SUBORDINATE LEGISLATION COMMITTEE

Tuesday 24 October 2006

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

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SUBORDINATE LEGISLATION COMMITTEE
28th Meeting 2006, 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)
Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)
Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)
Ms Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Professor Chris Himsworth (University of Edinburgh)
Professor Colin T Reid (University of Dundee)

CLERK TO THE COMMITTEE

Ruth Cooper

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 24 October 2006

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

The Convener (Dr Sylvia Jackson): I welcome members to the 28th meeting in 2006 of the Subordinate Legislation Committee. We have received apologies from Murray Tosh, who is away on Commonwealth Parliamentary Association business, I believe.

We are very glad to welcome Ruth Cooper back to the committee; I am sure that David McLaren from the clerking team is also glad to see her.

Item in Private

The Convener: Are members happy to take item 6 in private? We will discuss evidence received from the Court of Session and decide whether we will need to take oral evidence. Is that okay?

Members *indicated agreement*.

Regulatory Framework Inquiry

The Convener: We have two witnesses with us today. Professor Chris Himsworth is from the school of law at the University of Edinburgh, and Professor Colin Reid is the professor of environmental law at the University of Dundee. We are happy to have you both here today to go through some of the feedback that you have given to the inquiry.

I also welcome Iain Jamieson to the committee. He is the committee adviser and he has, as ever, been very helpful in briefing us. We also note that, although Aileen McHarg cannot be with us today, she has sent in evidence that I believe the witnesses have also already seen. That has been very useful to us. We asked the Executive if we could have a response from it before we wrote to you. That would have been very helpful, but we do not have it, although we know that it is in progress and we should receive it shortly. It would have been better to have had it now; I hope that there will not be any surprises in it. If the Executive's response makes any further points, we will write to you again, if that is all right. If, after today's meeting, you find that there are any points that you did not raise that you would like to write to us about, we would be happy if you did that.

Before we consider your responses in detail, I want to ask for your general views on our draft report and the recommendations that we have made. Are you in favour of the proposed procedures?

Professor Chris Himsworth (University of Edinburgh): Thank you for the welcome. I am pleased to be back with the committee, although I am doubtful at this point about what added value I can offer.

I do not think that I want to expand beyond what I said in my written response. My starting point is one of general welcome for a radical new and progressive proposal for handling subordinate legislation in the Parliament in a uniform way across the piece. That is a good initiative.

In a nutshell, my principal questions are as follows. First, to what extent do the proposals emerge from a broader consideration by the committee of the complete process of authorising the making of subordinate legislation and of the subsequent handling of subordinate legislation in the Parliament? I say that with particular regard to the relationship between the Parliament and the Executive under the process. In my written submission, I took the liberty of going back to the founding principles of the Parliament. I can see that reformulations of that relationship are coming out of the new procedures in any event, but there are possibilities for taking the process a bit further.

Perhaps we can then arrive at more technical or procedural proposals.

Aside from one or two other matters that are covered in my paper, my other lingering concern is about the consequences of the new, uniform procedure and what I interpret as the loss of the affirmative procedure. I retain an open mind on the matter, but I get the sense that the case has not yet been compellingly made for that result to be achieved. I would pick out a couple of instances, although they could be expanded way beyond this concern, looking back through the history of the Parliament so far, at the budget process and one or two pieces of legislation.

The Parliament gave a lot of attention to the style in which it wished to have instruments made and approved. That seems to have been a constitutionally interesting and important feature of practice so far, with the Parliament being seen as approving the content of certain instruments. I will keep an open mind on the issue, but I would have preferred the arguments that have been made in that direction to have been expressed more compellingly before the committee takes that step.

The Convener: You make two good points there, which we will return to in a second. Do you have any general points to add at this point, Colin?

Professor Colin T Reid (University of Dundee): I will make two points. First, we should not underestimate the scale of change that the new procedures will require, both on the part of the Parliament in how it decides where it will put its effort and how it stays alert to important things coming through, and on the part of the Executive in adapting to what I suspect will be a very different timescale for its way of working, particularly as it has to co-ordinate things with the other Administrations in the UK.

Secondly, I would pick up on what Chris Himsworth said about the need to think about subordinate legislation as part of the bigger picture. The actual scrutiny and procedures for making subordinate legislation are only one part of the story. When legislation is being scrutinised, there are initial decisions to be made about who will make what rules, and when. Furthermore, there are other ways of calling ministers to account: scrutiny of particular items of delegated legislation is not the only way to call the Executive to account for what it is doing.

The Convener: Thank you very much for that. As we go through these questions, please do not feel frightened to ask if you wish some things to be clarified. We had to explain to the Executive what we meant in certain areas. Ken Macintosh will start with one of the areas that Chris Himsworth mentioned: the balance between primary and secondary legislation.

10:45

Mr Kenneth Macintosh (Eastwood) (Lab): Chris, you have already outlined some of your thoughts on this. Will you expand on what you said? I think that you are suggesting that we are missing an opportunity. It is not that what we are doing is wrong, but it is being suggested that we are missing an opportunity to redress the balance of power—or the balance of control over legislation—between the Executive and the Parliament. There is an assumption that the balance is currently wrong. Is that correct? Am I reading too much into your comments on that?

Professor Himsworth: I am a bit nervous about how to put this. It sounds as though I am being rather impertinent about the role of the committee or about its perception of the balance between the Parliament and the Executive. My starting position comes from the historical position as it emerged over a much longer period in the Westminster Parliament and latterly in the Scottish Parliament—and, I suspect, in most jurisdictions worldwide where anything like the same system has run.

Thinking back to the talk of a new despotism in the 1920s and so on, the peril in any constitutional system is domination by the Executive. There can be a process whereby Parliament, in exercising its powers, is invited by a relatively dominant Executive to give further powers to that Executive to make further legislation, which vastly outweighs the legislation that can ever be made by the parent Parliament—in quantity, if not in quality. That is subject to the fact that, over the years, the powers of control have demonstrated themselves not to be up to the task of their apparent formal potential. In other words, Parliaments are not, on the whole, able to exercise their scrutiny role to the extent that they might be, for various reasons. That applies especially when it comes to the merits of statutory instruments. We should bear it in mind that it was, I think, the settled intention of this Parliament to try to redress that balance at relevant points. The committee's inquiry is perhaps the territory on which that rebalancing might be expected to take place.

The outcome of the thoughts about rebalancing would be a matter for the practices of the Parliament and the re-evaluations that the Parliament makes of its relationship with the Executive over the years, and it would be subject to the practicalities of the Parliament. There are limits to the time, resources and so on that the Parliament can be expected to provide.

The starting question might be whether under the future operation of the Scottish Parliament we expect the statute book to continue to be dominated by secondary legislation—in quantitative terms—or whether we expect more to

be done through primary legislation. Once one has got to the next stage of acknowledging that some things will be done through secondary legislation, one has to be alert to maintaining the Parliament's powers with respect to whatever is delegated to the Executive. The committee will approach the matter from that point of view, although there is a balance to be struck.

Of course there are considerations of efficiency and the effectiveness of government, for example. Committee members can be expected to be as sympathetic to or as knowledgeable about those considerations as people on the Executive side of the debate are. The starting point must be alertness to the dangers that that relationship holds, if it is maintained, and the measures that might be taken to contain it best.

I am being a bit general, but that is where my concerns come from. That is why I posed the more specific questions about affirmative resolutions and such matters.

Mr Macintosh: You have outlined your concerns, as you did earlier.

I ask Colin Reid to comment. The general point has been made that the volume of subordinate legislation is increasing—there is no doubt that it is—but it is difficult to see how the committee's proposals would weaken or dilute the current balance of power or scrutiny. On the balance of power, I suggest that the proposal offers the Parliament a far greater opportunity to exercise scrutiny and control—if I may use that word—over the Executive.

Professor Reid: Perhaps the big issue is the affirmative procedure. The Parliament has had three levels of involvement. The first is the full parliamentary procedure, which is multistage and inevitably takes a long time. The second is the affirmative procedure, under which the Parliament must give express approval, but in a way that tries to be efficient. The third covers the various negative procedures, under which instruments are considered carefully and the opportunity is available to make changes, but it is almost expected that most things will be all right.

The proposed simplification of procedures would largely get rid of the halfway house, which could result in an argument for putting more in primary legislation, if we wanted to require express parliamentary approval of matters. The affirmative procedure or some other halfway house provides a different way of dividing the work. We have a spectrum that goes from what clearly needs to be dealt with formally and officially with maximum scrutiny that involves everybody, to what is purely technical and involves tick-box exercises. Parliament must decide how many divisions to have along the spectrum and where the dividing lines will be drawn. As Chris Himsworth said, arguments and battles about how much power the executive should have for efficient government go back to the start of the previous century.

Mr Macintosh: I will continue in that vein on the affirmative procedure. We are going for a simplified procedure. Simplicity is a great advantage in securing transparency in how we exercise our scrutiny powers. I do not say that the affirmative procedure has been misused, but, in relation to orders on paralytic shellfish poisoning, for example, it has required a minister to appear before the Health Committee almost every month, although no questions are ever asked. When that happens, the process becomes slightly meaningless and is demeaned. The proposed reforms would allow judgment to be exercised about what is called for debate. A political or other judgment could be made about scrutinising a measure and whether the Parliament was required to make a statement or have a debate.

Several people have commented on the fact that the Parliament has never annulled an instrument, although the Executive has withdrawn some instruments. Chris Himsworth has said that we are missing the opportunity to use the affirmative procedure as a chance to focus debate, but we suggest that the new procedure provides a far better way to focus debate.

Professor Himsworth: I would be the first to subscribe to the general advantages of simplicity and transparency, and I see the attractions of the new procedure for such reasons. The attractions sound good. I also understand the difficulties that may emerge from some procedures becoming a bit tired, lying unused, being a waste of time all round and becoming overly formal in the worst sense. However, two responses can be made to that. First, one may still expect to want to flex one's muscles and use the power that is available to the Parliament only every so often; on other occasions, matters will remain relatively routine.

The other response relates to the general use of affirmative resolutions. If forms of delegated legislation have attracted the wrong procedure, it is in principle open to the Parliament to modify the procedure and enable something to be done differently, in so far as doing so is in the Parliament's gift. Of course the point is taken, as it has been at Westminster over many years, that measures such as additional taxation in particular ought to attract the affirmative procedure for constitutional reasons. A fairly consistent thread runs through the statute book on that basis.

However, beyond that, the perceived significance of instruments is the issue. Sometimes, a distinction is made so that the first instrument in a series on a new system of grants or other financial arrangements is subject to the

affirmative procedure while later instruments are subject to the negative procedure. I am sure that inconsistencies and irrationalities can be identified. However, that is a question of babies and bath water. We do not necessarily abandon the concept of the affirmative resolution procedure just because irrational inconsistencies have occurred.

Another step that was proposed in the direction of the committee's proposal was that the committee or somebody else in the Parliament could decide, after primary legislation had been passed, what procedure should attach to delegated legislation. That proposal has never attracted me much and I am rather glad that the committee has gone beyond it to the general procedure.

I return to the member's original statement about the new procedure. I accept that the idea that every instrument could be laid in draft and be subject to review by the Parliament—although that might not suit the Executive—sounds like a strong measure to adopt. However, still lurking is the present requirement—I do not see how its constitutional validity has been displaced by things that have happened since—that the Parliament must commit itself affirmatively and positively to some instruments rather than simply follow a procedure that requires a draft to be laid and enables consideration to be given but does not formally require the Parliament to be seen to say yes to an instrument.

11:00

Given the way in which the committee is going, perhaps that is a price that will have to be paid. My interpretation of Dr McHarg's response in her submission is that she believes that it would be worth paying that price. She can see that a balance must be maintained and seems to be persuaded by the committee's view. It is plain that reasonable people can reach different conclusions on the same matter. However, I believe that it is still an issue, because such instances, although currently uncommon, would be affected most poignantly by the proposed new general procedure.

Professor Reid: The Parliament should review at all times whether the correct procedure is used for particular orders. If the shellfish orders, for example, were subject to an inappropriate procedure, that should be considered and changed, to the extent that that is within the Parliament's power.

In relation to the bigger issue, I am left with a series of questions that I cannot answer. Does the fact that a measure has to go through the affirmative procedure alter the Executive's thinking about what it puts in it and how it is shaped? Does that alter what is acceptable in the political process? Will relying wholly on the parliamentarians to pick up the important points be absolutely sound, given distractions at times of political crisis? Realistically, one can have only so many balls in the air at one time and important matters might be allowed to slip through while concentration is elsewhere.

I do not know enough about the inside workings of either the Executive or the Parliament to be able to answer such questions. Retaining the affirmative procedure might be seen as a longstop or guarantee that members and the Executive will be forced to think consciously about measures rather than allowing them to be overtaken by other events.

Mr Stewart Maxwell (West of Scotland) (SNP): Professor Reid said that parliamentarians would have to be guard dogs who look at every proposal to make sure that they are aware of its significance in order to pick up on the important ones. That is correct.

Currently, the Executive decides what is important. In primary legislation, the Executive decides which later measures will be subject to the affirmative and negative procedures. Although the Parliament agrees to that when passing the primary legislation, the significance of the different procedures is not necessarily clear at the time. For example, negative instruments have later turned out to be extremely significant, and yet it is the Executive that is proposing negative instruments on important matters. I do not see how the proposed procedure would be worse than what we have currently.

Professor Reid: That goes back to the point that both Professor Himsworth and I made at the beginning of the meeting about the wider process. It is the Parliament that decides what procedure should be followed. The Executive might propose it, but ultimately the Parliament decides what will be in an act. That goes back to Chris Himsworth's point about the balance between the Executive and the Parliament in the law-making process at all stages.

There will always be areas that are thought to be important, whereas what is proposed is totally non-controversial and will not matter. Equally, areas that are not expected to be controversial can turn out to be so. It is true that there needs to be constant scrutiny of every measure in order to pick up such changes as and when they occur. However, as concerns constitutional propriety and the express endorsement of the Parliament, one could argue that there is scope for the affirmative procedure in areas where one wants to ensure debate.

Similarly, certain aspects always have to be gone through formally at company annual general

meetings although they are not controversial most years. The fact that directors have to come to the AGM to get certain matters approved is a form of check and guarantee that when people's minds are elsewhere for perfectly good reasons, people will realise that certain matters are still important.

Mr Maxwell: I accept what you say, but having gone through the review of parliamentary procedure, I have been convinced that the flexibility offered by the proposed new general procedure would allow parliamentarians, particularly in committees, but perhaps in the chamber, to focus on important proposed measures. The general procedure would give the flexibility to deal with unforeseen circumstances. I accept that different reasonable people reach different conclusions, but that ability to react to matters as they arise, as opposed to trying to predict what will happen in advance—I come back to that phrase, a "price worth paying"—is better than the formal process of the affirmative procedure. I am not asking a question; just noting a difference of opinion.

Professor Reid: What is the cost of having some measures go through the affirmative process unnecessarily? Would we lose more by doing that than we might gain through catching some of the important measures that could otherwise slip through? It is important to keep under review whether the correct procedure is being used for the correct measure so that when one identifies a class of measures that have been dealt with inappropriately, one can go back to the Parliament to get them changed.

The Convener: Stewart Maxwell is suggesting that, in the evolving process that we have, what we are currently accustomed to debating in the lead committee would be understood. An issue would be highlighted as on-going by committee clerks and committee members, which is what the affirmative procedure is being used for at the moment in many cases. I do not know whether you would accept that the experience that we have gained from the evolving process is sufficient to allow the general approach and the advantages of its simplicity. I understand your argument—I am of the same opinion—but we might have to accept that committees now have a lot of expertise. The areas that you outlined in particular, such as the budget, need that type of debate and have always had it. What do you think of the gathering expertise that committees now have?

Professor Himsworth: I pay huge respect to that gathering expertise and experience. Both Colin Reid and I made the point that there are aspects of the debate that raised questions that are much better answered by those who have got their hands dirty with this business in recent years, within the Parliament and the Executive. As I said at the beginning, I would accept the arguments that point in the direction of greater simplicity and transparency. I would certainly sympathise with developments in favour of greater managed selectivity of attention given by committees. That is bound to be a consideration, given that there are lots of other things to do. The use of appropriate procedures to enable selective approaches, which can be managed within a comprehensive procedure, sounds altogether attractive. Those are the upsides of that sort of development.

The parallel with company practices is not exact; nor is the parallel with local authority practices—I would be reluctant to draw such a parallel in other circumstances—but there is a statutory requirement that certain significant decisions by local authorities, such as the setting of the council tax, have to be handled by the full council of the authority, rather than by some delegated committee on behalf of the council. It is not a question of procedure or of the issue being brought to the attention of members. It is not that consideration cannot be given to such matters, but that a constitutional status is given to certain types of decision, which sets them apart.

I am not quite sure about the detail of what I would argue for. The exceptional procedure that is already envisaged would not take account of the instances of the use of the affirmative resolution of which I am thinking. It seems to me that it would be worth hanging on to the requirement that Parliament be seen to affirm certain measures as part of a generally uniform procedure. Once the number of procedural options has been whittled down from the five, seven or nine possibilities that currently exist on the statute book to one in principle, it should still be possible to retain that capability in the framework, until contrary arguments are produced.

The Convener: Does Colin Reid have a similar view?

Professor Reid: Yes. My general point is that, over the centuries, our constitutional tradition has attached as much importance to conventions as it has to legal rules. If the feeling is that there are clear practices and conventions that provide adequate protection for certain matters, that would certainly not be unusual in the British way of doing things.

The Convener: Gordon Jackson has some questions.

Gordon Jackson (Glasgow Govan) (Lab): We considered the idea of the Subordinate Legislation Committee and the lead committee considering items of subordinate legislation in parallel rather than in sequence, which is the present practice, and the possibility of our having the power to

recommend disapproval or annulment. Will you expand on your concerns about our proposals on disapproval or annulment?

Professor Himsworth: I will go first. My position echoes a point that Colin Reid put elegantly in his submission, which is about the manageability of consideration of subordinate legislation. It is difficult for people from outside the Parliament to comment on that. If a parallel procedure can be operated efficiently, it will be a good thing.

On the role of the Subordinate Legislation Committee specifically, my presentation of two arguments might, on the face of it, appear to be a little contradictory. That is because I had still not come to a final view when I prepared my submission. On one hand, it seemed to me that, with respect, the case had still to be made for the Subordinate Legislation Committee's role to be elevated to that of the lead committee or of the Parliament as a whole, which can recommend that an instrument be withdrawn or can take action that has the effect of annulling a draft instrument. However, I recognise that that proposal has its attractions and in no way do I wish to downgrade the work that has been done by this committee and its equivalent committees at Westminster. The points that have been made by those so-called technical committees have consistently been far stronger than those that have been made as part of reviews of legislative proposals on other grounds, such as their merits. The question is whether that should lead to this committee having the equivalent of an annulling power under the new procedure.

Since I first raised that question, I have become more sympathetic to the committee's point of view, which reflects the logic of its approach. My contrary view was that if the committee could recommend that an instrument be annulled on the ground that it was in some way ultra vires—in other words, unlawful—why stop at that? In her evidence, Dr McHarg made the point—Professor Reid might have done so, too—that the fact that an instrument raises a devolution issue is another ground on which it can be reviewed by the Subordinate Legislation Committee. Such a reason is similar to the ground of an instrument being ultra vires. To my mind, if there is a question about whether it falls within the power of the Scottish ministers rather than a United Kingdom minister to make the rules on a particular matter, that is just as fundamental an issue as whether an instrument is ultra vires.

Another example that was cited was that an instrument might be utterly unacceptable on the ground that it had been drafted defectively to the point of being unintelligible. That would seem to be just as compelling a reason for the committee to intervene at that point as the fact that an instrument gave rise to a hypothetical vires issue. There is a bit of a contradiction in my position. Although I recognise that there is an argument against the committee having a power to recommend annulment, I have largely rejected that view in that I now acknowledge that it could be argued that the proposed power should be extended so that the committee could recommend annulment on other grounds.

Gordon Jackson: I will bring Colin Reid in in a minute but, on the other side of the coin, you suggest that perhaps there should be other grounds on which we could recommend annulment. When it came to the power that we wanted to take, we restricted ourselves because even though we are a parliamentary committee, we are highly non-political. Believe it or not, we manage to succeed in not being political. I took the example of an instrument raising a devolution issue as being another way of saying that it was ultra vires. To say that something is not competent for reasons to do with devolution is just another way of saying that it is ultra vires. Did you have in mind grounds for recommending that an instrument be annulled other than that it was ultra vires or that no one could understand a word of it—I am paraphrasing the other reason that you gave?

11:15

Professor Himsworth: The list of the powers that the Subordinate Legislation Committee has contains about five, seven or nine points—I do not have the list in front of me. It is more or less a re-enumeration of the powers that the Westminster committees have. I have no doubt that the Subordinate Legislation Committee manages to maintain its non-political stance. Although it has occasionally been suggested that the Joint Committee on Statutory Instruments at Westminster has allowed political arguments to be raised covertly, under the cover of rather innocuous technical grounds, I am not aware that that has happened in the Scottish Parliament.

My point is not that the Subordinate Legislation Committee's approach should be questioned. Indeed, I believe that it could be adopted in relation to the other grounds on which the committee can intervene, for example in relation to the extraordinary use of powers—I forget the other grounds because I do not have the list in front of me. I am not sure why all those grounds should not remain part of the same group.

Gordon Jackson: I invite Colin Reid to comment on what has been said. Do you accept that if there is to be parallel consideration of instruments, we would need to have the power to recommend annulment or disapproval? Otherwise we would just be ineffective.

Professor Reid: That would be a useful power for the committee to have. Some of the discussion depends on how widely one draws the concept of vires. If an instrument were unintelligible, one could certainly argue to the courts that it went beyond the legal powers. We are talking about extreme cases that involve technical issues relating to the boundaries of power. The fact that matters of vires arise only in fairly extreme cases is perhaps an appropriate reflection of the role that the committee should be playing.

If there is to be parallel consideration, the Subordinate Legislation Committee should have the power to start the annulment procedure. There is then the practical issue of managing the process. Will a motion to annul be lodged by both the Subordinate Legislation Committee and the lead committee? Will one have to give way to the other? How will such matters be worked out? Such considerations must be dealt with through the internal workings of the committee system.

Gordon Jackson: We would assume that the other technical committee—the Procedures Committee—would work out a method of dealing with that nuts-and-bolts question in due course. I think that either one or both of you were somewhat unconvinced that a motion to annul could come only from the committees. Linked to that is the legitimate point that regardless of whether committees are whipped—one of the great mysteries of the Parliament is precisely what goes on in committees—there is an Executive majority on them. Should there be more power for Parliament to disapprove of instruments and, if so, how could that be provided, bearing in mind that it is likely that some of the instruments would already be in force? I am trying to tease out the idea of broadening out the Parliament's power as against the committees' power, given the Executive majority on committees.

Professor Himsworth: I sought simply to air the issue. My concerns about that are much less in relation to this committee. I believe that the current procedures in the standing orders provide that motions to annul have to be initiated within a committee.

Gordon Jackson: Any member of the Parliament can lodge a motion to annul and then go to the committee considering the motion. Only once in seven years have I laid a motion to annul before a committee of which I was not a member. That was pure politics; it was nothing to do with technical matters. Anyone can lodge a motion to annul and go to the committee considering it, but only the committee members vote on it.

Professor Himsworth: I wanted to raise that specific issue afresh in the context of a potential new procedure and the Parliament's first comprehensive consideration of the procedures since the development of the original standing orders.

I can see that it might still be necessary to confine the route, on the ground of efficiency within the Parliament. Political objections to instruments might well be made; the procedure might be a device for broader political purposes. I am not certain that such an opportunity should be narrowed. I suspect that the new procedure will not narrow it any more than the current rules do.

Professor Reid: There will always be a balance in the relationship between individual MSPs or groups of MSPs on committees, in the same way that there is a balance in the relationship between the Parliament and the Executive. You might want to consider providing that a certain number of MSPs could lodge a motion to annul, rather than allowing an individual MSP to throw a spanner in the works. The dynamics will change. If you are looking at all the instruments in draft form, you will not face the same pressure to consider whether an order will continue to be in force. That in itself might alter the dynamics in the committees. Without having observed the detailed workings of the various committees, I think that it is hard to comment on how open they are to suggestions from outside. Again, the wider context comes into this. If you are losing the affirmative procedure, that might narrow the opportunity for outside MSPs to get involved and take the initiative. With lots of different things moving around, the dynamic will be quite different.

Gordon Jackson: Does the new procedure accommodate the Executive too much? Are we making things too easy for the Executive?

Professor Reid: There is a danger of that. I am not sure how the whole process will work. A fundamental part of what is being proposed is the advance schedule of legislation. Given the Executive's current practice, whereby some measures that appear to have been promised are delayed for hidden reasons, such as the need to co-ordinate with European initiatives and measures in the rest of the United Kingdom, I am not sure how effective the new procedure will be. The new procedure will require a big change in practice on the part of both the Parliament and the Executive. If everybody buys into it and is happy for it to go forward, it could work. However, if either side is unhappy or the practice does not work out, things could fall apart.

The Convener: I ask Gordon Jackson to move on to questions on the definition of SSIs.

Gordon Jackson: We raised the question, "When is an SSI not an SSI?" We recommended that the definition of an SSI should not cover every rule or anything that looks like a piece of legislation. Dr McHarg made the interesting

suggestion that although there should be no general requirement that all rules of a legislative character be made by SSI, there should be enacted a rebuttable statutory presumption that rules that are not made as SSIs do not have any binding legal effect. She saw certain advantages in that. Do you have any comment on that?

Professor Reid: I hold the very old-fashioned, strict view that there are things that are law and things that are not. Only the things that are law change, take away or confer legal rights and entitle people to be punished. In the past 20 or 30 years, there has been a general problem in government of the blurring of the distinction between what are legal matters that should be stated in a formal, recognisable sense and other forms of rules, guidance and advice. A strict division should be stuck to. Rules that affect rights and provide for possible punishment should be made by a formal law-making procedure and not in any other way.

Gordon Jackson: Does that fit with Dr McHarg's view that it should be made clear, by statutory statement, that rules that are not made in that way are not legally binding laws?

Professor Reid: I do not think that there is any need for such a statement, because that should already be the understood position. However, if people are confused about it, stating what I would say is obvious might not be a bad thing.

Gordon Jackson: You had concerns about the suggestion that certain measures might be removed from the SSI category, which would impact on their publication. Will you elaborate on that?

Professor Reid: The SSI status affects the procedure by which things are made and the status that they enjoy in the courts. There are also publicity and publication elements to that. With local SSIs, it can already be hard to find out what the rules are, even though one can end up being prosecuted in court for breaching them. The same can apply to local authority byelaws. Somehow, getting hold of such things can be difficult.

If you are going to take things out of the class of SSIs, you need to spell out clearly the procedure by which they are being made, their legal status and the requirements for publicising them. Otherwise, people will be at risk of having their legal rights affected or of being prosecuted when they did not know what the rules were because they did not go out of their way to find out.

Gordon Jackson: I think that we tentatively saw some benefit in taking certain local matters and rules of court—they are an odd example to which I might return, although they are not covered in the briefing paper—out of the formal SSI structure, in the interest of proper scrutiny, given the sheer volume of instruments that we consider. We have ended up considering things that we feel that the Parliament would be better to leave alone.

11:30

Professor Reid: That might be appropriate. However, you have to decide what such rules are going to be. You cannot just say that they are not SSIs. You have to decide what they are going to be, the procedure for making and publicising them and their legal status. Perhaps many shellfish orders or traffic orders should be regarded as some sort of byelaw rather than statutory instruments, but that raises the issue that byelaws are a hotch-potch. Different bodies have powers to make byelaws by different procedures with or without rules on publicity, but those byelaws are still matters of law that affect legal rights and can lead to prosecution. The status of and procedures for byelaws throughout the country could be the subject for another inquiry by this or another committee.

Gordon Jackson: We suggested that we could leave instruments that are to do with court procedures—such as acts of adjournal and other things that the Lord President promulgates—and let the judiciary run its own business. As a lawyer, I thought that the judges would be delighted at that, but it turned out that they were horrified and said, "No, no. Please don't leave us on our own." I do not know whether that was due to a fear of high places. Do you have any comment on that? We thought that it was sensible to clear out of the committee a lot of stuff that we did not think it was necessary for us to scrutinise.

Professor Reid: The rules of court bring us back to two of the issues that I have raised. One is publicity, publication and how they will be disseminated, but they also raise some issues of scrutiny. Judicial independence is fine but, on the other hand, we want the judiciary to be accountable somehow. We do not want the Parliament to pass laws that give people rights that are unenforceable because the rules of court make them so—for example if, to claim a right that an act of the Scottish Parliament gave them, people had to appear at the Court of Session between 5 minutes to midnight and midnight on a particular day. That is an absurd example, but the rules of court have an impact on the effectiveness of what has happened at this end of the Royal Mile.

Gordon Jackson: It had never occurred to me that a rule of court could prevent an act from working. In the seven years of the Parliament, no one has ever scrutinised a rule of court. The committee's legal adviser scrutinises them from a technical point of view, but I do not suppose that we ever scrutinise the policy of the rules.

Professor Reid: I hope that that would never be necessary, but the question is whether you should have the fallback position of being able to do so in case things go wrong or whether other mechanisms that are available to the Parliament would provide adequate safeguards. You do not have to load everything into the SSI procedure; are there other routes by which potential problems could be dealt with?

Gordon Jackson: You have given me an answer as to why there should perhaps continue to be some scrutiny of the rules of court—they might bear on how we legislate—which I had not thought of before. However, you have also said that, if the rules of court are not going to be formal SSIs, there might have to be another way of scrutinising them. Would you like to suggest another way?

Professor Reid: Perhaps the production of an annual report on such matters would be one way. Would any minister's responsibilities extend to the rules of court? I do not know.

Professor Himsworth: My inclination would be to try to keep the rules of court within the SSI framework. That is not to disagree at all with Colin Reid's fundamentalism on the difference between law and non-law. I am with him entirely on that, but my understanding is that the SSI procedure—1946 and all that—came to the rescue, as rules were being made by all sorts of bodies according to all sorts of different procedures and were lying unknown and unappreciated by the general public or even their advisers. The huge advantage of the SI designation and procedures was to cure that and bring everything within central Government control. Of course, local authority byelaws and some other things remained distinct but, as long as Parliament said that a measure was to be an order in council or a statutory instrument, the complete code was brought to bear. Perhaps it is worth trying to hang on to that.

There seem to me to be two reasons for departing from a standard procedure. One relates to publication, but I wonder whether that has been overcome by technology. Websites seem to be able to accommodate virtually anything and I cannot understand why we cannot have every SSI, whether local or not, on the same website. One can understand the concerns of Her Majesty's Stationery Office in 1946 about not wanting to publish local instruments and complicated schedules, but one could still have rules about what has to appear on paper and be published by the Stationery Office.

The other question is what parliamentary procedures should attach to certain categories of SSI. I understand that there might be a wish to distinguish between SSIs at that point in the process. If the committee still does not have the stomach for scrutinising every local statutory instrument, so be it. There is nothing to prevent that, but the idea of retaining the uniform designation of SSI sounds nice to me. It is a good thing to hang on to.

I notice what the Lord President has said on procedure. He obviously welcomes the committee's future intervention.

The Convener: We have spent nearly an hour on this matter, so I ask members and the witnesses to make their questions and answers punchier. We will move on to questions about the amendments that the committee would be able to make under the proposed new procedure.

Mr Maxwell: I will treat that warning with due reverence.

There seems to be a difference of opinion between the witnesses and Dr McHarg on the power of amendment. We recommended that the committee should have the power to suggest amendments to the Executive to tidy up mistakes in an instrument without stopping the clock—that is the phrase that has come to be used. What is your opinion on going beyond the committee's recommendation on that point? Should lead committees be allowed the power to suggest to the Executive amendments on the policy of statutory instruments? Dr McHarg seems to suggest that such powers should go as far as the lead committee and even further.

Professor Reid: I favour leaving the power of amendment in the Executive's hands on the directions of the committees because so much subordinate legislation is interconnected in all sorts of ways or is constrained in various ways by European legislation that a well-meaning, sensible and perfectly reasonable proposal that anyone in the Parliament could make might hit other problems elsewhere. For that reason, the right way forward is for the Executive to be responsible for proposing detailed amendments. It is a safer way forward than committees doing what they think is best and what seems perfectly reasonable to everybody and then, three months down the line, discovering because of something that is about to come out that a stray provision is in force.

On who should have the power to propose amendments, to the extent that the power is meant to deal only with minor, technical drafting matters, it seems more appropriate to leave it to this committee. If it were opened up to the lead committees, would it be regarded as an opportunity for restructuring the policy issues? Would it be an irresistible invitation to start debating matters that are perhaps not appropriately debated in the context of making

particular changes to particular bits of legislation that may be part of a wider network?

Mr Maxwell: Professor Himsworth, do you have a view on the question?

Professor Himsworth: I can be brief, as I broadly agree. The move from the old procedures to the uniform procedure in draft provides a good opportunity for the proposals on recommendation of amendment, whereas the old notion of amendment instead of annulment raised sharper and perhaps more difficult questions that the committee did not fully resolve.

As to which committee should have the power, my provisional feeling is that there is no reason why recommendations on amendments to draft instruments should not come from both sources.

Mr Maxwell: When the committee discussed the arguments, our view was that going beyond minor or technical amendments could open up an issue again. Parliament agrees the policy in the primary legislation, and we felt that giving people a second chance by allowing them to make policy amendments to statutory instruments could lead to radical changes to the intentions of the primary legislation. The example comes to mind of the Smoking, Health and Social Care (Scotland) Act 2005, in which much of the detail was left to regulations. If a committee could intervene in such regulations, the same debates could come up as came up during the passage of the parent act. We did not feel that that would be appropriate.

Professor Himsworth: Some parent acts more or less say, "The Scottish ministers shall go away and make regulations"—they say scarcely anything further. That is much frowned on and may be a style of legislation that, over the years, this Parliament will increasingly not agree to pass.

Some powers are remarkably broadly cast, and the point at which rules are made is really the first opportunity for the Parliament to debate the substance of legislation. Even if the Parliament has seen some draft rules in advance, it would not be reasonable—if any notion of scrutiny or of potential control over outcomes in issues of substance is to be retained—to surrender the power to scrutinise beyond saying, "We think it's a bad thing," or to lose the power to say, "No, we really want you to have a rethink, even at the cost of delaying the making of the regulations, because some fundamental issues remain to be resolved."

The Convener: As you say, a lot is often left to ministers. However, what has happened in practice is that the committee has demanded to see draft regulations so that it can be sure that certain things have been covered. The situation is not quite as bad as you suggest. Practice has evolved—although I am not sure that we are going in the best direction.

Mr Maxwell: Dr McHarg suggests that the whole Parliament should be given the power to amend SSIs. Would that be a natural and logical extension of lead committees having such a power, or should the line be drawn at committees?

Professor Himsworth: Two issues arise. One is the fundamental constitutional issue, which was raised the last time we were here, although it was not tested to destruction. Whose rules are they? Who owns the rules once they are made? Do they remain the Scottish ministers' rules, even when responsibility has been shared with the Parliament? Such questions are answered to an extent by scrutiny of drafts, because out of that procedure come instruments that are made by ministers.

The second issue is that of practicality. A lingering democratic instinct may make people feel that certain issues should be brought to the chamber—

Mr Maxwell: That is what the committee discussed—practicality.

Professor Himsworth: Yes, and such discussions can lead to a rather different tension. The question becomes not only one of ownership and constitutional propriety, but one of the tension between democracy and efficiency.

Professor Reid: Timing would also be an issue: when would an amendment take effect and would anyone be able to check it? If a committee recommends an amendment and the Executive takes up the recommendation, there is a possibility of parliamentary consideration as a backstop if a dispute arises over whether the amendment is adequate. However, if the issue is raised only with the full Parliament, problems may arise.

11:45

The Convener: Would Stewart Maxwell like to ask about commencement orders?

Mr Maxwell: All right. Interestingly, the two professors seem to have come to diametrically opposed conclusions on commencement orders. Professor Himsworth thinks that commencement orders should be subject to scrutiny by the lead committee on policy grounds; and Professor Reid is saying that such orders are non-controversial—they are just commencement orders. I ask both to expand on how they arrived at their different conclusions.

Professor Himsworth: I accept that, on the whole, lots of commencement orders turn out to be non-controversial. However, I have a bit of a bee in my bonnet about them.

Unless it is constrained by one of the rather complex formulae that say that, in any event, a law will come into effect by a certain date, a Parliament that delegates the power to decide whether laws come into effect or not—and, if so, when—is actually giving remarkable power to the Executive. At Westminster, there are lingering examples of legislation that has never come into effect because it has never been commenced. At Westminster—and the issue may also be being considered in this Parliament—there has been a struggle to monitor what has come into force and the criteria used for bringing it into force on a particular date.

On the whole, commencement orders have not been subject to parliamentary procedure—to annulment or to affirmative resolution. That has struck me as being slightly anomalous over the years, and I hope that this Parliament will consider the issue. The conclusion may be that, in the main, commencement orders are indeed deeply insignificant and merely technical. However, because of their possible policy consequences, it is not inconceivable that timings will affect the effectiveness of an act. That could be just as important as other policy issues raised by the act itself.

Mr Maxwell: I accept that, but the problem of non-commencement would not be solved by your suggestion. If a commencement order is never introduced, it is difficult to know how to deal with the Executive about that.

Professor Himsworth: I take that point.

Professor Reid: Commencement orders can raise significant policy issues, but I am not convinced that the best way of addressing the problem is to subject individual orders to scrutiny as items of subordinate legislation. An overview taken at certain times—considering what has or has not been commenced—would give the Parliament a better opportunity to scrutinise what is going on and to identify patterns. Taking such an overview as a separate exercise would be better than taking a piecemeal approach and perhaps losing track of things.

Mr Maxwell: That chimes with something that we have discussed—that the committee should produce a report card covering what the Executive has or has not done, what legislation it has or has not commenced and which of our recommendations it has or has not taken up.

Professor Reid: You will know whether this committee is or is not the most appropriate committee to consider commencement orders, in view of the policy issues that arise. However, a statement of where we stand in relation to commencement and an opportunity to discuss that statement and to question the Executive on why legislation has been delayed more than was expected would be useful additions to the way in which the Parliament operates.

Mr Maxwell: I do not think that we envisaged that we would then bring the minister to account for that. It might be a lead committee's role to pick up on the report and to ask why certain things had happened or not.

The Convener: We picked up this point from the Joint Committee on Statutory Instruments at Westminster, which I think had adopted that approach.

Professor Himsworth: On the non-making of an order, the exception comes where large tranches of an act are brought into force but some sections are not. I do not see why, in theory, an order could not be scrutinised in respect of its omissions.

The Convener: Those are very good suggestions. Thank you very much.

Adam Ingram has the final question, on the emergency procedure.

Mr Adam Ingram (South of Scotland) (SNP): There seems to be a little bit of confusion about the exceptional procedure. There are two types of case: first, cases that are identified in the parent act as being subject to the emergency procedure; and, secondly, cases in which the Executive considers that it cannot comply with the general procedure and that an instrument has to come into force urgently—for example, it might be necessary to have instruments that are similar to those that apply in the rest of the UK. Do you agree that the exceptional procedure should be available in both types of case?

Professor Himsworth: I did not submit anything on exceptional procedures, beyond acknowledging that they are there and that they seem to be a good thing. I imagine that there is an argument for both types of case coming under an exceptional procedure.

Professor Reid: I agree. The obvious examples concern food safety and certain environmental safety matters, on which quick action is required. Those areas can be identified in advance. I suspect that you might run into difficulties and arguments with the other category. When is it necessary, as opposed to convenient, desirable, preferable or practical, to bring in measures at the same time as Westminster brings them in? There might be particular difficulties given that Westminster operates under a different timetable of recesses and elections.

The issue of co-ordination will require a lot of thought and, I suspect, a big change in practice, and not just in the Scottish Executive. If such co-ordination is really to work, the change will need to apply to the Whitehall departments. Otherwise, there is a danger that, in those areas in which the European Community lies at the back of things, matters will be dealt with in London, through Westminster's powers under the European Communities Act 1972, rather than people facing the hassle or difficulty of working out the different timescales, going through the exceptional procedure and putting in reports. People will say, "Och, it's easier just to make one order in London."

Mr Ingram: Would not that put a burden or obligation on the committee to scrutinise the urgent cases as defined by the Executive? If we determined that any such instruments were unnecessary, should we be able to report that to Parliament? Can you suggest any criteria that we could use to measure what the Executive might regard as necessary or urgent?

Professor Reid: I would quite like to see what the Executive says in relation to that suggestion in the first place before expressing a clear view on the matter. There are very few cases in which one could argue that, legally, it was absolutely necessary for things to happen together on a particular date. In lots of other cases, it will be hugely convenient—not just for the Executive, but for the people on the receiving end of the legislation—for rules to come in at the same time throughout the country. The issue is not black and white. The example that I was thinking of relates to a reserved matter, so it is not a good one, but there are all sorts of areas of cross-boundary business in which it makes sense for rules to come in on the same date. It is not absolutely necessary for them to come in on the same date, but it is good government for them to do so.

Professor Himsworth: This strikes me as rather post hoc report card stuff. Provided that one puts in an initial hurdle and that the Scottish ministers are seen to be declaring that a matter is an emergency and reporting that to the Presiding Officer, for example—whatever procedure is adopted, it must be followed seriously—post hoc monitoring is probably the best way to check up on things after the event.

The Convener: Thank you very much for spending time with us this morning. Some of your suggestions have been very useful. We hope to take some more evidence and finish our report by Christmas. We also hope to receive a response from the Executive that will be useful. I hope that you will not mind if we write to you if we think of further questions. If you have any further thoughts, please get back to us.

I suggest that we take a few minutes' break before we move on to item 3.

11:55

Meeting suspended.

12:02

On resuming—

Delegated Powers Scrutiny

Protection of Vulnerable Groups (Scotland) Bill: Stage 1

The Convener: Under agenda item 3, we are considering the Protection of Vulnerable Groups (Scotland) Bill at stage 1. The bill contains a large number of delegated powers, the drafting of which follows closely the drafting of equivalent provisions in the Safeguarding Vulnerable Groups Bill, which is being considered by the House of Commons. Part 1 is entitled "The lists". Sections 3, 4 and 5 are on references by organisations, agencies and businesses. It is suggested that the drafting of those sections is a little confusing because of the use of the term "prescribed information", which as we will discover occurs frequently in the bill. As the legal brief states, the issue is whether the term confers a power or is simply a descriptive noun that needs a definition. Are members happy that we ask for clarification on that?

Mr Macintosh: Yes. If the term comes up frequently, the issue is important.

The Convener: We will come across it time and again.

On section 6, "Reference relating to matters occurring before provisions come into force", there is a wee problem about the rationale for the provision.

Mr Macintosh: The legal brief suggests that the Executive is confused because of the use of the term "prescribed information". We should ask the Executive to clarify whether the power is necessary.

The Convener: Yes. Is that agreed?

Members *indicated agreement*.

The Convener: Section 7, "Reference by court", again contains the term "prescribed information", the use of which is not clear. Do members agree to ask about that?

Members *indicated agreement*.

The Convener: It is not clear why section 8, "Reference by certain other persons", is necessary, as it does not impose a duty to provide information, only a power to do so. The power appears to be acceptable, but there is a question mark over whether the power in section 8(2) is sufficient for the stated purpose. It does not appear to be wide enough to remove or make any alterations to references to bodies that are listed in the bill. That is, the references can only be added to. I do not know whether we want to ask the Executive again to clarify the drafting of the provision.

Mr Macintosh: Indeed.

The Convener: We can ask in particular about "prescribed information", which also relates to sections 10(1)(a) and 11(1). Is that agreed?

Members *indicated agreement*.

The Convener: Section 14, "Automatic listing", which confers a power, not a duty, on ministers to make the relevant order leaves considerable discretion to the ministers. Perhaps the bill should at least specify some parameters for the conduct that would lead to automatic barring, given the significance for the individuals. Do we want to question the Executive further on how it intends to exercise the powers and on the definition of "specified description"?

Mr Maxwell: We have to question the Executive. Listing can be significant for individuals, and on the face of it a lot of discretion seems to be being left to ministers. If the Executive were to give at least a fuller explanation of its intentions before we decide on our recommendation, that would be helpful.

The Convener: Is that agreed?

Members *indicated agreement*.

The Convener: Ministers intend to use the power in section 17, "Information relevant to listing decisions", to extend a "relevant finding of fact" to include those made by the professional regulatory bodies identified under section 8. The section also allows consequential changes to be made if any bodies undergo changes of name or structure. It is subject to negative procedure.

Are we content, or do we want to ask the Executive whether it is satisfied that the power in section 17(5)(f) is sufficient? It appears that the purposes that are outlined in the delegated powers memorandum are slightly different, and that the power in section 17(5)(f) might not fulfil all the purposes that are outlined in the memorandum.

Mr Macintosh: The intention is to limit the power to the regulatory bodies named, but that is not the only thing that could be done. The power could apply to other bodies, and we should clarify that point too.

The Convener: Is the list of bodies that the power will extend to also covered in section 17(5)?

Mr Macintosh: Yes.

The Convener: Is there anything else?

Members: No.

The Convener: Section 19, "Information held by public bodies etc", is similar to section 17 and raises the same issues. Shall we put the same questions?

Members *indicated agreement*.

The Convener: Section 25, "Application for removal from list", gives the listed individuals the powers to apply to the sheriff for review of their listing. The power, as read with section 99(2), may be used to prescribe different timeframes between listing and application for removal from the list for different individuals depending on their circumstances. Are we content with the procedure or do the regulations require the more detailed scrutiny of the affirmative procedure?

Mr Macintosh: Am I wrong in thinking that we wanted to keep the bill in parallel with the UK bill, which is going through Westminster? We may wish to return to the point. We can exercise our judgment about the level of scrutiny, but it would be useful to know what Westminster is doing.

The Convener: We will keep alert to that one. Is there anything else?

Mr Maxwell: I hear what Ken Macintosh is saying, but that is not necessarily where my primary motivation would come from.

The Convener: I did not think it would be.

Mr Maxwell: My concern is more whether it is appropriate in the circumstances to leave the power under negative procedure. There are arguments on both sides, but in principle the affirmative procedure might be more relevant in this case than the negative procedure. I take Ken Macintosh's point that we should find out what Westminster is doing, but I would like to hear more from the Executive to explain why it feels that the negative procedure is appropriate in this case.

The Convener: I do not think that we have a problem with asking the Executive for a justification for using the negative procedure.

Mr Macintosh: It sounds as though Westminster will amend the Safeguarding Vulnerable Groups Bill to give greater reassurance on a very sensitive matter. I would be interested to hear what is being suggested at Westminster. I do not want to ask the Executive to defend a position that we then suggest should be changed.

The Convener: One would hope that some collaboration takes place between the Executive and the Westminster Government on the two bills, given that they are similar.

Mr Maxwell: One can always hope.

The Convener: Let us ask the Executive for a justification for the use of the negative procedure.

Section 29, "Notice of listing etc", includes a power that is similar to those that we have considered in sections 8, 17, 19 and 25. The same technical issues arise. Shall we raise the same points with the Executive?

Members *indicated agreement*.

The Convener: Section 29(4) and section 29(5) authorise ministers to publish guidance, but there will be no statutory obligation on organisations to follow or have regard to that guidance. We discussed this issue earlier. It does not appear necessary, therefore, for the guidance to be incorporated in or be confirmed by a Scottish statutory instrument or to be subject to any parliamentary procedure. How important do members think the guidance is? Are we quite happy with the provision?

Mr Maxwell: This goes back to our discussions about the publication of such guidance. The issue is how widely published the guidance is and whether people are aware of it. Is such guidance sometimes published as an SSI for that reason?

The Convener: It would do no harm to ask why the guidance will not be published as an SSI. We can also ask about the publication of the guidance. Do members have any other points?

Mr Macintosh: Perhaps we should draw the point to the attention of the lead committee, given that it will also consider the guidance.

The Convener: We can do that.

Do members have any points to raise on section 30, "Relevant inquiries"?

Mr Macintosh: No.

The Convener: In section 31, "Offences against children and protected adults", the power to remove offences from the list is subject to the affirmative procedure. Are we happy with that?

Mr Macintosh: The provision seems to be a Henry VIII power, but the bill lists the offences that are covered. The suggestion is that we should give the Executive flexibility in case the law is changed and new offences are introduced or other offences are removed.

The Convener: Yes, that is the reason for the power.

Mr Maxwell: The concern about the power to remove offences from the list is self-evident, but I am sure that the circumstances that Ken Macintosh mentioned are why it is thought that some offences might need to be removed from the list in the light of future legislative changes. I have a slight concern about the width of the power, but I do not envisage that the Executive would use it in a malicious way. However, I register my concern about the fact that the power would allow such

changes. It would be nice if the Executive could confirm that its intention is to use the power to remove offences for the reason that Ken Macintosh suggested.

The Convener: We can ask the Executive to reassure us that what Ken Macintosh said is correct. Is that okay?

Mr Macintosh: Yes.

The Convener: On section 32, "Duty to notify certain changes", there is some concern about the clarity of the proposed power. Do we want to ask how the power might be used?

Members *indicated agreement*.

12:15

The Convener: Under section 37, "Police access to lists", ministers will be required to make information from the lists available to chief constables for the purposes of preventing or detecting crime. Are members content that the information will be prescribed in regulations that will be subject to the negative procedure, or should the bill provide for the use of the affirmative procedure?

Mr Macintosh: The provisions provide an interesting example of the phenomenon that Professor Himsworth and Professor Reid described, whereby importance is ascribed to regulations by making them subject to the affirmative procedure. The use of the affirmative procedure would not make much difference in practice, but it would emphasise to everyone who handled the legislation that the regulations covered an important and sensitive matter. The inclusion of names on lists and the sharing of information are sensitive matters that go to the heart of the bill. We must decide whether, for the sake of making that point, we want to burden the Parliament by recommending that the regulations be subject to the affirmative procedure.

The Convener: We are discussing sensitive issues.

Mr Macintosh: The bill is full of sensitive issues. It is a long, complicated bill and its progress is at an early stage, so I am not in a position to judge whether the regulations that are made under section 37 should be subject to the affirmative procedure. Perhaps we should return to the matter.

Mr Maxwell: Like Kenny Macintosh, I am struggling to decide what we should do. I take solace from the fact that the main issue is the inclusion of a person in a list. Information that was made available under section 37 would be used just to confirm a person's identity, which is a more technical issue. The sensitive aspect is the inclusion of a person in a list and not the use of information—such as a person's date and place of birth or current address—for verification purposes. In the light of that, perhaps the negative procedure would be acceptable.

The Convener: We will leave it at that for the moment.

Are members content that regulations made under the powers in section 39, "Power to regulate procedure etc", will be subject to the negative procedure? We could ask why section 39(1)(a) does not contain an illustrative list of information to be included, such as is set out in the DPM.

Mr Maxwell: During the past few years we have had a debate with the Executive about illustrative lists.

The Convener: Yes. We have been told that they are not inclusive, so—

Mr Maxwell: The Executive would give us the answers that it has given us in the past. I am not saying that we should not ask the question, but I could probably write the letter that we will receive from the Executive.

The Convener: To be fair, the DPM gives an indication of the Executive's approach. Perhaps we should leave it at that.

Mr Maxwell: It is up to you, convener. We could ask the question, but we might not gain much from doing so.

The Convener: We would probably get the answer that we usually get. What do other members think?

Mr Macintosh: I do not feel strongly about the matter.

The Convener: We will leave it, then.

We move to part 2, "Vetting and disclosure". Section 46, "Vetting information", will confer on ministers the power to prescribe information as vetting information. Regulations that are made under the power will be subject to the negative procedure. There is concern that the Executive does not seem to know what information will be included in the regulations. Section 46(1)(a) also refers to "prescribed details", which we have discussed; we should ask the Executive to clarify that term and its implications for section 46(2). There is also an issue about sanctions.

Mr Maxwell: We need to ask why section 46(2) does not appear to provide for sanctions, which is a different approach from that of other provisions in the bill. We should ascertain whether that was the Executive's intention and, if it was, we should ask for a brief explanation of the reason for the different approach.

The Convener: Are members content that regulations that are made under section 47, "Duty to notify certain changes", will be subject to the negative procedure?

Members: Yes.

The Convener: Regulations made under section 54, "Disclosure restrictions", will be subject to the negative procedure. I think that that is okay.

Mr Macintosh: The provisions again refer to "prescribed information".

The Convener: We can ask for clarification on that.

Regulations made under section 60, "Power to use fingerprints to check applicant's identity", will be subject to the negative procedure. Is the committee content with the provision? Does it want the Executive to explain why, if it is the intention that fingerprints should be taken at a police station, it is necessary for that to be prescribed by subordinate legislation rather than set out in the bill?

Mr Maxwell: I have not read the bill in detail. Is it the intention that fingerprints will always be taken at a police station? In other legislation that the Parliament has considered, we have opened up the possibility of fingerprints being taken for the purposes of identification away from police stations. The Police, Public Order and Criminal Justice (Scotland) Bill, which was passed earlier this year, made provision for the use of remote and electronic devices.

The Convener: The intention is not clear. The delegated powers memorandum states that it is

"intended that … the applicant will be invited to attend a police station".

Mr Maxwell: That does not mean that fingerprints will necessarily be taken at a police station.

The Convener: No. Do members agree that we should seek clarification of the memorandum?

Members *indicated agreement*.

The Convener: Regulations made under section 61, "Power to use personal data to check applicant's identity", are subject to the negative procedure. There are no problems with the provision.

Regulations made under section 64, "Unlawful disclosure: supplementary", are subject to the negative procedure. The provision seems okay.

Regulations made under section 67, "Fees", are subject to the negative procedure. Is the provision okay?

Members *indicated agreement*.

The Convener: Regulations made under section 69, "Procedure", are subject to the negative procedure. The provision seems okay.

We move to part 3, "Sharing child protection information". Section 76, "Code of practice about child protection information", obliges ministers to publish a code of practice on which they must consult before publication. However, the delegated powers memorandum does not comment specifically on the provision, which is quite important. Are members content for the code of practice not to be enshrined in legislation or laid before the Parliament?

Mr Macintosh: A suggestion was made earlier concerning guidance that is issued by ministers. It is obviously unclear at what point codes of practice or guidance acquire legislative overtones. My concern relates to the importance of the policy. For that reason, I suggest that we refer the matter to the lead committee and indicate that we have concerns about whether the code of practice should be enshrined in legislation or whether the provision is adequate as it stands. If the code of practice is to be as thorough as it can be, it must be published, as there is a duty to consult.

The Convener: According to my interpretation of the provision, the code of practice does not have to be laid before Parliament. I am concerned about that.

Mr Maxwell: Section 76(5) states:

"A relevant person must have regard to the code"

in the circumstances indicated. It would be helpful for the code to be laid before the Parliament and widely consulted on.

The Convener: MSPs have been concerned to ensure that there is sharing of information and that that happens in the proper way. For that reason, we should know about the code.

Shall we pass on our concerns about the matter to the lead committee?

Mr Maxwell: In time, we might pass on our concerns to the lead committee but I presume that, at this point, we simply want to question the Executive and express our concerns about the matter. This is only the first week that the matter has been with us.

The Convener: That is true. Do we agree to write to the Executive?

Members *indicated agreement.*

The Convener: Section 80, "Relevant persons", gives ministers the power to extend the definition of "relevant persons". Ministers cannot remove anything from the list, nor can they take into account changes to the names of the bodies listed; they can only add to the list. That does not

appear to meet the policy objective set out in the delegated powers memorandum.

Do we agree to query the policy intention with the Executive?

Members *indicated agreement.*

Mr Macintosh: It is always good to be asking the Executive to take on more powers, is it not?

The Convener: There are a number of issues in relation to section 81, "Enforcement etc.", which gives ministers an order-making power to define further provisions to ensure compliance with the duties imposed by part 3 and empowers ministers to modify any enactment, instrument or document for that purpose. The power is very wide and is subject to the affirmative procedure. It has been suggested that we might want to ask for a bit of clarification about what the power will cover.

Mr Macintosh: There are a number of concerns. Apart from anything else, although the power is subject to the affirmative procedure, that is the case only when it amends the text of the act. In other situations, it is subject to the negative procedure. The Executive appears to be slightly unsure about what the power will be used for. However, I think that we should debate the point with the Executive because the power is rather open handed given the powers that this committee would usually accept should be granted to ministers.

The Convener: Okay. It has also been brought to our attention that the memorandum makes reference to the need to make provision to ensure compliance with the duties in part 3 but does not give any indication of what that provision might be. Further, the use of the term "any enactment" in section 81(2) is less than clear. Do we agree to ask the Executive to clarify the points that have been raised?

Members *indicated agreement.*

The Convener: Another point that has been raised relates to the way in which section 81(1)(b) dovetails with section 99(4). There is a question about why we need the former section if we have section 99(4), because they seem to deal with similar things. Do we agree to ask for clarification of that matter?

Members *indicated agreement.*

The Convener: On part 4, "Amendment of part 5 of the Police Act 1997", the powers in sections 82, 84 and 85 are subject to the negative procedure. Are we content with the powers and the procedure?

Members *indicated agreement.*

The Convener: On part 5, "Meaning of 'school care accommodation service'", the power in section 86 is a re-enactment of an existing power in the Regulation of Care (Scotland) Act 2001 and is subject to the negative procedure. Are we content with the power and the procedure?

Members *indicated agreement*.

The Convener: In part 6, section 87, "Transfer of Disclosure Scotland staff etc.", involves the transfer into the Scottish Administration of certain employees, which will enable Disclosure Scotland to become part of the new executive agency. Although the nature of the provisions has a precedent elsewhere, there are some practical reservations about the power to specify persons.

Do members have views on the drafting of section 87(2)? Also, do members think that there should be a provision requiring consultation with staff prior to the making of an order under this power?

Mr Macintosh: It is quite clear that the intention is to protect staff during the transfer period. At the same time, it is good practice, at the very least, to ask members of staff for their views.

The Convener: With other bills, we have picked up on the fact that the necessary consultation might not have been undertaken. Shall we raise those issues?

Members *indicated agreement.*

The Convener: Section 88, "Power to give effect to the Safeguarding Vulnerable Groups Act 2006", contains a wide power, but we have been told that the Executive intends to make amendments to the section at stage 2. The question is whether we want to return to the matter at stage 2 or make a point about it at the moment.

12:30

Mr Maxwell: I do not think that we need to make a point at the moment, as we have said that we will return to the matter at stage 2 if necessary. We should wait and see.

The Convener: That is fine.

Mr Macintosh: It is obviously a difficult issue. In effect, the Executive is saying that we can proceed with the legislation, but it is giving ministers the power to amend the provisions if they do not gel properly with the United Kingdom legislation. That is a sweeping power, so it is obviously a big concern, but at this stage we are talking about a safety clause more than anything else. The situation will become clearer as the Westminster bill progresses.

The Convener: Fair enough.

In part 7, "Interpretation", the powers in section 92 are subject to the negative procedure. Are there any issues?

Members: No.

The Convener: Section 94, "Meaning of 'protected adult'", also includes powers subject to the negative procedure. Are there any issues? Under subsection (2), an order may have a wide effect on a particular service and will be subject to the affirmative procedure. The legal brief suggests:

"The power in subsection (2) is … sweeping. It is a power to modify subsection (1) in its entirety."

We might want to ask the Executive to indicate further how the power is to be exercised.

Mr Maxwell: That is the least that we must do, given the width of the power, which is about not just adding to but modifying subsection (1). We must be clear about what that means.

The Convener: Okay. Let us ask for an indication of how the power is to be exercised and what that will mean.

Section 96, "General interpretation", gives ministers the power to define by order the term "care service provider", again subject to the negative procedure. The definition is left entirely to delegated legislation, unlike any other term in the bill. That means that the operation of part 3, as it applies to such persons or bodies, is left entirely to ministerial discretion.

Mr Maxwell: That is rather odd. I do not see why the bill could not define "care service provider" and include the power to amend, as happens in other sections. We have just considered many similar sections, and that would seem the more logical way to work. I do not understand why the approach is different in section 96, and at the very least we need sound reasoning from the Executive for why it has chosen to work in such a way.

The Convener: The legal brief suggested asking whether there should be an indication in the bill, for example of the type of provider envisaged or a list of providers with a power to amend by order. Another question is whether the definition should be covered by the negative procedure, but it seems as if that will be okay if we get clarification on the first point.

Mr Maxwell: If the definition of "care service provider" was in the bill, it would probably be agreeable to amend it by negative procedure in future. However, given that there is no definition in the bill, I am not sure that it is appropriate for the negative procedure to be used.

The Convener: Let us frame a response to the Executive, saying that we cannot comment on the appropriateness of the negative procedure until we know the answer to the first question.

Mr Macintosh: I have sympathy with the Executive. The difficulty is that it is using the provision of care services to define vulnerable adults, which is why it is a thorny problem. However, there are concerns about the issue, so there is no harm in asking for further discussion.

The Convener: Part 8, "Final provisions", includes section 97, "Ancillary provision". Unusually, by virtue of section 99(4), the power in section 97 will extend to amending the provisions of the bill. Is that acceptable? We might want to ask why the section includes that power.

Mr Maxwell: We have had discussions about this before and the fact that the power exists has never sat comfortably with us. However, we have seen it used elsewhere. We should certainly question the Executive on it before we make a final decision.

The Convener: Yes. We should say that we have worries about the issue.

It might be necessary to make some minor consequential amendments to other statutes, and stage 2 amendments will be lodged to address that. We will have to keep an eye on that one.

The power is subject to the affirmative procedure only where it amends the text of an act. Under the power, it would be possible to make an instrument that has a substantial effect on primary legislation without actually making textual amendment to that legislation. In those circumstances, the instrument would be subject only to the negative procedure.

Mr Maxwell: We should just raise that point.

The Convener: Yes.

After everything we discussed during our evidence session earlier in the meeting, are members content with section 100, "Commencement"?

Members *indicated agreement*.

The Convener: We move on to the schedules.

Orders made under the provisions in schedule 2, part 3, paragraph 14, on further education institutions, are subject to the negative procedure. Is that okay?

Members *indicated agreement*.

The Convener: There are also some concerns about the words

"and any other body added to that schedule as Ministers may by order specify."

If the policy intention is to reflect changes made to the list in schedule 2, it is not thought necessary to confer a power to that effect in the bill. We should just ask the question that is raised in the legal brief.

The power given to ministers in schedule 2, part 5, paragraph 26, "Power to amend schedule", is unlimited and its exercise could affect how the bill operates and the protection provided to children under it. An order under the power is subject to the affirmative procedure. Do we want to ask the Executive to clarify its intentions, as there are implications for the whole bill?

Mr Ingram: We should ask the question.

Mr Macintosh: It is a significant point; we should draw attention to it by asking the Executive to explain how the power will operate, and we should draw the attention of the lead committee to the potential significance of the power if it is used.

The Convener: We should ask whether the power in the bill needs to be restricted or whatever. The lead committee can think about that. Is that fair enough?

Members *indicated agreement*.

The Convener: Schedule 3, part 5, paragraph 15, "Power to amend schedule", raises the same points as we have just discussed in relation to schedule 2. Are we agreed on that?

Members *indicated agreement*.

Instruments Subject to Annulment

National Health Service Central Register (Scotland) Regulations 2006 (SSI 2006/484)

12:38

The Convener: No points arise on the regulations.

Land Registration (Scotland) Rules 2006 (SSI 2006/485)

The Convener: It has been suggested that we should ask the Executive to explain the omission of a list in schedule 2 as referred to in items 10 and 12 of that schedule. There is also a minor point to raise informally.

Mr Macintosh: Are the rules a negative instrument? I should have asked that before the committee started.

The Convener: Yes, they are.

Inshore Fishing (Prohibition of Fishing for Cockles) (Scotland) (No 3) Order 2006 (SSI 2006/487)

The Convener: No substantive points arise on the order, but there is a minor point to raise informally.

Sea Fishing (Northern Hake Stock) (Scotland) Order 2006 (SSI 2006/505)

The Convener: No points arise on the order.

Curd Cheese (Restriction on Placing on the Market) (Scotland) Regulations 2006 (SSI 2006/512)

The Convener: The nice curd cheese regulations breach the 21-day rule, but that was essential given their purpose. There are two issues to raise. First, we ought to ask for an explanation of what is meant by "product" in the first line of regulation 5(1). Secondly, we should ask whether regulation 7(2) is intended to confer on an authorised officer all the powers under section 32 of the Food Safety Act 1990 or only the powers of entry. Is that agreed?

Members *indicated agreement*.

Mr Maxwell: I have no problem with that, but I would like to reflect on what you said earlier. You said that these are the nice curd cheese regulations, but I think that they are about not-nice curd cheese, which is why it is being prohibited.

The Convener: So it is. Well done, Stewart.

Instruments Not Laid Before the Parliament

Highland (Electoral Arrangements) Order 2006 (SSI 2006/481)

Fife (Electoral Arrangements) Order 2006 (SSI 2006/510)

Aberdeen City (Electoral Arrangements) Order 2006 (SSI 2006/511)

12:40

The Convener: No points arise on the orders.

Animal Health and Welfare (Scotland) Act 2006 (Commencement No 1, Savings and Transitional Provisions) Order 2006 (SSI 2006/482)

The Convener: No particular points arise on the order, but there are a couple of minor points that we can put in an informal letter.

Assynt - Coigach Area Protection Variation Order 2006 (SSI 2006/488)

The Convener: Again, it is suggested that we should ask the Executive to provide details of the consultation it undertook on the order, whether any objections were received—members will remember that there was some controversy over the order—and what, if any, action has been taken in relation to such objections. Is that agreed?

Members *indicated agreement*.

12:41

Meeting continued in private until 12:59.

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