

12:15

The Convener: The bill also contains two powers to amend or modify primary legislation. Such powers are usually subject to the affirmative procedure but, in this case, they are to be subject to the negative procedure. The first, which is in section 118(10), deals with vessels, vehicles and moveable structures. The provision will confer powers on ministers to modify, as they consider necessary, the application of the bill to vessels and so on. As the other provisions in the bill apply to buildings, the Executive takes the view that having alternative provisions for vehicles and other structures would lead to overcomplication. The Executive considers that, because of the highly technical and delimited nature of such regulations, the negative procedure is appropriate.

Is that reasonable, or should we ask for the affirmative procedure to be used?

Mr Maxwell: I agree with the Executive on the powers in section 118(10)—there is no problem with the negative procedure.

The Convener: Do members agree?

Members *indicated agreement*.

The Convener: Paragraph 2(1A) of schedule 2 relates to membership of the local licensing forums. The bill will allow ministers to change the number of members of local licensing forums if necessary, following experience of the forums in operation. The Executive applies the same argument as it applied on the previous matter: although the power allows subordinate legislation to be used to amend primary legislation, in the Executive's view, the modification is highly delimited and is not sufficiently important to merit a debate in Parliament. Do members agree that the negative procedure should be used?

Members *indicated agreement*.

The Convener: Paragraph 8(4) of schedule 3 and paragraph 7(4) of schedule 4 relate to irresponsible drinks promotions. To clarify and enhance the regulation-making powers, subparagraphs have been added that will allow ministers to make additional provision regarding descriptions of drinks promotions. It is difficult to say firmly what drinks promotions might occur in the future, so we must be flexible. Are members happy with the provisions?

Members *indicated agreement*.

Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Bill: Stage 1

The Convener: Item 3 is delegated powers scrutiny in relation to the Joint Inspection of Children's Services and Inspection of Social Work Services (Scotland) Bill at stage 1. We will have another chance to consider the bill, as we have a few concerns. The bill makes provision for a new multidisciplinary inspection team for child protection services, which will be led by Her Majesty's Inspectorate of Education.

In part 1 of the bill, which is on children's services, section 1(6)(g) will give ministers a power to specify a person or body as one to which section 1 applies. The effect is to allow ministers to specify a person or body to conduct an inspection that relates to the provision of children's services. The power will be subject to the negative procedure. There appears to be no need for a more onerous procedure, as the committee normally accepts the need for such powers for the reasons that are given in the policy memorandum. However, the power is wide, which may be an argument for a stricter degree of scrutiny. What are members' views on that?

Mr Macintosh: I am relaxed about the use of the negative procedure.

The Convener: Are members happy to leave it as negative?

Mr Maxwell: Yes. However, I have just reread our legal brief, which points out the difference between a power to amend a list and a power to add to it, which appears to be the power in this case. The policy intention is for a power to amend the list, but the effect of the provision is to provide a power to add to the list. There is a clear difference between the intention as stated in the policy memorandum and the power that is provided for in the bill. Perhaps we should ask for clarification on that.

The Convener: That is reasonable. As I said, we will return to the bill next week, so we will ask for clarification on that matter in the meantime.

Section 2 will confer powers on ministers to direct any person or body who is not on the list, or who is not specified in an order, to participate in an inspection. There appears to be no limit on the powers that can be exercised by such a person. Section 2 therefore seems to confer a wide power to modify the bill, albeit in relation to particular inspections. Do members have worries about that provision? The negative procedure is used. [*Interruption.*] I am told that just a direction is involved. The power to modify the bill's provisions is wide.

Mr Maxwell: We have expressed concern about unlimited powers such as the ones that section 2 appears to provide. We should at least seek clarification.

The Convener: We need clarification particularly about the apparent lack of a limit on the powers that can be exercised by a person who is directed.

Mr Maxwell: Yes.

The Convener: We will ask the Executive for its views on whether a limit exists.

Mr Maxwell: We can ask what the intention is.

The Convener: Do we agree to ask about that?

Members *indicated agreement*.

The Convener: Section 3(1) provides the power to make regulations for the purpose of a joint inspection. Section 3 provides for regulations to be made that cover several sensitive matters, including the creation of offences for the purpose of enforcing any provision of the regulations.

The Executive argues that that power is necessary to allow ministers to provide those who conduct inspections with sufficient powers to carry them out and has provided a draft of the

regulations, which members have received. The Executive considers that the powers should be set out in subordinate legislation, as they might have to be refined as inspections proceed. The Executive considers it appropriate for the regulations to be subject to the affirmative procedure. Do members feel that that is the correct level of scrutiny and that the balance between primary and secondary legislation is correct?

Mr Macintosh: The penalty that the regulations can impose has no limit, although a limit is normally set. We should explore that with the Executive.

The Convener: That relates to section 3(1)(f).

Mr Macintosh: Yes.

The Convener: We will ask for more information on why the penalties have no limits.

Mr Macintosh: Another point is that we have not received all the regulations. I believe that they have just been printed, but we have had no chance to review them. Much will be left to regulations, which should therefore be in front of us. I assume that we will have a chance to consider the regulations next week.

Mr Maxwell: My point follows on from that. Rather a lot will be left to regulations. Considering the balance between primary and secondary legislation is within the committee's remit. On the face of it, leaving so much to regulations does not seem reasonable. Perhaps that relates to our discussion about using the super-affirmative procedure and the lack of a power to amend. It would help if the Executive laid out some detail on its thinking about why so much should be in regulations.

Murray Tosh: In particular, section 3(1)(f) gives regulations the power to create offences. When possible, it is preferable to create offences in primary legislation and to deal with all the ramifications in secondary legislation. The balance does not seem to be right.

The Convener: No—absolutely. We will take on board those concerns.

We will move on, because our letter to the Executive will have to deal with other provisions, too. In part 2, which is on social work services, section 5(3) provides the power to make regulations for the exercise of functions under section 5(1). Section 5(3) provides for the types of inspection and covers matters that could be sensitive. The Executive undertook to provide a draft of the regulations to members this week, which I gather the clerk received last night. As Ken Macintosh said, everything is coming at us quickly. I ask members for comments. Given the limitations of subordinate legislation procedure, is the power in section 5(3) more acceptable than those that we just discussed?

Mr Maxwell: The same points apply. All that we said about section 3 applies to section 5(3).

The Convener: I agree.

Murray Tosh: I agree.

The Convener: Part 3 is headed "General". The definition in section 7 of "social work services functions" provides the power to make regulations defining which local authority functions are to constitute social work services functions. The Executive justifies leaving the definition of what is to constitute a social work services function to be set out in regulations because that allows for flexibility to cover future developments. The power is subject to affirmative procedure. However, the definition of "social work services functions" is a key provision of the bill, and it is therefore open to debate whether it is acceptable to leave the matter entirely to subordinate legislation without any limitation.

Murray Tosh: The briefing paper gives the extreme example of transport matters being dragged in. However, many local authorities operate close working partnerships with health boards on social work and aspects of health services. Many local authorities operate housing services within community services departments. Therefore, it is not hard to see where the edges of what constitutes social work could be significantly blurred and where regulation could start to impinge beyond the principal purpose of the bill. There must be a sharper definition in the bill of "social work services functions", given that many people in the field may act across a wider remit than simply the narrow profession of social work.

The Convener: Is it agreed that we will explore that with the Executive as well?

Members *indicated agreement*.

The Convener: Finally, section 8 makes several consequential repeals of other pieces of primary legislation that will be superseded by the bill. However, there is no provision for any transitional arrangements or consequential amendments in relation to those repeals. We need to ask about that as well. Is that agreed?

Members *indicated agreement*.

Executive Responses

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

12:26

The Convener: I will leave discussion on the order, because another very similar instrument comes up later and we would just be repeating ourselves. We shall keep this one in abeyance.

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

The Convener: As members will remember, we asked for an explanation of the vires for several of the rules. The first are rules 24(4) and 33(3). It appeared that provision for the payment of expenses of persons other than tribunal members or staff is already provided for in a substantive provision of the Education (Additional Support for Learning) (Scotland) Act 2004, namely paragraph 17 of schedule 1.

In relation to both rules, the Executive has indicated that it is making an incidental or supplemental provision under the parent act and that it considers that there are vires. As drafted, the rules confer the power to make payment of expenses in certain cases and to that extent there may be doubt about vires. Should we raise that point or are we content that they are intra vires?

Murray Tosh: It is clear that we should raise the point. There is doubt in some of the questions in the briefing paper about who is responsible for paying the money. Several issues are raised in the briefing paper and we should ask questions about them. We should also ask the Executive to confirm that it is content about the vires.

The Convener: I am being told that we cannot ask any further questions; we just have to report the point to the lead committee and the Parliament.

Murray Tosh: We should just report it then.

The Convener: Do we agree with the proposed action on rules 24(4) and 33(3)? We also had doubts about whether rule 28(5) is intra vires, given what paragraph 14 of schedule 1 provides for. We would have to report that we had doubts about those rules.

Rule 37(1) raises another issue of vires. The Executive has indicated that to avoid the possibility of a tribunal becoming deadlocked in the absence of a member, it is considered under reference to section 34(2)(a) of the 2004 act that rule 37(1) is an incidental or supplemental provision considered to be expedient and that there is accordingly vires for it.

From the information that we have, it seems that there is less doubt about the vires of rule 37(1) than there is about the other two.

Mr Maxwell: It seems odd that there might be a situation in which there were just two members and one of them might have two votes. That does not seem right somehow, although that is not exactly technical language. I assume that the intention was that the minimum number would have been three rather than two. We should point out those concerns.

12:30

The Convener: Okay, we will do so if that is the committee's feeling. The briefing note seems to indicate that the first points are more major, but I accept that we still have concerns about the last one. Is that agreed?

Members *indicated agreement*.

The Convener: We move on to the point that we made about rule 37(2). Paragraph 14(1)(b) of schedule 1 to the act would seem to rule out the use of the wording from "save as" to the end. It also appears to allow no exceptions. Our point on rules 39(2)(b) and 39(5) was made in light of paragraph 10 of schedule 1, which states:

"The Scottish Ministers are to pay any expenses reasonably incurred by the President or a Tribunal in the exercise of the President's functions or, as the case may be, Tribunal functions."

The Executive agrees that the committee's observations on those two rules are well founded. It has undertaken to bring forward amending rules to address the points that we raised. On that count, we can report that the matter will be rectified.

Finally, the committee sought explanation of why, in rule 37(3)(a), a requirement to send out a copy of the decision was thought necessary, given that such a requirement is already to be found in paragraph 14 of schedule 1. The Executive has indicated that its intention was to clarify that, as a matter of practice, the administrative responsibility for doing so rests with the secretary. Again, the provision appears to be of doubtful vires. Shall we add that to our list of concerns about vires?

Members *indicated agreement*.

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

The Convener: Regulation 4 states that if the prescribed conditions apply, an appeal committee shall be deemed

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

of schedule 2 to have confirmed the decision of the education authority on a placing request. As paragraph 6(6)(b) is simply a regulation-making provision following the wording of the enabling power, the committee asked the Executive whether the phrase in question should not read:

"for the purposes of this Act".

I remember this one. The Executive accepts the committee's suggested rewording, but says that it had thought that it would be helpful for a specific reference to the paragraph to be made in the schedule and that it does not consider that the validity of the regulations is affected. Therefore, I assume that it will not rectify the matter quickly. Will we report the regulations to the lead committee and the Parliament on the ground of defective drafting? The Executive seems to have accepted that our wording should be used.

Mr Maxwell: I am disappointed by the Executive's response. It should have agreed with us and used its usual phrase that it would make the changes "at the earliest legislative opportunity". Clearly, it is not going to do that.

The Convener: There is nothing to stop us from writing another letter.

Mr Maxwell: Yes, but all that we can do about the regulations is report them.

The Convener: Yes, we can report the regulations to the lead committee and the Parliament on the ground of defective drafting. Is that agreed?

Members *indicated agreement*.

The Convener: Does the committee want to write again to the Executive?

Mr Maxwell: Will we achieve anything by doing so? We seem to have come to an impasse. Clearly, we disagree. What would the content of the letter be? All that we would do in so writing would be to reiterate what we said last week. The Executive has said that it does not agree.

The Convener: Shall we leave it?

Murray Tosh: We could put it to the committee that it should lodge a motion for annulment.

The Convener: We could, but I think that we will leave it at that.

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

The Convener: Members will remember that we asked the Executive for an explanation of article 3(2). We asked, in particular, about the words "and that" at the end of the fourth line. We also expressed concern about the number of typos in the order. The Executive accepts that the words "and that" are not essential; they were meant only to be of assistance in the reading of a lengthy sentence. It is satisfied that the phrase does not affect the validity of the order.

Should we report the order to the lead committee and the Parliament on the ground of defective drafting or on the ground that the meaning could have been clearer?

Mr Macintosh: We should note the Executive's apology.

The Convener: Yes. The Executive is very apologetic about the typos.

Mr Maxwell: I am not sure whether I would go as far as to say that the order is defectively drafted.

Mr Macintosh: It could be clearer.

Mr Maxwell: At the very least, the order certainly could be clearer. However, it us up to other committee members to decide whether it is worth reporting it on the basis of defective drafting, because I do not feel strongly either way.

The Convener: The typos have been altered, so shall we accept the Executive's apology and pass on to the lead committee our view that the order could have been clearer?

Members *indicated agreement*.

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

The Convener: Members will remember that we asked why the title of the regulations did not follow the usual form for instruments. The Executive's explanation is that the use of "Amendment" in the title was misplaced, but that it is satisfied, again, that the validity of the regulations is not affected. The Executive is also making appropriate arrangements to put right its error and produce a replacement instrument that will be available free of charge. Are we content just to draw the lead committee's attention to the regulations along the lines that they have not followed proper legislative practice but that they will be altered?

Members *indicated agreement*.

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

The Convener: The committee asked for further information on the reason for the breach of the 21-day rule—Stewart Maxwell will remember this.

Members have the Executive's explanation before them, which seems to be that Westminster was late in telling the Scottish Executive.

Mr Maxwell: It is as we thought. We have Executive assurances that it will try to ensure that such a discrepancy does not happen again. There is an obvious solution in the longer term, but perhaps that is for another place.

The Convener: Of course—not here. We pass that on to the lead committee and the Parliament, do we?

Mr Maxwell: Do you mean my allusion to independence?

The Convener: No, I mean your comment that we should accept the Executive's explanation. We should also pass on the Executive's commitment to ensuring that the discrepancy does not happen again. Is that agreed?

Members *indicated agreement*.

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

The Convener: Members will recall that I referred to this order earlier when we dealt with the first victim statements order. This is the second of the orders.

The committee asked the Executive why the explanatory notes did not fulfil the requirements of the guidance on the drafting of statutory instruments, as the effect of the orders is not made clear. We were concerned that that was available only on the internet. The Executive accepts that it would be feasible to provide a detailed description in the explanatory notes, but it states that that would inevitably lengthen them without necessarily increasing their utility to the reader.

Mr Macintosh: The Executive is getting confused about the purposes of the two orders.

The Convener: And the explanatory notes.

Mr Macintosh: Exactly. The explanatory notes should explain what an instrument does; they should not attempt to explain the policy behind an instrument, which is the purpose of the Executive note. Perhaps we ought to write to the Executive in that respect.

The Convener: I think that we must report now to the lead committee and the Parliament. We can report the order on the ground of its failure to comply with proper legislative practice. Again, given our earlier discussion, that is very important. Is that agreed?

Members *indicated agreement*.

Draft Instrument Subject to Approval

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

12:38

The Convener: Item 5 is a draft instrument subject to approval. No substantive points arise on the order.

Mr Macintosh: We should thank our advisers for spotting the European directive case very early on and alerting the Executive.

The Convener: Absolutely. We can raise a minor point in an informal letter. Is that agreed?

Members *indicated agreement*.

Instrument Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 14) (Scotland) Order 2005 (SSI 2005/529)

12:39

The Convener: Item 6 is an instrument subject to approval. No substantive points arise on the order. Is that agreed?

Members *indicated agreement*.

Instruments Subject to Annulment

Avian Influenza (Preventive Measures) (Scotland) Regulations 2005 (SSI 2005/530)

12:39

The Convener: Item 7 is instruments subject to annulment. I refer members first to paragraph 119 of the legal briefing. You will be aware that the exercise of powers of entry to private houses has given rise in the past to a number of cases being brought under the European convention on human rights. For that reason, if for no other, where a power of entry encompasses dwelling houses, it is usual for regulations to provide specifically that that power can be exercised only at a reasonable time and/or after reasonable notice. However, such a provision is absent from the regulations. Do we want to raise that point with the Executive as well as the minor one?

Mr Maxwell: I think that we probably should raise it. Normally, I would agree that the timing should be stipulated and that inspectors should enter private premises only at reasonable times. However, if a case came to light late in the day and, as I hope that they would, the inspectors acted immediately, it might be that action would need to be taken outside the times that would normally be deemed to be reasonable. Perhaps that is the intention.

Murray Tosh: If that were the case, it would be better if that were spelled out in the regulations, so that we could all understand the intention. It would therefore be appropriate for us to go back and clarify whether this is a policy choice or not.

The Convener: Do we agree to put those points to the Executive?

Members *indicated agreement.*

Murray Tosh: Were we not going have an argument about what "midnight" means? I was not aware that there was any dubiety about that. Perhaps legal advice will clarify the issue subsequently.

Avian Influenza (Preventive Measures in Zoos) (Scotland) Regulations 2005 (SSI 2005/531)

The Convener: The regulations form the second part of the package to reduce the spread of avian influenza and impose controls on the keeping of birds in zoos.

Regulation 5(2) refers to vaccination being carried out in accordance with instructions from Scottish ministers. European Commission decision 2005/744/EC provides that vaccination must be carried out

"under the supervision of an official veterinarian of the competent authorities".

We wonder whether regulation 5(2) meets that requirement. Do we agree to ask that important question?

Members *indicated agreement.*

The Convener: Annex II of the decision imposes a number of conditions in relation to vaccination including restrictions on the movement of vaccinated birds. However, it is not clear how those are to be enforced. Do we agree to ask for clarification of that matter?

Members *indicated agreement.*

Food Labelling Amendment (No 3) (Scotland) Regulations 2005 (SSI 2005/542)

The Convener: No points appear to arise on the regulations. However, members might want to comment on whether they should have been made available free of charge.

Mr Maxwell: Did the Executive not do that?

The Convener: I do not think that it did.

Mr Maxwell: Our legal advice says:

"the mistake in this case was not of the Executive's making".

The Convener: Shall we ask for a bit more clarification?

Mr Maxwell: We could maybe just ask.

Murray Tosh: It is worth finding out about. From the point of view of whoever is regulated, legislation is, presumably, a seamless process and the issue of where the fault has arisen scarcely matters.

The Convener: We will ask for clarification of why the regulations were not made available free of charge.

The next meeting of the committee is on 15 November. At the meeting after that, which is on 22 November, the committee will be taking evidence from the Deputy Minister for Finance, Public Service Reform and Parliamentary Business, George Lyon—I did not realise that he had such a long title. It is important that we are all here for that.

Meeting closed at 12:44.

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