SUBORDINATE LEGISLATION COMMITTEE

Tuesday 22 November 2005

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
32nd 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:

George Lyon (Deputy Minister for Finance, Public Service Reform and Parliamentary Business)
Jane McLeod (Scottish Executive Legal and Parliamentary Services)
Murray Sinclair (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 22 November 2005

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

Item in Private

The Convener (Dr Sylvia Jackson): I welcome members to the Subordinate Legislation Committee's 32nd meeting in 2005. I have received no apologies. Agenda item 1 is to decide whether to take an item in private. The clerks require guidance from members on the content of the committee's draft report on phase 2 of our inquiry into the regulatory framework in Scotland. Such discussions are usually taken in private. We will discuss the report next week, so I am giving members advance warning. Are members content to discuss the report in private?

Mr Stewart Maxwell (West of Scotland) (SNP): Is that the report on our inquiry?

The Convener: Yes. Do members agree to take that item in private?

Members *indicated agreement*.

Regulatory Framework Inquiry

14:37

The Convener: Agenda item 2 is the inquiry into the regulatory framework in Scotland. I welcome today's witnesses: George Lyon MSP, the Deputy Minister for Finance, Public Service Reform and Parliamentary Business; Murray Sinclair, whom we have seen before and who is the head of the Scottish Executive constitution and parliamentary secretariat; and Jane McLeod, from the office of the solicitor to the Scottish Executive.

I understand that the minister wants to make an opening statement.

The Deputy Minister for Finance, Public Service Reform and Parliamentary Business (George Lyon): I make it clear from the beginning that I am no expert on subordinate legislation. While I will endeavour to answer members' questions, I will be highly reliant on my colleagues, who will deal with the details.

I will make one or two remarks on the Executive's overall approach to regulation. We believe that regulation should be imposed only when, on balance, the inherent constraints and costs are assessed to be more than offset by the anticipated benefits. Our approach to the regulation of regulation—that is, to the processes and procedures that govern the making of regulation—is based on the similar view that the costs that are incurred, for example through additional consultation and scrutiny, should not outweigh the likely benefits. That is the context within which we have responded to the inquiry and to the issues that the committee has raised.

The Executive welcomes the committee's initiative and we are happy to discuss the subordinate legislation procedures. The discussion is timeous, as we have now had six years of experience of such legislation, with more than 3,000 instruments brought into force. The issues that have been raised in the consultation paper and discussed with those who have given evidence help us in thinking through the subordinate legislation procedures and considering whether they might be done differently. Some of the proposals have attractions, but their impact on the overall picture must be thought through. Our intention is to take a constructive approach and to work with the committee.

There is little point in making changes that would improve some aspects of the procedures but that might create difficulties in other areas. For example, we have concerns about the proposal to give powers to the Parliament to amend subordinate legislation. That sounds attractive, but

it could adversely affect timescales for legislation coming into force, and legislation could change from what was consulted on or assessed through a regulatory impact assessment. We need to be careful when thinking through possible changes to procedures.

My officials and I hope to input to the committee's proposals based on the Executive's experience of subordinate legislation. I invite questions or comments from the committee.

The Convener: We will come to amendments to subordinate legislation later, but I begin with general questions on the nature of parliamentary supervision. Committee members may come in on the back of my questions. You say in your submission that it is necessary to have the two types of parliamentary control—affirmative and negative resolution—and that you support the retention of all eight variations on the procedures. What is your general view of the current handling of Scottish statutory instruments and the use of the affirmative and negative procedures?

George Lyon: The Parliament appears to be reasonably content with the two procedures. As you rightly point out, there are eight variations, which gives us flexibility in the approach that we take. To date, the affirmative and negative procedures have worked reasonably well. The super-affirmative procedure has been used on one or two occasions, and it has a role to play, albeit only in exceptional circumstances. Officials may wish to comment on the detail, but our general view is that the Parliament seems to be content with the procedures that are in place, which to date appear to have worked reasonably well.

Murray Sinclair (Scottish Executive Legal and Parliamentary Services): I agree entirely with the minister.

The Convener: That leads me to the next question, on which you may be able to give us more detail. We gave you advance notice that we were particularly interested in examining the eight variations on the procedures. What is the rationale for retaining those that are rarely used?

Murray Sinclair: We have the procedures for historical reasons. They were incorporated into particular acts for reasons that were thought appropriate at the time. We are open to the committee's ideas on how to rationalise those processes but, as we have noted, our position is that none of them is broken. They offer a degree of flexibility, which is useful in particular circumstances. For that reason, we do not propose to suggest changes. The truth of the matter is that some of the procedures—for example the draft negative procedure—are, indeed, rarely used. If the committee has thoughts about how we can rationalise that procedure and some of the others, we would be prepared to listen.

George Lyon: It is important to stress that we are willing to listen to the committee's views, especially on the numbers and whether you see scope for change. We want to take a constructive approach to the committee's work.

The Convener: We are more than happy about that. Could you provide information on when the procedures have been used? To our knowledge, some either have not been used or have been used rarely. That would help us.

George Lyon: Do you want to be given a detailed breakdown of the number of times that they have been used, and to know whether we envisage circumstances in which some of those that have not been used—

Murray Tosh (West of Scotland) (Con): The why is important, as is the when.

George Lyon: So you want to know the rationale behind the number of times that they have been used, and why we think it worth while to keep some of the ones that have been unused.

The Convener: Yes.

George Lyon: That would be possible.

Murray Sinclair: We have a note of when each of them was used, and we could take the time to talk about some of them. However, it sounds as though you might find a note in writing more helpful, and that is something that we can certainly let you have.

10:45

The Convener: That would be very helpful.

Use of the class 4 procedure—that is, for draft instruments subject to annulment—would ensure that the Parliament considers draft instruments and has the opportunity to recommend amendments to the Executive, thereby avoiding instruments coming into force before the period of annulment expires. Why has that procedure not been used? Do you envisage that it could be used?

George Lyon: Can we be clear? Are you talking about a negative instrument?

The Convener: Yes, the class 4 procedure.

Murray Sinclair: That is the ordinary negative resolution procedure.

The Convener: The draft negative procedure.

Murray Sinclair: For what it is worth, the one example of that that we have been able to find is the Holyrood Park Amendment Regulations 2005 (SSI 2005/15). As far as we are aware, the

procedure is not at all common. There could be some timing difficulties with it, because the instrument would be made and considered but would not come into force until 40 days after it had been laid. As things stand, that would mean 40 days not counting any recess days. Therefore, there are potential difficulties about the coming into force of those instruments. That is especially so as the operation of such a procedure leaves no room for exceptions—at least it is not obvious how there would be room for exceptions. It is not like the 21-day rule, which—in extremis and if one has a good argument—one can breach without threatening the instrument. I assume that one could not do that with the draft negative procedure—certainly not as things stand—so there would be concerns there.

We could tease out some of our concerns in the note that you have asked for. Our initial take is based on the fact that the class 4 procedure is used so rarely. It is one of the procedures that could be viewed critically.

The Convener: In all fairness, originally we thought along similar lines, but now we think that it might be quite useful.

Murray Tosh: I would like to press the matter a bit further. We are conscious that much of our business primarily concerns going back to the Executive with comments on technical and textual issues. Often, the response is that you know what we have said but you cannot do anything about it because the process has taken over and there is no ability to go back.

It appears to us that useful work is done when we have the opportunity to put drafts before the committee, our legal advisers and support staff, and that expanding the use of draft negative instruments might be very helpful to you in some ways, by allowing more of the documents that go forward to be proof-read and foolproofed, which could be done if we could overcome the timing difficulties that you have just outlined.

We will return later to our concerns that commitments that you give us at that stage may not be tracked, and we will press you on what tracking you do. However, we see the procedure as an opportunity for you to run stuff by us and to get all the gremlins ironed out before the full order comes before us. There would be advantages in such an arrangement for you and, of course, for how we work.

Murray Sinclair: There are two issues there. One is whether it would be useful, if possible, for us to let the committee see a draft. We all recognise that that is a good thing, and it could be done without any procedures; it could be done as part of a consultation process, apart from anything else. We aim to do that, and it sometimes happens, although we all recognise that, for reasons to do with timing, pressure of work and so on, it does not happen as often as perhaps it could. However, we would continue to try to exercise that option where we can.

Under the existing procedures for negative resolution, the use of the class 4 procedure is quite rare. However, I can think of several examples of the committee making a good criticism of an instrument during the 21-day period, as a consequence of which we have made a change. That can be done within the 21 days, because we can breach the 21-day rule as long as we have a good reason for doing so. Breaching it because the instrument is defective is obviously a good reason, and we can do that under the existing procedures. I could not give you a figure for how often we do that, but we certainly do it sometimes. Our position is that we do it where we recognise that any perceived defect in the order is significant and needs to be corrected. Therefore, there is quite a lot that we can do under the existing rules.

Whether we should move instead to a more common use of the draft negative procedure is another matter. We would need to ask whether it would really help or add in a beneficial way to the arrangements that we already have. As things stand, I am not entirely sure about that. Quite apart from the timing difficulties with the 40-day rule, would not the position be such that, if there were amendments during that 40-day period, the 40 days would be triggered again? I think that there would be 40 days' consideration for an instrument as laid, so if we were to change the instrument during the 40-day period, and if there is no scope for breach of the 40-day rule, the clock might start again. I apologise for not being able to say for certain whether that is the case, but it would be worth looking into that, because that would be an important defect in the procedure, in comparison with the procedure under the 21-day rule.

Murray Tosh: Perhaps your response on the detailed analysis of SSIs might also address that point and whether there might be ways of getting round that, taking into account what we have said today and further research on what happens. If you isolate a number of practical difficulties, you may find that some of them are capable of resolution.

George Lyon: We will endeavour to provide that information to the committee.

The Convener: That would be helpful.

I now move on to another issue. As I understand it, your view is that, rather than examine the instrument to see whether the affirmative or negative procedure ought to be used, the

procedure for making regulations or orders should be highlighted in the parent act. The issue arose at a previous meeting when members of the Conveners Group talked about a significant number of instruments that implement European Union obligations. In particular, the convener of the Environment and Rural Development Committee mentioned the less favoured area support scheme. The significance of some of the orders relating to that scheme was not apparent until later, and it would have been better for them to have been handled using the affirmative procedure rather than the negative procedure.

I want to talk about circumstances in which the parent act may not be the best place to flag up whether a power should be affirmative or negative. In some cases, we may well have to wait for fuller information about a specific regulation.

George Lyon: Would the committee suggest that the parent act should not designate the procedure and that flexibility should be left for a decision further down the line, based on the content of the instrument and its importance?

The Convener: The issue has been evolving, particularly as the committees have handled more instruments relating to EU obligations, such as the one dealt with by the Environment and Rural Development Committee.

George Lyon: Will you clarify what the concern was with the instrument that you mentioned? Was there concern that there had not been wide enough consultation, or was there a lack of understanding about its impact?

The Convener: The expenditure connected with the instrument on the less favoured area support scheme was £60 million per annum, and the instrument was subject to the lowest level of scrutiny, the negative procedure. Obviously, the committee thought that it should have been dealt with under the affirmative procedure.

Murray Sinclair: Was the relevant order made under the European Communities Act 1972?

The Convener: Yes.

Murray Sinclair: So there was a choice of procedure. Our view is that it is always appropriate for the parent act to provide for the procedure. The committee will know from scrutinising powers to make subordinate legislation in bills that it is important to ensure that we get the procedure right. We err on the side of caution. If there are examples of acts of the Scottish Parliament where we have not got the balance quite right, it would be useful to hear about them. Our experience is that generally we get it right: we plump for the affirmative procedure where it is appropriate and the negative procedure where it is appropriate.

There is a separate set of parent acts in which there needs to be a choice of procedure because of the width of the powers. The 1972 act is one example; the Scotland Act 1998 is another. The acts in question are usually constitutional statutes, which have to confer wide powers given their constitutional nature. There is a choice of procedure with such acts. In our experience, the procedure can be chosen according to two sets of criteria. Criteria in the parent act itself are usually to do with whether the powers can be exercised to amend primary legislation. It will sometimes be stated that if the power is to amend primary legislation, there is no choice and the affirmative procedure must be used. Otherwise, criteria are set out in policy statements for which ministers are accountable. It would be a matter of policy for them to choose to use the affirmative procedure in some circumstances and the negative procedure in others.

That seems to be a good way of facilitating the discretion that is necessary. In any bill for an ASP where it was thought that there should be a choice of procedure, we would listen to views on that. As things stand, we tend to err on the side of caution and provide for the affirmative procedure rather than the negative procedure to be used when in doubt.

The Convener: I understand that section 2(2) of the European Communities Act 1972 allows for legislation to be enacted in a number of ways. Substantial policy measures governed the rules for the less favoured area support scheme, and the negative procedure was used. Either you did not think that the issue was sufficiently important to use the affirmative procedure or you did not know enough about it and so used the negative procedure. Why was the negative procedure used in that case? I agree with the rationale that you have set out, but in that case the appropriate, affirmative procedure was not used.

Murray Sinclair: I do not know the circumstances of the case, which is why I am talking in general terms. I do not think there is a problem with the procedures as such. The issue is whether the right decision was taken in any given case. I assume that, under section 2(2) of the 1972 act, a policy choice was made about what procedure to use in the case of the less favoured area support scheme. That decision would have to stand and it would have to be supported by the circumstances of the case. My point is that there is nothing wrong with the procedures that we already have or the way in which we construct the parent acts. The parent act will specify or prescribe a procedure or give a choice of procedure.

George Lyon: It seems that the point is about the choice that the minister concerned makes about the type of instrument to use. It sounds as if

the criticism is that the wrong choice was made, given that such a big policy issue was involved, which had such a widespread effect, and that the affirmative procedure should have been used to allow people to have a proper discussion on it.

11:00

The Convener: Could we allow you to look at that particular example?

George Lyon: Have you other examples, convener?

The Convener: I am sure that we could find some that we could write to you about.

Mr Kenneth Macintosh (Eastwood) (Lab): The most obvious example is one in which there is not insufficient consultation; it is the other way round. For food safety regulations, for example, a minister must appear before the Health Committee to talk about amnesic shellfish poisoning orders every time that they are laid. The minister is just going through a routine, because there is no huge issue about such orders. In fact, they concern emergency procedures that have already been put in place, so the fact that the minister appears to talk about them after the fact is a little bit of a farce. There is very little political discussion about them.

George Lyon: As I recall, there was quite a substantial amount of political discussion around those particular orders.

Mr Macintosh: There certainly has been in the past, but I would suggest that dealing with such orders now takes up a lot of parliamentary and ministerial time and to little purpose. I am not saying that that was always the case, but that is currently the situation. I would imagine that an element of flexibility would suit the Executive as much as it would suit a parliamentary committee.

George Lyon: On your example, there has been on-going political debate for the past three years about those particular orders and their use. The suggestion has been that we have tried to avoid that debate. The orders have been challenged in the chamber at every opportunity. I am not sure how parliamentary scrutiny of the orders would be improved by your suggestion of finding ways of avoiding the debate. I am not clear what you are driving at.

Mr Macintosh: It is purely an example that has come up. It is not something that the committee has agreed; I think that the Food Standards Agency Scotland or someone else might have suggested it to us and it is my view of the matter. It is also my view that one of the reasons why there have been umpteen statements about the orders in the chamber is because the wrong process is in place, which encourages members to make points about them. As soon as a member stands up to make a point, groans of dismay go round the chamber. That just shows that we are playing out a rather strange political game rather than giving a very important piece of legislation the correct amount of scrutiny. That is my view. I speak neither on behalf of the Subordinate Legislation committee nor on behalf of the appropriate subject committee. I am just flagging up the issue as an example.

The Convener: We might pick up that point later when we talk about emergency orders.

Murray Sinclair: Although we are getting into particular cases, the discussion that we are having does not demonstrate that it is wrong in principle for the regulatory procedure to be provided for in the parent act. In debating any future bill for an ASP, the question is whether the procedure is right. There should be a debate about that and the right place to have it is in the context of the act that confers the power.

Murray Tosh: I have a supplementary, which is really about accepting the premise that the sensible place to begin is the parent act. However, given that under some procedures an initial regulation is laid under the affirmative procedure and subsequent ones come under the negative procedure, I wonder whether there would be merit in making the procedure more flexible so that, in effect, the parent act defines a default position—the standard—but gives the Executive some discretion if it feels, for policy or other reasons, that a negative procedure could be set aside and the affirmative procedure used. The reverse could apply when there has been a series of orders—in the case of the amnesic shellfish poisoning orders, for example. In the past few months, we have seen the level of debate on those de-escalate; they are no longer challenged in the chamber to the same extent. I think that one party still forces a vote, but we do not have the speeches and the groans any more. Therefore, it might be reasonable in certain circumstances, particularly where there is a series of similar or identical orders, for the Executive to have a way of proposing—and getting the lead committee to agree—that the affirmative procedure need no longer be used and the negative procedure may be used. That would give everybody more flexibility. I wonder how you feel about that.

George Lyon: We will take that point back and examine it.

Murray Sinclair: That is really what happened in the context of the Scotland Bill, for example. I think that it is also what happens in the context of some of the powers to make consequential provisions that ASPs confer. For some of those, the choice of procedure is based on the fact that the changes that could be made are very small, so

the negative procedure is perfectly appropriate; other changes might be quite important, in which case the affirmative procedure would be more appropriate.

The Convener: I will just summarise before we move on. If we write to you with some examples of cases in which it would appear that the wrong decision was made in the parent act, for example in the case of the less favoured area support scheme, you will elaborate on that and send us an answer.

Murray Sinclair: Without accepting that the wrong decision has been made, I can say that we would consider the circumstances of the case. We can certainly consider the issue.

The Convener: I am talking about examples of what might have appeared to committee conveners to have been wrong decisions.

Mr Maxwell: I have a question about the power to annul. When the committee conveners were before the committee last week, they supported the idea that this committee should have the power to annul an instrument that, in our view, is technically flawed. In effect, we would have an independent power to recommend to Parliament that an instrument should be either annulled or not approved for technical reasons. That procedure would obviously be over and above the normal procedure whereby an individual member can move against an instrument. What is the Executive's view of the Subordinate Legislation Committee having that collective power?

George Lyon: Would the power be used only if the instrument was technically flawed?

Mr Maxwell: We would be able to annul an instrument only on narrow technical grounds, not on policy grounds or anything of that nature.

George Lyon: I do not know how the committee works, but I understand that the Executive takes account of any concerns that it raises and tries to respond to them. Perhaps Murray Sinclair will be able to elaborate on that. You are asking for a power over and above that process, so that you could recommend that Parliament should annul a flawed instrument and the Executive would have to go back and start again.

Mr Maxwell: You are quite right—the committee writes to the Executive about things in the instruments that it thinks are technically incorrect. Sometimes the committee and the Executive agree, and sometimes they do not. The committee conveners certainly thought that it might be helpful if the committee had such a power rather than just the ability to enter into correspondence when there is disagreement. The committee conveners were concerned about instruments going round the committees twice for technical reasons when an instrument has to be lodged again because there is a problem with it. However, if the Subordinate Legislation Committee had the power to annul faulty instruments at that stage, they would be stopped and the committees would not have to deal with them twice.

George Lyon: Are you talking about negative instruments only?

Mr Maxwell: I do not think so. I think that we are talking about both types of instrument.

The Convener: Yes; it is right across the board.

Murray Sinclair: My first question would be whether that would add anything. It is already open to any MSP to challenge the validity of negative and affirmative subordinate legislation. Would what you propose be any different? I presume that there would still have to be a debate and a vote, so would not the proposal just do what is done at the moment but via a different route?

Secondly, the whole instrument would be annulled when it might be wrong only in part. The committee would be able to annul only the whole instrument; that might be considered a fairly nuclear option for a defect that does not go to the very heart of the instrument.

Thirdly, as you said, at the moment the committee makes its comments and the Executive responds. However, we do not always agree. When the Executive agrees that there might be a problem, we have a mechanism—namely by making amendments to the order within the 21-day period and breaching that rule—by which concerns can be addressed. That should help us to get over significant problems in subordinate legislation and I think that it has done so in practice. In other cases, we accept that the drafting is not all that it could be, but there is no fundamental flaw in the instrument and we commit to coming back with a tidied up draft at a later date.

George Lyon: The point was made that instruments can go to the committees twice, which affects their workload. However, if an instrument were to be annulled, the Executive would still be forced to produce another instrument to deal with the specific matter under consideration. Is that correct, or am I misunderstanding the proposal?

The Convener: The point is that the instrument would not have to go to the lead committee; it would go straight back to be revised and would go to the lead committee only after that had happened. The lead committee would therefore see the instrument only once, rather than twice as happens at the moment.

George Lyon: So the instrument would be annulled at the Subordinate Legislation Committee before it was ever passed to the lead committee. I

take it that, at present, you look at an instrument and pass it on regardless of whether there are concerns about it.

The Convener: Yes.

Murray Sinclair: Or the instrument might be annulled by the Parliament, in effect on a motion of the committee. You would go to the Parliament on a technical issue before an instrument went to the subject committee. The comments that I made earlier would apply to that situation.

Mr Maxwell: I accept that MSPs have the right at the moment to attempt to annul or block an instrument. However, I am sure that you would agree that the Parliament's view would be different if the issue had been raised by a committee of the Parliament rather than by an individual. If a committee raised serious concerns over technical flaws in an instrument and said that it wished the instrument to be annulled, the level of seriousness would be different—if I may put it that way—from the level of seriousness if an individual raised the concerns. An individual may not like an instrument for political or policy reasons, but a committee would raise technical issues. There is, therefore, a clear difference between the two situations.

Is annulment a nuclear option? Yes, I think it is. It would therefore be used very infrequently. You said that we would have to annul the whole instrument. That is true, because we do not have the power to amend instruments; we will come on to that issue later in the discussion.

If instruments that we all accept are flawed go through and you promise to come back and sort the flaws at the next available legislative opportunity—or whatever the phrase is that is always used—difficulties are created for the users of the instruments.

Murray Sinclair: As I said, we must acknowledge that sometimes we do not agree over whether something is fundamentally flawed. The Executive would be concerned if an important policy was not being delivered on time because problems were being raised with an instrument that we felt had no fundamental problems. However, when we accept that there is a difficulty with an instrument, we try to resolve that under the existing rules by making amendments during the 21-day period, so as not to prejudice the on-time delivery of the policy. That is important.

When I talked about a flaw in the drafting, I meant the kind of error that everyone accepts causes no fundamental difficulty in the operation of the instrument for the delivery of the policy. We have to ask what the priority is. Is the priority to deliver the policy on time, on the understanding that the instrument will work perfectly well in practice despite some minor drafting flaws that can be corrected later? I do not think that there would be any particular difficulty about that. I would hope that we could agree that it would not be appropriate for someone to have the power to stop a set of regulations in its tracks, or to ask the Parliament to do that, thereby stopping a policy in its tracks. We are talking about something that is merely a drafting slip—some wording that is not quite right—rather than something that is a serious or fundamental flaw.

Mr Maxwell: I was talking about something more serious than a simple drafting flaw. Everything that you said about simple drafting flaws was perfectly reasonable and acceptable. We may discuss later the use of amendments as opposed to the use of—in your phrase—the nuclear option of full annulment. It is clear that there have been occasions on which the error has been more than just a slight drafting error. You have made your views fairly clear; I simply wanted to get on record your understanding of the position.

11:15

Murray Tosh: It may be worth my saying—if I do not give away any state secrets in so doing—that our legal advisers, in the confidential briefings that they give us, often observe on the flaws that they find in instruments and state their disagreement with the legal advice that the Executive has given us. However, notwithstanding the differences that remain, they frequently agree with the Executive's point that the admitted and acknowledged flaws do not damage the impact of the instrument—they agree that it is correct and that it will still function. We do not therefore envisage any challenge being made in the sort of area that you have just gone over. We are, however, concerned about the balance between the Executive and the Parliament.

The system works effectively for the Parliament's subject committees: if they have genuine concerns on the policy, they have the opportunity to annul. However, it has become clear from our evidence taking that the subject committees consider only the policy issues. We make our reports to the committees and they decide whether to take account of them. I am saying not that the committees disregard or misunderstand our reports, but that the points that we make are often not their first priority. The subject committees neither deal with procedural issues nor focus on the seriousness or otherwise of the points that we make. They tend therefore to base their decisions solely on policy considerations.

The balance needs to be shifted a little bit in the Parliament's favour to allow the Subordinate Legislation Committee to influence the outcome of subordinate legislation when we think that that

would be appropriate. The circumstances in which we would want to do that would be the exceptional ones in which we have fundamental concerns about, let us say, the vires of an instrument. We do not have that option at present and it would be useful for us to be able to use it in a handful of circumstances. The option could also be useful for the Executive, in that it would concentrate the mind; I am not saying that it is not concentrated at the moment, but the option would require the Executive's people to get together with our people to discuss the legal and technical issues. They would have to hammer out a common position that would allow both of us to go forward in agreement on the instrument.

George Lyon: If the committee could forward to us one or two examples that show a fundamental difference of opinion on the technical aspects of an instrument, that would be useful and would help us in our consideration of the matter.

The Convener: That is no problem. What you have just said is helpful to the committee.

We move to our consideration of existing parliamentary procedures, starting with questions from Kenneth Macintosh on information and intelligence.

Mr Macintosh: Lack of information and intelligence is a running theme through many of the questions. We will come later to the 40-day and 21-day rules. The subject informs our questions on whether draft instruments that are considered under the negative procedure are more appropriate in certain circumstances. The Subordinate Legislation Committee and the subject committees do not have enough time to give due consideration to many of the instruments that come before us. We want to find the best way in which the Executive and the Parliament can have more time to consider subordinate legislation effectively.

If the Executive were to give us notice of subordinate legislation, that would be an obvious help to us all. The example of Wales has been quoted. The National Assembly for Wales is not an exact parallel to the Scottish Parliament, in that it deals primarily with subordinate legislation, but it is given a huge amount of notice of subordinate legislation. The system that it operates is well thought out and tracked; all committees know six months in advance what is happening.

I am not saying that we would want to go down that exact route, but we would welcome the minister's thoughts on the way in which the notice and information on subordinate legislation that is given to committees could be improved. Given that you and your colleagues plan and prepare subordinate legislation prior to its introduction, you must have the information in your diaries. Better notice and notification would help us all to prepare for the consideration of subordinate legislation, which we do at present on a restricted timetable.

George Lyon: I am of the view that we should do everything possible to try to give the Subordinate Legislation Committee as much notice as possible of subordinate legislation. From trying to get enough time to deal with the matters that come our way, all of us know that time is precious for the Parliament.

It is difficult to draw comparisons with Wales, which has no primary legislative powers and has its sole focus on secondary legislation. We would expect parliamentarians in Wales to have a firm focus on that, because that is their bread-and-butter work. Comparisons cannot be drawn, because we in the Scottish Parliament are driven by the legislative agenda and programme—the primary legislation that drives much of the work that parliamentarians do.

We are perfectly relaxed and happy about considering how we might improve the information flow to the committee. If the committee has any suggestions about that, we will consider them positively. Does Murray Sinclair want to talk about the details of the current process?

Murray Sinclair: I agree entirely with the minister. We will do what we can, but the nature of our business means that, sometimes, we cannot give as much warning of instruments as we would like to do. However, having read some of the evidence that the committee has heard, we have made initial contact with colleagues in the National Assembly for Wales and we will make further contact to see whether we can learn lessons from what they do. It is in no one's interests for us to have unnotified bulges of instruments. As the minister said, we will do what we can. If we can learn lessons from Wales—notwithstanding the significant differences between the two bodies, which the minister mentioned—we will try to do that.

Mr Macintosh: Obviously, the committee will make recommendations. When the Executive responds to us in due course, will it say what it believes would be possible? You must have some sort of planning diary that lets you know which instruments need to be produced by a certain date. I am not asking for things that would be impossible to deliver or which would create more problems than they would solve. However, such notice would help all subject committees and allow them to prepare. It would also get over the restricted timetable problem, which I mentioned. Perhaps you could give us a thought on what information you could share more formally or informally.

George Lyon: I am happy to give the reassurance that we will look at the matter. As Murray Sinclair said, we will consider whether anything in the procedures in Wales can be lifted into the Scottish context. We will have further correspondence with the committee on the issue. If we have any views on how we can make the system work better, we will set them out for the committee's information. We also want to listen to what the committee has to say.

The Convener: We have visited the National Assembly for Wales and we have links with our opposite numbers there, who I know are moving towards considering aspects of primary legislation. They have plans for dovetailing their subordinate legislation. If you get ideas from Wales, it would be useful if they were communicated.

George Lyon: I am very willing to do that.

The Convener: Lovely—thank you.

Murray Tosh: Part of the traffic between the committee and the Executive is over explanatory notes and Executive notes, which feature in the legal briefings that we receive. You will occasionally see praise in the committee's *Official Reports* for particularly helpful and clear notes, but, on balance, comment is more often the opposite and criticises a lack of consistency in quality, jargon and a lack of plain English, or perhaps the sheer obscurity of what is said. Sometimes, we feel bad that we are critical, because there are good examples, but we are aware of a wide range of quality in the notes that come to us. What quality control measures do you apply in drawing up notes? How do you disseminate best practice in the Executive? We cannot say that everything is bad when there are good examples. You get it right sometimes, but at other times it does not work well. How do you monitor and manage that? How is that going in general?

George Lyon: That issue is of equal concern to ministers, who have to sign off the documents before they come to the committee. We have concerns about the need for plain English and a proper explanation of what the instrument should achieve. We have experienced problems in the past because a memorandum has not reflected what the instrument was meant to do. Murray Sinclair can explain the details of the processes that we have in place to try to ensure that consistent and good-quality information is provided to everybody who is involved in the process. We all have an equal stake in being able to understand fully what instruments aim to achieve—that should be explained in plain English so that everyone can clearly understand the substance.

Murray Sinclair: We try to ensure consistency in different ways. As with all such matters, the main way in which we do that is through guidance on, and examples of, what Executive notes should contain. We monitor correspondence with committees, including this one, about Executive notes and either change the guidance to reflect that or send out a more general message. There is evidence of on-going improvement as a consequence of those measures. As we said, we agree that a statement on regulatory impact assessment and consultation should be included in Executive notes.

We have contacted colleagues in the National Assembly for Wales because we have been advised that they have good examples. After considering those examples and discussing them with colleagues in Wales, we intend to get in touch with the committee clerks to find out whether we can do more, perhaps by setting precedents or styles for good and bad Executive notes that we can send out with a refreshed version of the guidance. We have made improvements, but we accept that we can make further improvements and we are in the process of doing that. We will work in conjunction with the committee clerks and, if necessary, the committee itself.

George Lyon: The suggestion that Executive officials liaise with clerks in dealing with concerns is a good one. It is in all our interests to ensure that the flow of information is consistent and of sufficient quality to inform those who eventually have to make decisions and vote.

Murray Tosh: Thank you for that positive answer. You anticipated my next question, so I will move on.

As I said, although we comment on many instruments, the Executive does not always agree to change them or cannot do so because of the timetable. However, we frequently receive the response that you will use the next opportunity to amend or improve the legislation. What system do you have in place to track the commitments that you make to us? Do you have a management regime to ensure that the changes are made? We are a bit concerned that some of our suggestions might disappear into the ether unless each one is tagged, logged, passed on and dealt with the next time that the instruments in question are amended.

The question is pretty technical, so it is probably one for Murray Sinclair.

George Lyon: I certainly was not going to attempt to answer it.

Murray Sinclair: It may even be for Jane McLeod.

At present, we do not, I think, maintain a central log of all the points that the committee makes, although I will check that. Therefore, it is really for

the team in question to note the position and make the mark. However, the Executive takes seriously its commitments in that regard, which is probably why we have not set up a formal system of checking from the centre—we know that individual teams take the commitments seriously, as they must do. We hope that they will comply with them, but if there are examples of situations in which we have not done what we promised to do, it would be useful to know of them.

Perhaps I should highlight an example or two. If we say that changes will come forward at the next available opportunity, people usually think that we are talking about the next time that we look at the regulations. However, that might not happen for some time. Such a position might be justifiable if the regulations in question work well in the interim. However, other types of undertakings might come forward more quickly. I am sure that they are all taken seriously. However, as I said, if you know of any examples in which they might not have been, we would find it useful to hear about them.

11:30

Murray Tosh: It is not so much that we have any such examples, but that an instrument is sometimes withdrawn, reworked and re-introduced. We appreciate that you are sensitive to any important difficulties that are flagged up. However, although we often flag up points that need to be changed, you judge that, on balance, the instrument will work, but that certain flaws need to be combed out. As you say, it might be some time before the instrument is revisited. We cannot put our hands on our hearts and say that we monitor the situation over a five or 10-year period and know what has happened. However, after reviewing the process, we feel that there should be some way of accounting for that and of monitoring that what is, in effect, an agreed future change is delivered when the opportunity arises.

Murray Sinclair: That is monitored and accounted for, although not centrally. Indeed, I am not sure that such an approach would work for us.

I know for a fact that, when such matters are flagged up, they are recorded. As a result, people are aware that, if we have accepted that something ought to be changed, that will happen.

Murray Tosh: Presumably you have a protocol with your various sections and departments that sets out guidance in that respect. Indeed, I imagine that such guidance features in in-service training and that those sections and departments respond to you in that regard.

Murray Sinclair: Yes. There needs to be a record and a system to remind people that they are accountable for such promises. As I said, we have such a system at the moment.

Murray Tosh: Does Jane McLeod have any evidence from her area of responsibility of how that system works in practice?

Jane McLeod (Scottish Executive Legal and Parliamentary Services): I find it slightly difficult to highlight any precise examples, because I have been in my current job for only a short period and the issue has not yet arisen in my area.

However, Murray Sinclair is right to say that there is no central monitoring of the kind that you have described. The issues are flagged up in the policy divisions that are responsible for the regulations in question, the legal team that supports the administrator and the team that is responsible for drafting. The committee's comments are noted on the file and taken forward the next time around.

Murray Tosh: I am not suggesting that you carry out an exhaustive piece of work, but I wonder whether it would be possible to circulate a note to the various section heads and ask them to give us some examples of how they pick up and track changes in subsequent instruments. It would be like performing a mini-audit to see whether this sort of thing happens and would satisfy our question whether the current system is effective.

Murray Sinclair: No one has told us that the issue has caused practical problems, but I realise that you are not necessarily saying that. You simply want to ensure that the right processes are in place. I looked to Jane McLeod to answer the question because various bits of the Executive such as the legal team, the policy team and my central unit have an interest in these matters. We can certainly look at the guidance that we have issued and, if necessary, refresh it. We will let the committee know about that.

George Lyon: We give you a commitment that we will come back to the committee on that question.

The Convener: Stewart Maxwell has some questions about the 40-day rule.

Mr Maxwell: A number of witnesses have expressed some sympathy or support for extending the 40-day rule, not across the board but under certain circumstances. The Executive has stated clearly that it does not support any such extension. Will you expand on your reasons for taking that position?

George Lyon: Our primary concern is that such a move would create significant timetabling issues and make the process difficult. We are concerned that lengthening the time that committees have could impact on orders being laid and coming into force.

Murray Sinclair: We wonder to what extent the extra time that would be built into the system

would add value. We try to consult widely on subordinate legislation—certainly on subordinate legislation of importance—and if we are consulting properly now, we wonder whether extending the current period by an extra 20 days would be worth while, given the extra time that that would add on, as the minister said, when it comes to delivering policy.

Mr Maxwell: The committee conveners from whom we heard, who were fairly unanimous on the matter, supported such an extension. The proposal would mean extending the 40-day period not across the board, but in quite rare circumstances. The effect of the extra 20 days—that is the length of extension that has been discussed—would be that committees might be able to take additional evidence. Such an extension would give committees time to discuss an instrument at another meeting.

The conveners felt that the 40-day period was too tight. By the time that an instrument had been through the Subordinate Legislation Committee and reached the lead committee, it was felt that there was insufficient time for that committee—under certain circumstances—to give it enough attention. The conveners felt that that made it difficult for the committee to decide whether to support an instrument; they saw the instrument only once and had to decide whether to support it.

I presume that you do not support that proposal, but I wonder why not. The proposal would allow a committee to lodge a motion to extend the period that is allowed for a maximum of 20 days under particular, rare circumstances, if it felt that there was a reason to do so.

George Lyon: We would be concerned about the delays that that could create. There are significant pressures on the legislative programme as it is, and we would have concerns around introducing a 20-day extension. I hear what you say about the tightly defined circumstances, but our concern remains the same.

Mr Maxwell: I think that we would agree that such extensions would be made fairly rarely, but would the extra 20 days, when a lead committee felt that there were significant issues to be dealt with, make such a difference to the timetable?

George Lyon: It would depend on the number of cases involved and on the criteria according to which it would be decided whether an instrument related to a genuine case that needed extra time. A series of questions arises about how such circumstances would come about. In general, we would be concerned about the timetable and our ability to get the legislation through and on to the statute book. Therefore, we would have a lot of reservations about the proposal.

If conveners can cite specific instances in which there would have been an advantage in extending the period, I would be willing to listen. I reiterate, however, that, in general, we would be uncomfortable with agreeing a general disposition to create even greater amounts of time in the system, given the pressures on the legislative timetable.

Mr Maxwell: I do not want to put words into the mouths of the conveners who gave evidence to us but, in summary, they felt boxed in on all sides. They felt that they did not get enough notice and that they did not have enough time to look at instruments, because, as they saw it, they were late in coming to them. An extension would help. The conveners cannot amend instruments—and nor can any other member—so they are left with nothing but the nuclear option.

The conveners felt that, in appropriate circumstances, they could use an extension to gain a little bit of breathing space, take any extra evidence required, spend a little more time examining the instrument and, possibly, come to an agreement that the instrument was in fact okay. However, in some circumstances they did not have that opportunity. They have been passing instruments on which they did not have sufficient time or explanation to feel comfortable about doing so.

George Lyon: I take the point. On balance, however, we still have reservations about the suggestion.

The Convener: Some bills are essentially framework bills, which confer powers to implement policy through regulations and other instruments. We are thinking about situations in which there is not an agreement that the committee could see draft instruments early on. There could be considerable regulation raising sensitive issues that needed to be addressed, about which we might, or might not, know. What would happen if draft instruments were not made available early on?

George Lyon: I understand the circumstances that you describe. The Executive is endeavouring to ensure that as many instruments as possible are available at stage 2 so that the committee can scrutinise them. There has been a substantial effort to ensure that that happens. It does not happen in every case, unfortunately, but we have endeavoured to improve our performance in that area. I hear what you say, but we have reservations about the suggestion.

Mr Macintosh: One of the problems with the 21-day rule is that it often leads to peaks just before recess—for all of us. One of the suggestions from the Executive is that we allow recess days to be included in calculating the 21-day period. One of

the difficulties with that suggestion for the Parliament would be that the instrument would be in force—particularly if it was introduced in the early part of the summer—for several months before it was given parliamentary consideration. Instead of a peak before the summer recess, the parliamentary committees would have to deal with a peak after it. All the instruments that had been laid over the summer would have to be considered when we returned after the summer recess. Is that really the avenue that we want to go down?

George Lyon: We offered that as a constructive suggestion to deal with the peaks that you referred to in your question. It is on the table for consideration, and the Executive awaits the committee's view on the matter. We think that it might help to level out the workload. However, as you say, it could actually create a peak for members when they return at the end of the recess. It depends on how many instruments are laid during the recess. We would take cognisance of that when laying instruments to make sure that we mitigate the likelihood of a peak.

Murray Sinclair: We would just have to hope that the peak at the end of recess gave you slightly more room for manoeuvre than the big squeeze that you have just before the summer recess. In addition, the material would be there for officials to look at and circulate as far as they could. We thought that counting the recess days as part of the 21-day rule could not make matters any worse and might have some advantages. As the minister said, we offer it as a constructive suggestion, not as a panacea.

Mr Macintosh: A suggestion was made to us that the 21-day rule should be extended to cover the whole of the 40-day period allowed to annul a negative instrument. That would enable Parliament to consider an instrument before it comes into force, perhaps subject to the proviso that if that is not possible the Executive should explain to the Presiding Officer the reasons why. What are your views on that?

Murray Sinclair: We would have similar concerns to those expressed about extending the 40-day period to 60 days. If the norm for negative resolution were that there had to be 40 sitting days before an instrument could come into force, there would be serious delays in the delivery of policy; coming into force sooner rather than later is in the interests of the Executive, and, indeed, everybody.

It is really a question of whether or not the 21 days suffice. In nearly all cases they work perfectly well. To double the time, excluding recess days, would considerably prejudice the delivery of policy when it ought best to be delivered.

George Lyon: It could extend to quite a considerable time, if one took the recess and the 40 days into consideration.

11:45

Mr Macintosh: There are obviously different views on what can be added by the process and on the advantages of additional time.

Turning to emergency procedures, the 21-day rule is breached every time an emergency procedure is put in place. Why not just have a separate procedure altogether? I know that we started by asking you to reduce the number of procedures, but why not have a different one in this context—a specific emergency procedure? If you are always breaking the 21-day rule, that makes a bit of a nonsense of the rule. Would it not be better just to create a separate class of procedure that is an emergency procedure?

George Lyon: If the committee believes that that is a worthwhile proposition, we would certainly be willing to consider it. We would have no objection to doing that. It certainly flies in the face of the earlier discussion about whether we need the eight classes of procedure that we currently have. Certainly, once we do the analysis, we will find that one or two of those are virtually never used at all. Clearly, though, if the committee thinks that it would be an advantage to create another class of procedure, we can consider that. Perhaps we can create one and take away two.

Mr Macintosh: It is not in anyone's interest to have a procedure that you do not follow and which you all know you do not follow.

George Lyon: I understand your point. We would be willing to listen to what the committee has to say on that particular matter.

The Convener: Before we leave the matter, I add the proviso that we realise that defining an emergency is also an issue. It would be helpful if you had any ideas on that.

Murray Sinclair: That is another aspect of the question whether the procedure should be prescribed in the parent act or whether it should be a more general procedure. That is certainly one of the issues that one must think about when conferring a power. We must think about whether there will be circumstances in which the power will have to be used in an emergency. If so, should there be no procedure when it is used in such circumstances? As you say, convener, it is difficult to define an emergency. Currently, when there is an emergency, there will probably be a breach of the 21-day rule and a letter will be sent to the Presiding Officer explaining what the breach is. That works quite well. I accept, however, that there are cases in which it is foreseeable—and ought to have been seen—that there would be a breach of the 21-day rule in every case.

That is something that we should think about in the context of conferring powers. Certainly, if we

can say of a power that, in nearly every case, its exercise will not be able to be subjected to the negative resolution procedure, that ought to be thought about when the power is conferred and it should be reflected in the rules. What will be appropriate in terms of such a power will vary from case to case. Perhaps there could be, not a formal laying procedure, but a procedure whereby a report followed its exercise. The report need not be oral—it could be in writing to the committee—but accountability could be provided in that way. One size will not fit all. That must be borne in mind when we are conferring a power in a parent act.

George Lyon: I will add one point to that. In my experience, emergencies are never apparent until they are upon you.

Mr Maxwell: I hesitate to use the phrase foreseeable emergencies, but—

George Lyon: That is a contradiction in terms.

Mr Maxwell: I think that it is. Most of what we are thinking of in this context is the food hygiene regulations, which are all about amnesic shellfish poisoning and Iranian pistachio nuts. The food hygiene regulations tend to be the emergency ones. There is really no argument about that. However, they all breach the 21-day rule—for good reason. It just seems slightly odd, though, that they do so automatically when we all know that they will occur regularly, albeit that we cannot foresee exactly when they will occur.

George Lyon: That is a good point. We will certainly be willing to listen to the committee's views on that.

Mr Macintosh: I have a final suggestion that I want to put to the minister, about giving the Parliament more time to apply the right level of scrutiny. Currently, under the 40-day rule, if a committee wishes to move a motion to annul an instrument, it must do so within the 40 days. In other words, if a committee wishes to annul an instrument, it loses a week of scrutiny because the motion must be considered by the Parliament within the 40 days. One way of giving committees more time for scrutiny would be to allow that motion to be taken after the 40-day period had expired. In other words, there would be 40 days of scrutiny and the motion to annul would come after the end of that period. What do you say to that, minister?

George Lyon: So after the 40 days had elapsed you would still have an opportunity to move a motion.

Mr Macintosh: Exactly. I have been told that that happens in New Zealand and Australia, although the process might be separate from the 40 days. However, we could have a variation where the motion to annul is considered after the 40 days have expired. Currently, an instrument comes to the Parliament, the Subordinate Legislation Committee looks at it and then we send it to a lead committee. That can take a week, or between two and two and a half weeks if the committee meets fortnightly. If the lead committee lodges a motion to annul, it has to be moved at a meeting of the Parliament. Those timescales can mean that the lead committee ends up with one meeting at which to discuss an instrument. The end or the beginning of the process could be changed, but if the motion to annul was taken out of the 40-day period, it would probably allow for an extra committee meeting.

George Lyon: I think that the motion to annul would need to be tied in to the 40 days at some stage. The motion would at least have to be lodged to notify the Parliament that a motion to annul was coming.

Murray Sinclair: It is difficult to see how that would operate in the context of a procedure that still has a 40-day rule. Presumably, there would have to be rules on the extent to which you could push the envelope. Presumably, the motion would have to be dealt with within a prescribed period of time following expiry of the 40-day period.

We would also have general concerns, because motions to annul are quite troublesome, especially for negative instruments after they have come into force. The law can become quite complicated in relation to what should happen during the period between the date on which the order came into force and the date on which it was annulled. It is a good thing to reduce that period as much as possible, otherwise it is confusing for people, especially those who have acquired rights or attracted criminal liability or whatever.

Mr Macintosh: I recognise that there are difficulties.

All the suggestions are aimed at giving the Parliament the proper amount of time to scrutinise measures. After it has deliberated on the suggestions, will the Executive say how it would find the freedom—within the restrictions under which we all operate—to give the Parliament appropriate time for scrutiny? That might be done by allowing a motion to annul outside the 40-day period, by advance notice that something is coming up, by extending the 21-day period to 40 days, or by using draft negative instruments more often. There are many different ways of addressing the issue, but they all have the same point in common, which is that the Parliament is often frustrated by the amount of time it has to examine the issues.

George Lyon: I see the debate as being about getting early notice to committees, so that they are prepared to deal with instruments within the

timescales to which we work. I hear loud and clear the committee's frustration about the lack of notification and preparation time for committees to perform their rightful scrutiny role within the required time period. We will see what we can do to respond. We look forward to your report. If you have good, constructive suggestions we will be willing to look at them.

The Convener: That is a good point.

Murray Sinclair commented that there would be a problem with annulment outwith the 40 days, because the order would be in force. As I understand it, the order could be in force after 21 days, so you would still have the problem.

Murray Sinclair: Quite so. Difficulties can arise within the envelope. I am saying that we would need to think about the issues that arise in pushing the envelope out further and introducing an indeterminate period.

The Convener: If we get information on the operation of the New Zealand system, could you comment on it?

George Lyon: We would be pleased to do so.

The Convener: We do not want to keep the witnesses here all day, so we will move swiftly on to the third set of issues that we want to discuss, which relate to amendment.

Mr Adam Ingram (South of Scotland) (SNP): In the Executive's response to our consultation, it has set its face firmly against allowing the Parliament to amend subordinate legislation. The Executive talks about having "serious concerns" and there being "unwelcome consequences in practice" if that were allowed. Will you elaborate on those concerns and on what you see as the unwelcome consequences?

George Lyon: We can envisage circumstances in which an instrument as amended does not necessarily reflect the policy intention of the original act, as agreed by the Parliament. The flexibility in the current process allows the committee to influence heavily the instruments that come before it for scrutiny. If the Parliament is dissatisfied with an instrument it can reject it and, in so doing, make clear what specific changes are required before a subsequent instrument will receive more favourable treatment. Powers exist to allow the Parliament to signal that it is uncomfortable or unhappy with instruments and that they need to be changed. So far, the experience is that the process is flexible enough to allow the committee to influence the Executive heavily if it has concerns about technical matters. We have tried to respond to such concerns and to work with the committee to ensure that your comments are taken on board and amendments are made. We are concerned that allowing the Parliament to make amendments would change the nature of the process fundamentally.

Murray Sinclair may wish to comment.

Murray Sinclair: I invite the committee to consider how such a system would operate. I presume that every MSP would be entitled to suggest amendments and that, at least, the affirmative procedure would have to be used. Apart from the policy implications, in the sense that the Parliament has already decided what should be implemented through subordinate legislation, there are questions about how the process would work in practice. Several stages with different forms of filtering would be needed to ensure that the instrument that emerged at the end of the process was coherent and correct. All of that would, almost inevitably, build in delays. Given the context that the Parliament has already agreed what measures ought to be implemented by subordinate legislation and that, often, if the policy is significant, we will have consulted widely on the subordinate legislation, we must wonder whether the difficulties that would be involved in such a process would be worth it.

Mr Ingram: I was really talking about the possibility of a power for the Subordinate Legislation Committee to amend technical parts of subordinate legislation. We discussed the issue earlier when we talked about the nuclear option being the only available one, which obviously acts as a deterrent, if you like, to getting legislation right. If we removed that, we could work together with the Executive to improve the technical quality of subordinate legislation. Why would you not accept such a process?

12:00

George Lyon: Under the current process, if the committee has concerns about technical aspects of instruments, we try to respond and make amendments to address them. There is enough flexibility to allow the committee to have significant influence on the instruments before it, and to ensure that the Executive gets them right.

The committee has highlighted one or two areas where there has been a disagreement between it and the Executive. It is a matter of opinion as to which lawyers are right and which are wrong—do not ask me to pronounce on that. We have tried to engage constructively with the committee in response to its concerns and to amend instruments in accordance with the current process. If the committee has other views, or examples of where it believes that its having the power to amend instruments would have made certain instruments better, we will certainly consider them. We are here to try to deliver the policy and ensure that the instrument that we put

in place to do so is technically correct. Your role is clearly to ensure that we have brought forward the proper, technically correct instrument.

Mr Maxwell: There are two distinct issues. One is the committee's potential ability to amend instruments for technical reasons and the other is the ability of a lead committee to amend instruments for policy reasons. You said that there were different legal opinions about what is right and wrong with an instrument. We discussed earlier the fact that there are times when the committee and the Executive agree that there is a mistake in an instrument, although it might not have profound legal implications. The Executive sometimes responds by saying that it will correct such mistakes at the next available legislative opportunity. Surely, if the committee had the ability to amend instruments for technical reasons, that problem would be resolved; it would not be necessary to bring back an instrument for a second time. However, I accept that the process would not have to interfere with the clock—we would not go back to the beginning and start again. If the committee wanted to make a change that was purely technical and did not change the nature of the instrument, surely the Executive would think that it was worth while for it to have the power to do so.

George Lyon: I am willing to listen to the committee's views on that. I will ask Murray Sinclair to address the issue of technical amendments. You mentioned making changes for policy reasons. It would be wrong for the committee to have the power to amend the policy position after the Parliament had agreed the policy decided by the Executive and how it should be delivered. I would be uncomfortable with that. You made a reasonably fair point about technical changes, to which I will ask Murray Sinclair to respond.

Murray Sinclair: This goes back to what I said earlier in the discussion about the possibility of annulling an instrument. Our procedures at present allow for that. During the 21-day period, the Executive can lodge an amendment—breaching the rule—where there is agreement that there is a real problem that needs to be addressed. That is how we can address those difficulties constructively. As the minister said, we are happy to listen to what the committee has to say by way of a more detailed proposal.

The Convener: We move on to the definition of SSIs.

Murray Tosh: One of the issues that has come up is that the translation of policy into practice creates a regulatory package that is much wider than simply the SSIs themselves. There are also codes of guidance, directions and other things. We have debated whether they should appear as SSIs, and we have consulted on that. No strong belief has emerged that they should appear as SSIs; people feel that there is a difference between regulations and the less rigorous parts of the regulatory package. Nonetheless, some of those less rigorous parts have a legislative quality, and they are all important, somewhere, to somebody in the system.

We discovered a belief that directions, guidance or codes that are made under statutory powers are often quite hard to locate. Will the Executive consider publishing such documents so that they are available to the public? The clerks did not want me to say this, but they have told me that they sometimes find it difficult to track down those documents. Because of their links with the Executive, they can short-circuit the problems and find the information they require, but the public at large—the people who are being regulated, the businesses who rely on the codes and guidance—do not always find them easy to get hold of. Can you make the provision of such information much more customer friendly?

George Lyon: You asked whether we might formalise procedures, but we would see little benefit in that.

Your second point is a good one. I would certainly be willing to find out whether we can do more in that area. The founding principles of the Parliament are about transparency and ensuring that we engage with the wider community. I see no reason why we would not try to make information as widely available as possible.

Murray Sinclair: That is our general policy. There is the question whether a document, because it is called a code or guidance or guidelines, should be subject to a parliamentary procedure, or laid as an SSI, or subject to some statutory requirement to be published. The answer to that is no, because nothing should be subject to any particular procedure just because of its label; we have to consider the substance and then work out the appropriate process. Sometimes, although rarely, things that are called guidance will have some sort of statutory procedure attached to them; and sometimes there will be a statutory requirement to publish the guidance, at least in some context, so that we ensure that the main audience is targeted.

The Executive's general practice is to ensure that everyone who needs to know about such things is aware of them. Actual regulations will be in subordinate legislation, will be printed and will have Executive notes to accompany them. However, as the minister says, our general principle is that guidance and codes of conduct should be seen by the people who need to see them. We will keep our practices under review to see whether they can be improved.

Murray Tosh: Do you feel that the information is already readily accessible? Do you not know of anything that is not readily accessible? I am not trying to put words in your mouth.

George Lyon: I see no reason why information should not be easily accessible.

Murray Sinclair: Our policy is certainly that the people who need to know will get to know. That is our policy and we continually look to find ways of achieving it. However, real issues arise as to how we go about that. It is not just about publishing on a website, for example, because that might not be the best way of getting information to certain people.

Murray Tosh: But in those circumstances you would not have a policy of not publishing on your website.

Murray Sinclair: That is correct.

Murray Tosh: Our clerks might be able to give you some information on that.

The Convener: I turn now to financial transparency. The Finance Committee has told us that it has difficulties in checking how the costs that are set out in subordinate legislation link to the financial memoranda of primary legislation. The committee gave a particular example to do with the Management of Offenders etc (Scotland) Bill. As you know, the bill proposed the creation of a number of community justice authorities, each of which will cost £200,000. However, the committee did not know until the regulations appeared how many such authorities there would be. Is there any way in which we can get over such difficulties? It can be difficult for the Finance Committee to consider issues in the round.

George Lyon: That is a difficult question. Until the decision was taken as to how many community justice authorities there would be—which was not without its difficulties—it was difficult to provide a financial memorandum that stated whether we would create six, eight or some other number, and that the cost would be £X. We try to ensure that decisions are made as early as possible so that appropriate information is provided to the Finance Committee in good time, but it is difficult for colleagues to reach agreement and decisions can take a significant amount of time. There is not much more information that I can offer.

The Convener: If we get any more information, we might write to you about that, if that is okay.

George Lyon: I am happy to respond to any questions that you may have.

The Convener: The end is near; we are on to the final section, which is on consolidation. Murray Tosh has a couple of questions.

Murray Tosh: There has obviously been quite a bit of evidence and comment about consolidation since we discussed it with you in phase 1 of the inquiry. The question has arisen whether there should be a special procedure for consolidating legislation. We understand that part of the Executive's difficulty is that there is concern that consolidation would not be simple and straightforward, but would involve revisiting enormous areas of policy, and that there would be political and workload implications. Can you expand on what you see as being the problems in introducing a programme of consolidation? In particular, can you expand on the idea of introducing a special procedure to allow consolidation that is largely a technical and textual exercise that has no policy considerations? That might appeal to us, but it might also concern the subject committees, which might feel that they were being left out of consideration of consolidation. There could be issues for us all, so it would be helpful if you could set out your current thinking.

George Lyon: I am delighted to ask Murray Sinclair to set out our current thinking on that.

Murray Sinclair: Our current thinking has been current for a little while—I hope that that is not an unwelcome statement. As members know, we all recognise that consolidation of subordinate legislation would be a good thing, especially as we live in an age when the production of subordinate legislation ought, technically, to allow consolidation to happen quite easily. That is certainly something that we should be aiming at, but there are resource issues; we must have priorities and we need to balance those priorities. As Murray Tosh said, one of our concerns is that consolidation may be more than just a restatement of existing law; it may revisit various policy issues that underpin what will become the consolidated text. Sometimes it is difficult not to revisit such issues when we come across a policy difficulty or a technical difficulty that we would not want to ignore.

There are issues about how we achieve a balance. We would certainly be keen to think about a different procedure that would enable us to ensure that consolidation was dealt with properly without our having to reopen large areas of policy. At one stage, there was a working group involving the committee clerks and people from OSSE—not Jane McLeod, but others—to look into all the issues in the round and to consider whether it is possible to devise a procedure that could achieve that end. That working group has not been meeting recently; it is fair to say that it has never really got off the ground. Given that we all share the aim of improving the process for consolidating legislation, it would be good if that working group could meet. Once it has done some

work, it might also involve officials from other interested committees.

12:15

Murray Tosh: We think that, on the technical and textual side, you must have working copies of every regulation incorporating what you think has been included in each successive wave of amendments. We think that you must be working from a consolidated text that is available to you but not to everyone else. That is the irreducible minimum towards which we have to work; the textually consolidated and updated documentation has to be available to everyone. I would like to hear your comments on that.

We also think that, in respect of policy, significance should be attached to the introduction of a rolling programme of consolidation to enable re-examination of regulations. You say that there are resource implications: we understand that, but we cannot measure them. We do not know what we can realistically expect you to do and we cannot really tell the difference—in terms of work, time, resources and staff—between a Rolls-Royce consolidation exercise and the streamlined process that you are talking about. We do not really know what is on offer or how to respond to it. It would be helpful to have some idea of how you see that working and what you can do to keep regulations updated.

Murray Sinclair: To some extent, what we were trying to do earlier was agree a process that would help to reduce the potential resource implications because that would effectively make consolidation easier. The difficulty is that, under the current rules, a consolidated set of regulations is subject to all the current procedures, with scrutiny of the policy starting over again, which means that there is more to do than might be necessary. That is why we hope that a joint working group between the Executive and Parliament is the way ahead. It would be useful if that group could do some joint thinking about what you are asking for, which is a set of procedures that will satisfy all our aims.

Murray Tosh: We would be happy to see that group progress, but we are concerned that it has not met and, as you know, sometimes in life a working group is a way of parking something. If the working group can be a way of developing co-operative work towards an agreed goal, we would be happy to support that in our final report.

Murray Sinclair: We all agree that we should try to ensure that the working group is refreshed.

George Lyon: Yes. I am certainly willing to give that assurance.

The Convener: To follow up what Murray Tosh said, do you have updated versions of instruments that have all the amendments in place?

Jane McLeod: That varies from case to case. I know that some sets of regulations that I have worked from have been paper and paste with little manuscript additions here and there. It would certainly be feasible for us to make available an updated text for every single set of regulations from which we work.

In more recent times, better working kits have become available in some areas, but when regulations extend back over a considerable number of amendments and years, it becomes hard to produce something that is legible to anyone but the person who produced that working kit.

Murray Sinclair: We would almost certainly have to sign caveats because those would not be official consolidations. Different people will have done different things to the instruments over time. That is one of the reasons why we would be cautious about sharing with people; we do not want to share something that might not be wholly reliable.

Murray Tosh: Does not that mean that it ought to be relatively straightforward to keep up to date using the more recent and better working kits, whatever that means in practice? I appreciate that regulations from pre-devolution legislation—or from the year dot—might be more difficult. There might be policy areas for which we would agree a timetable for consolidation and which you would prioritise.

However, it ought to be possible for us at least to put our own house in order and to produce decent regulations. You have, since 1999 had software that enables you to insert new text; you do not need to cut and paste paper for the recent stuff. Surely we could get regulations into a condition from which you would be able to give us up-to-date consolidated text.

George Lyon: It is important that we examine whether that can be achieved and that we try to ensure that the working group gets around the table to discuss those matters face to face in the not-too-distant future so that we can establish what the problems are and whether we can deliver what the committee is looking for.

The Convener: Maybe you could tell us when that working group will meet; it would be helpful to keep in contact on that and to know what the group discusses.

George Lyon: I will come back to you on that.

The Convener: On that very constructive note, we finish our questions for the minister. Thank you very much for coming along this morning.

I suspend the meeting for a few minutes.

12:21

Meeting suspended.

12:28

On resuming—

Delegated Powers Scrutiny

Housing (Scotland) Bill: as amended at Stage 2

The Convener: I thank members for staying with me. Agenda item 3 is scrutiny of delegated powers in the Housing (Scotland) Bill as amended at stage 2. In his letter to me, which we have circulated, the Minister for Communities, Malcolm Chisholm, said:

"The Executive intends to table an amendment providing that the regulations under section 101(1), which will be used to implement the Single Survey and Purchaser's Information Pack schemes, may make provision for and in connection with the registration of prescribed documents."

A copy of that amendment has been provided. That is for information; I gather that we can do nothing about it at today's meeting.

Members will recall that the bill contains many delegated powers that were previously referred to the committee. We made suggestions and the lead committee also made suggestions, which we will consider.

Procedure changes have been made that affect sections 88(4), 96(2), 101(1), 102, 108(4) and 120(1). As no committee member has points to make, we need not comment further on them. Are we agreed?

Members *indicated agreement*.

The Convener: We move on to chapter 8 of part 1, which is on supplemental provisions, including appeals. New section 64A, which is on the power to change the method of appeal on adaptations, will give ministers the power to change from the sheriff to the private rented housing panel the route for appeals by a tenant when a private landlord refuses consent for or imposes conditions on adaptations to meet a disabled occupant's needs or the installation of central heating or other energy efficiency measures.

Are members content for the route for appeals to be subject to change from the courts to the panel by ministerial discretion? An important point is that that will be within the Parliament's supervision. Any regulations would be subject to the negative procedure. As nobody appears to have concerns, are we happy?

Members *indicated agreement*.

12:30

The Convener: Part 2 is on a scheme of assistance for housing purposes. Section 68(4) allows for local authorities to provide assistance for housing purposes by way of grants and loans. As amended, the subsection will allow ministers to make further provision for any type of assistance in relation to the acquisition or sale of a house or work on land or premises for specified purposes. I gather that that is intended to allow local authorities to provide effective assistance in a wide range of circumstances. Do members have any concerns about that?

Members: No.

The Convener: We are happy.

Section 70(2A) deals with when assistance must be provided. It allows ministers to make further provision about the type of assistance that must be provided in connection with adaptations to make a house suitable for a disabled person's needs. The Communities Committee has added quite a few provisions. Do members have further thoughts on that?

Murray Tosh: The section provides a good example, because any change that is suggested will immediately prompt interest among all sorts of stakeholders, perhaps including the Communities Committee, about whether the Executive is going far enough. In many areas, pressure will be exerted for the Executive to go further. Given that, any regulations would be a prime candidate for the use of the super-affirmative procedure. When, in response to our earlier discussion, the Executive supplies appropriate examples, it will be interesting to see how closely the provision matches.

However, I am not sure whether we can do anything about that at this stage, as I presume that to do so we would have to lodge an amendment, which would mean asking the Presiding Officer to use his discretion to permit a manuscript amendment to change the bill so close to its stage 3 finalisation.

The Convener: I take on board your points, but I think that we should keep the bill as it is.

Murray Tosh: That certainly avoids the need for the Presiding Officer to take an awkward decision.

The Convener: Does anybody think differently?

Mr Macintosh: I am all for rescuing the Presiding Officer from any such difficult decisions.

The Convener: That deals with section 70(2A).

Section 88(4) concerns local authority payments to not-for-profit lenders and deals with arrangements by local authorities with designated lenders to make loans on their behalf. At stage 1, the committee recommended that the regulations under section 88(4) should be subject to the affirmative procedure. The Executive took that on board, which I am sure we are happy about. In

addition to the procedural change, the powers have been elaborated on by amendment to subsections (1) and (3) and by the addition of subsection (3A), which clarifies the drafting. Are members happy to note the changes that have been made?

Members *indicated agreement*.

The Convener: Part 3 is on the provision of information on the sale of a house. Section 110(3), which will insert section 63A in the Housing (Scotland) Act 1987, is on information for tenants who exercise the right to purchase. The section will confer a power on ministers to make regulations that prescribe additional information that a landlord is to supply to a tenant who has served an application to purchase under the right-to-buy provisions. New section 63A(2A) of the 1987 act will ensure that such information is provided to a prospective right-to-buy purchaser only if the tenant has paid the landlord for its provision. The sum that is to be paid will be specified in regulations, which will be subject to the affirmative procedure. Do members have concerns?

Members: No.

The Convener: Part 3A has been added to deal with tenancy deposit schemes. It gives ministers the power to prescribe arrangements for the handling of tenancy deposits and allows them to approve tenancy deposit schemes. The change was made in response to a recommendation from the Communities Committee. I understand that consultation is continuing on the way in which the Executive will proceed. I propose that we simply note the change. Is that agreed?

Members *indicated agreement*.

The Convener: Part 4 concerns the licensing of hours in multiple occupation. Section 145(3) allows local authorities to charge fees for HMO licensing. Again, unless members have any points to raise, I propose that we should simply note the change.

Mr Macintosh: It is houses in multiple occupation, convener.

The Convener: Oh, what did I say?

Mr Macintosh: Hours of multiple occupation.

The Convener: Right. I must have been thinking of something else—Freudian slip.

Are members content to note the change?

Members *indicated agreement*.

Executive Responses

Fundable Bodies (Scotland) Order 2005 (draft)

12:36

The Convener: We move on to Executive responses, the first of which concerns the draft Fundable Bodies (Scotland) Order 2005. We asked the Executive to explain why the explanatory note that accompanies the order does not contain information on the content of schedule 2 to the Further and Higher Education (Scotland) Act 2005 and the meaning of "fundable body".

The Executive acknowledges that the explanatory note could have been more informative. It hopes that the committee will accept that the omission does not invalidate the effect of the order. Are members content to report the instrument on the ground of the defective drafting of the explanatory note?

Members *indicated agreement*.

Contaminated Land (Scotland) Regulations 2005 (draft)

The Convener: The second response concerns the draft Contaminated Land (Scotland) Regulations 2005. Given our concerns about the complex changes to the instrument, we asked the Executive to consider the use of a Keeling schedule. Members will remember the point well.

The Executive has responded by saying that a Keeling schedule does not need to be included in the instrument given the nature of the amendments. However, it also makes reference to a consultation on the modification of the Environmental Protection Act 1990 and says that it will consider the committee's comments on improving the clarity of the text of the instrument following the completion of the consultation.

Are members content to report the instrument to the lead committee and the Parliament on the basis of the Executive response?

Members *indicated agreement*.

Glasgow School of Art (Scotland) Amendment Order of Council 2005 (SSI 2005/525)

The Convener: Two points arose on the instrument, the first of which was whether the Executive's intention was that the transitional provision in article 1 of the order should apply only to the governors who are elected. The Executive confirms that its intention is for the provision to apply only to the small group of governors who

were either elected or appointed prior to 6 May 2003. The Executive acknowledges that the instrument is defectively drafted in that regard.

The second point, which was also on article 1, was that it was not clear whether the exception in article 1 was a personal exception or one that applied only for the duration of the present period of office of a governor. The committee will remember that Stewart Maxwell raised the point last week.

The Executive explains that the exception in article 1 is intended to be personal and is not limited to the present period of office for governors. The exception will no longer apply once the current maximum period of office of 12 years has been served in each case. The Executive further acknowledges that article 1 does not achieve the objective of disapplying article 2 for all the governors who were either elected or appointed prior to 6 May 2003. However, it says that, notwithstanding the drafting error, the order in council is not invalidated, but it confirms that it will consider whether to bring forward an amended instrument.

Murray Tosh: It would be good if the Executive were to agree that we should have the power to make such minor, textual amendments.

The Convener: I knew that you were going to say that, Murray.

Murray Tosh: It would make life easier for the Executive, too.

The Convener: The instrument gives us another example of that.

Are members content to report the instrument to the lead committee and the Parliament on the ground of defective drafting?

Members *indicated agreement*.

Education (Graduate Endowment, Student Fees and Support) (Scotland) Amendment (No 2) Regulations 2005 (SSI 2005/545)

The Convener: We asked the Executive about its plans for the consolidation of the regulations. It says that its intention is to consolidate the regulations before the beginning of the academic year 2006-07. Given that it has recently effected a further amendment to the regulations, it considers that the instrument does not represent an appropriate vehicle for consolidation. Are members happy simply to note the response to the lead committee and the Parliament?

Members *indicated agreement*.

Electricity from Non-Fossil Fuel Sources (Scotland) Saving Arrangements Order 2005 (SSI 2005/549)

The Convener: We had two questions on the order. In relation to article 10(m), the committee asked for clarification of whether the amendment is intended to apply to payments that accrued prior to the original date of coming into force of section 33(10) of the Electricity Act 1989, or prior to the date of coming into force of the amendment. The Executive has said that the amendment is intended to apply to payments accrued before the coming into force of the new amendment. In the Executive's view, the words "this subsection" refer to the amending subsection. Are members content to report the order on the ground of defective drafting?

Members *indicated agreement*.

The Convener: We also asked for an explanation of why the words "came into effect" have been used rather than the more usual reference to coming into force. The Executive explained that the phrase "into effect" is more appropriate than "into force", as the section that is being modified is no longer simply in force. I am waiting for Murray Tosh's comment.

Murray Tosh: Only Sir Humphrey could do that justice.

The Convener: The Executive acknowledges that the explanatory note could have been clearer to help the reader. Are members content to report that matter to the lead committee and the Parliament?

Members *indicated agreement*.

Draft Instrument Subject to Approval

Private Landlord Registration (Modification) (Scotland) Order 2005 (draft)

12:41

The Convener: Agenda item 5 is a draft instrument subject to approval. The draft order adds new categories of houses to the list in section 83(6) of the Antisocial Behaviour etc (Scotland) Act 2004 and covers properties that are to be disregarded for the purposes of registration as a landlord under part 8 of that act. The committee will note that article 2(h)(ii) refers to the "Crofters (Scotland) Act 2003", but we are reliably informed that there is no such act and that the reference should be to the Crofters (Scotland) Act 1993. The Executive acknowledges the error but points out that the act is correctly cited in paragraph (g) of the article. The Executive has accepted the point and confirmed that the instrument will be amended before it is made—well done. Are members content for the draft order to proceed on the basis that the correction will be made?

Members *indicated agreement*.

Instruments Subject to Approval

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 15) (Scotland) Order 2005 (SSI 2005/575)

Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 16) (Scotland) Order 2005 (SSI 2005/579)

12:42

The Convener: Agenda item 6 is instruments subject to approval. No points arise on the orders.

Instruments Subject to Annulment

Marriages and Civil Partnerships (Fees) (Scotland) Regulations 2005 (SSI 2005/556)

Private Landlord Registration (Advice and Assistance) (Scotland) Regulations 2005 (SSI 2005/557)

12:42

The Convener: Agenda item 7 is instruments subject to annulment. No points arise on the first two sets of regulations.

Private Landlord Registration (Information and Fees) (Scotland) Regulations 2005 (SSI 2005/558)

The Convener: Five points have been raised on the regulations. First, regulation 2(2) states that, where information is not relevant to the applicant, the relevant person "should" indicate the fact on the application. The effect of the word "should" is unclear, so we will ask about that. Secondly, paragraph 3 of schedule 1 obliges the applicant to declare any convictions, but it does not refer to disclosure of spent convictions. Thirdly, paragraph 4 of schedule 1 requires applicants to declare that they comply with

"other legal requirements relating to his or her lettings",

but it is not clear what is intended to be included in that requirement. Fourthly, a similar point arises in relation to paragraph 5, on the meaning of the phrase "The identity" of any other owner. Fifthly, in the second item in the table in paragraph 3 of schedule 2, it is not clear what is meant by the phrase

"Where the applicant has been declared under section 83(1)(c)".

Do members agree that we should seek clarification of those five points?

Members *indicated agreement*.

Private Landlord Registration (Appeals against Decision as to Rent Payable) (Scotland) Regulations 2005 (SSI 2005/559)

Antisocial Behaviour Notice (Appeals against Order as to Rent Payable) (Scotland) Regulations 2005 (SSI 2005/560)

Antisocial Behaviour Notice (Management Control Orders) (Scotland) Regulations 2005 (SSI 2005/561)

The Convener: No substantive points arise on the regulations.

Antisocial Behaviour Notice (Landlord Liability) (Scotland) Regulations 2005 (SSI 2005/562)

Antisocial Behaviour Notice (Advice and Assistance) (Scotland) Regulations 2005 (SSI 2005/563)

The Convener: No substantive points arise on the regulations.

Mr Maxwell: My notes state that SSI 2005/562 is called the "Landlord Licensing" regulations not, as you said when you read out the title, the "Landlord Liability" regulations. Those are quite different matters.

The Convener: Yes. That is what I had in my notes. We will check the matter and put whatever is correct.

Disability Discrimination (Public Authorities) (Statutory Duties) (Scotland) Regulations 2005 (SSI 2005/565)

The Convener: No substantive points arise on the regulations.

Firefighters' Pension Scheme Amendment (Scotland) Order 2005 (SSI 2005/566)

12:45

The Convener: The order makes detailed amendments to the Firemen's Pension Scheme Order 1992 as it extends to Scotland and in relation to spouses' entitlements in respect of firefighters' pensions. The committee should perhaps ask the Executive to confirm what plans it has to amend the firefighters' pension scheme to take account of civil partnerships under the Civil Partnership Act 2004 from 5 December 2005. We should also raise some minor points.

Mr Maxwell: I agree that we should raise the matter with the Executive. It is slightly odd that the matter is not already covered in the order. The

issue of civil partnerships has been addressed in a number of other instruments that deal with pension matters—Murray Tosh points out that that was the case in some instruments last week. There may be a valid reason why that is not occurring with this order—perhaps the Executive is consulting or doing something else. However, it seems strange that the matter is not addressed in the order, as that is the obvious place to deal with it.

The Convener: We could ask that question. Is that agreed?

Members *indicated agreement*.

Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Separations) (Scotland) Regulations 2005 (SSI 2005/567)

Civil Partnership Act 2004 (Relationships Arising Through Civil Partnership) (Scotland) Order 2005 (SSI 2005/568)

The Convener: No points arise on the instruments.

Less Favoured Area Support Scheme (Scotland) Regulations 2005 (SSI 2005/569)

The Convener: We mentioned the less favoured area support scheme earlier. No points arise other than the one that was raised earlier.

Registration of Independent Schools (Scotland) Regulations 2005 (SSI 2005/571)

The Convener: The regulations prescribe the information to be supplied to ministers by applicants for registration of an independent school and to the registrar of independent schools by the proprietor of such a school. The committee will observe that the regulations do not appear to reflect the enabling powers, in particular under section 98(3) of the Education (Scotland) Act 1980. The suggestion is that we might want to ask the Executive, in the light of section 98(3), to explain the vires of regulation 4 and, as the requirements of section 98(3) are mandatory, seek an explanation for the omission of a provision reflecting paragraph (c) of that subsection. Is that agreed?

Members *indicated agreement*.

Civil Partnership Act 2004 (Modification of Subordinate Legislation) Order 2005 (SSI 2005/572)

The Convener: The order makes amendments to a number of statutory instruments to take account of the introduction of civil partnerships—this perhaps follows on from the point that Stewart Maxwell made. The committee may wish to consider asking the Executive a number of questions. First, is it the intention of the order to encompass all the amendments to subordinate legislation currently identified as necessary and that are not being dealt with in some other way? Secondly, in relation to the preamble, why is there no reference to section 259(4) of the enabling act, which seems relevant to the order? Thirdly, in relation to the amendments made in regulations 3 and 4 of the Cremation (Scotland) Regulations 1935, why has no amendment been made to the heading to form G?

Fourthly, in relation to the amendments made to the Scottish parliamentary pension scheme in articles 26 to 30, why has no amendment been made to article N2(a)? Is the omission intentional? In addition, why has section 259 of the 2004 Act been used as the enabling power rather than section 255, which requires prior consultation and affirmative procedure? That is a fair question about why one procedure has been used rather than another. Finally, we should seek confirmation that the wording in article 48 is correct in relation to the amendment to the Education Maintenance Allowances (Scotland) Regulations 2004. Are members content that we ask the Executive those questions? Are there any other points?

Mr Maxwell: I am content that we should ask those questions. The question that I would like to emphasise is the one about the use of section 259 of the 2004 act rather than section 255. Section 255 provides for a specific power and section 259 provides for a general power. I would have thought that the specific power would take precedence over the general power. One provides for the negative procedure and the other for the affirmative procedure. It would have seemed more relevant to have used the specific power in this case rather than the general power. We should draw special attention to that in the letter that we send to the Executive.

The Convener: Is that agreed?

Members *indicated agreement*.

Civil Partnership (Overseas Relationships) (Scotland) Order 2005 (SSI 2005/573)

The Convener: No points arise on the order.

Instruments Not Laid Before the Parliament

Antisocial Behaviour etc (Scotland) (Commencement and Savings) Amendment Order 2005 (SSI 2005/553)

12:50

The Convener: We move on to the final item on the agenda. The title of the order amended by SSI 2005/553 is misquoted both in article 2 and in the explanatory note. That could have serious consequences, in that the amendment order could be rendered ineffective. However, the defect could be rectified by reference to a footnote on page 1. I would have thought that we would raise that matter formally. Do members agree?

Members *indicated agreement*.

Education (Additional Support for Learning) (Scotland) Act 2004 (Commencement No 3) Order 2005 (SSI 2005/564)

The Convener: No points arise on the order.

School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004 (Commencement No 2 and Transitional Provisions) Order 2005 (SSI 2005/570)

The Convener: No substantive points arise on the order, but we will raise a minor point that has been highlighted in an informal letter.

Act of Adjournal (Criminal Procedure Rules Amendment No 6) (Vulnerable Witnesses (Scotland) Act 2004) (Evidence on Commission) 2005 (SSI 2005/574)

The Convener: No substantive points arise on the act of adjournal, but we will raise a minor point that has been highlighted.

Fees in the Registers of Scotland Amendment Order 2005 (SSI 2005/580)

The Convener: No points arise on the order.

Before we close, I will give members the correct title of the instrument that Stewart Maxwell asked about. It is called the Antisocial Behaviour Notice (Landlord Liability) (Scotland) Regulations 2005.

Mr Maxwell: Landlord liability is very different from landlord licensing.

The Convener: It certainly is.

Our next meeting will be next Tuesday. I thank members for their patience and will see you all next week.

Meeting closed at 12:51.

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