SUBORDINATE LEGISLATION COMMITTEE

Tuesday 21 November 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE
32nd 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)
*Euan Robson (Roxburgh and Berwickshire) (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:

Gerald Byrne (Scottish Executive Legal and Parliamentary Services)
Andrew Crawley (Scottish Executive Legal and Parliamentary Services)
Ms Margaret Curran (Minister for 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

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 21 November 2006

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

Regulatory Framework Inquiry

The Convener (Dr Sylvia Jackson): I welcome members to the Subordinate Legislation Committee's 32nd meeting in 2006. I have received apologies from Adam Ingram and have been informed that Gordon Jackson may be a little delayed.

I welcome the Minister for Parliamentary Business, Margaret Curran, and her officials, Gerald Byrne, Murray Sinclair, whom I know, and Jane McLeod—I hope that I got the officials' names right, as I do not have my glasses on. Most of you have been here before, so you will be familiar with the committee.

Before we start, the minister would like to say a few words on the Executive's response to our consultation on our draft report.

The Minister for Parliamentary Business (Ms Margaret Curran): I am delighted to be back at the committee and I am looking forward to our exchanges. I am grateful for the opportunity to give evidence on the committee's draft report on the regulatory framework in Scotland. For the record, I emphasise that the Executive welcomes the opportunity to discuss what are important matters. We acknowledge the expertise that the committee has built up during its deliberations and the commitment that it has to improving the regulatory process in Scotland.

The committee's work was triggered by the need to establish a regulatory framework that is tailored specifically to the working practices of the Parliament. The Executive wishes to emphasise our thanks for the work that the committee has undertaken, which has helped us to consider some of the detail in what is a complex area. The draft report covers a wide range of issues that are relevant to the procedures for scrutinising instruments and explains how various reforms might operate in the context of the proposed streamlined Scottish statutory instruments procedure.

I am sure that members recall that, in the plenary debate on the draft report in June, I confirmed that the Executive had concerns about the proposals and would need carefully to consider the detail of what would amount to a significant body of measures. Our conclusions on the recommendations are now recorded in the Executive's written response. As members of the committee will have seen, the Executive could not lend its support to the core recommendation that a uniform procedure should apply to all instruments. We have concluded that the perceived benefits of the proposal would in fact be outweighed by the disadvantages. The Executive considers that the current regulatory framework applies an appropriate degree of Parliamentary scrutiny to instruments. I am sure that we will explore that later, but our arguments are set out in the written response.

The Executive does accept that the existing framework creates significant difficulties for the committee and for the Parliament as a whole, particularly to do with planning and timescales for work, and the handling of minor, technical changes to statutory instruments. I recognise the committee's key points and wish to respond to them. I hope that our alternative proposals address the substance of what the committee is trying to achieve. We hope that we can persuade the committee that our proposals are a way forward.

First, we propose that instruments subject to the negative procedure should not normally come into force until 28 days have elapsed since they were laid. That would allow the Subordinate Legislation Committee and the subject committee between two and four weeks to scrutinise such instruments, depending on how much parallel working is done by the committees—something that we want to encourage. Secondly, we suggest that a protocol—rather than a requirement in standing orders—be agreed between the Executive and the Parliament on the forward planning of secondary legislation to allow better use of time and resources. Thirdly, we propose that a procedure be introduced to allow minor and technical changes to be made to negative instruments without the need for a further instrument to be made. The Executive considers that those measures, taken together, would go some way to meeting the committee's points and would alleviate current procedural difficulties without losing some of what we regard as the principles behind the existing regulatory framework.

The Executive welcomes many of the recommendations in the draft report. The proposal that the committee work in parallel with lead committees would have a significant impact on the time available for parliamentary scrutiny. I consider there to be considerable consensus between the Executive and the committee on consultation. There is also much scope for the Executive and Parliament to work together to review strategies for the consolidation of

instruments and to improve financial transparency of provision where that might be considered necessary.

I know that the committee will want to explore some of those issues in greater depth. I emphasise my gratitude for the committee's work in improving procedure. If agreed, it will have a significant impact on the way in which the Executive works in the near future and, hopefully, the longer term.

The Convener: I will start with a few general questions. You talk about the merits of the existing procedure compared with the new procedure proposed by the committee. Will you elaborate on that?

Ms Curran: The obvious argument is that the existing procedure is well understood. We think that people are now working it effectively and that changing it might lead to greater confusion. The more principled and important argument relates to our belief that it is for the Parliament and the Executive to determine the right level of scrutiny. Rather than having a uniform procedure, the level of scrutiny should rest with the Parliament and the Executive. The level would very much depend on the instrument and the policy that was at hand. Embedded in that is an argument about accountability. When the Executive proposes a certain instrument, depending on the importance of that policy, it is appropriate at times that it is taken to the Parliament. That is it in a nutshell. I will bring in the officials if they wish to comment.

Murray Sinclair (Scottish Executive Legal and Parliamentary Services): As the minister said, the essential point is that the procedures are designed to provide the right level of scrutiny and accountability on the part of the ministers. We think that the two main procedures that we have at present—the negative and the affirmative—work well. In introducing any new power to make subordinate legislation, there is scope not only to decide whether those two procedures are apt but, given the unusual nature of a particular power, whether any alternative procedures are apt. It seems perfectly appropriate to consider such a question in the context of the legislation that would introduce the new power. The alternatives are, for example, to make a power open so that it can be subject to more than one procedure in certain circumstances, or to make a power subject to what is sometimes called the super-affirmative procedure, such as that which was employed in the National Parks (Scotland) Act 2000. Any such alternatives would allow for the right level of scrutiny and accountability in the context of the particular piece of subordinate legislation.

Murray Tosh (West of Scotland) (Con): The minister commented that the existing system allows the Parliament to determine the level of scrutiny. However, when we took evidence, I think that I am right in saying that the example that particularly impressed us was when Sarah Boyack talked about an instrument that came before the Environment and Rural Development Committee on the disbursement of less favoured areas support money, or something similar. Her committee wanted time to consider it in some depth, but as it was a negative instrument that was not possible, and they felt that they were not allowed to give the policy issues that were inherent in the instrument the level of scrutiny that they wanted. That has weighed heavily with us. One of the reasons why we want more flexibility is to enable committees to determine for themselves the time that they give to considering instruments and the depth that they go into on them. Under the current system, all the discretion is contained in the parent act, which does not give a committee discretion if it makes a separate judgment about the importance of a specific instrument.

10:45

Ms Curran: I am not sure that the proposed system would give you that flexibility either. Perhaps I need to explore that more, because I am not sure that it would necessarily address the point that Sarah Boyack made. I do not know the specific point, and I would need to go back and consider it.

Murray Tosh: If I may interrupt, the new system that we propose would afford a 40-day period for consideration and, when it is aligned with the advance programme of work, it would mean that a committee could anticipate a significant instrument coming up and programme an appropriate volume of work on something that it considered to be important in policy terms.

Ms Curran: Thank you, I appreciate the point now. That would be my answer. At the first level, we would want to ensure that the lead committee gets the maximum time to scrutinise an instrument in what it deems to be an appropriate manner. There could be engagement between a committee and the relevant minister on the level of scrutiny. We find that committees are approaching us more and more about that.

We take your points about forward planning and extra time. Moving to a 28-day period would afford a significant bonus in that regard, as it would allow us to address the problem by creating space for greater scrutiny and more planning of committees' workloads. If, having explored all the policy issues on an instrument, a committee feels that there should be a debate on it in the Parliament, an affirmative instrument would allow for that. I do not know the details of the case to which you referred, so I do not know why the instrument was negative and not affirmative. Given that the committee

wanted more time, perhaps it should have been affirmative.

Murray Tosh: Because the instrument was negative, the Minister for Environment and Rural Development did not go to the committee and no debate in the Parliament was possible because the negative procedure does not provide an opportunity to trigger one.

Ms Curran: Presumably, the decision to make the instrument negative would have been made by the minister, based on the level of scrutiny that was required and on the nature of the instrument. I do not know the details of those points in the case to which you referred, but I am happy to go away, examine the details and have a further discussion with you.

Murray Tosh: I doubt that the minister would have had any discretion, as the parent act probably specified the negative procedure.

Ms Curran: That makes the point. When we pass a parent act, it is important that we know the level of scrutiny that will be necessary for subordinate legislation under the act. We now put much more emphasis on preparation for subordinate legislation when we prepare a bill.

The argument against the proposed SSIP is that it is very broad: it could equally apply to a commencement order as to the instrument to which you referred. That is too inflexible. It also does not address the problem that you flagged up, which is a problem on two levels. The first is about the committee's time, forward planning and partnership with the Executive. The other is about ensuring that the decision to make an instrument negative is commensurate with the level of scrutiny that it needs. That is the point that we are trying to make, but I do not know the details of the case in point.

Our key point is that a variety of instruments need to be introduced under subordinate legislation. That variety runs from commencement orders, on which there will not be much debate on many of the issues, to instruments on which there should be a debate in the Parliament. We need to allow the instruments in between the appropriate level of scrutiny, which must be linked to the policy of the instrument, not only its procedural aspects.

The Convener: You said that, in future, committees will be able to discuss more with you so that the situation that Murray Tosh described would not arise. How would that have worked in practice to ensure that the less favoured areas scheme would have got the airing that it deserved?

Ms Curran: We would have to go back to the point at which the issues were originally discussed. I presume that the lead committee was the one that considered the parent act and therefore that it would have understood the context of the subordinate legislation that was introduced under it. It should have understood the significance of the connection between the act's implementation and the procedural implementation—that is, the instruments that are associated with the act.

To me, the key point is a point of principle about the connection between the policy, the instrument, the impact of the instrument and the level of scrutiny that is determined by that. It seems to me that many instruments are lodged that do not need much debate because they are just the natural consequences of things that have already been debated and clearly decided, about which there is no dispute. If there needs to be such debate, it should be embodied in the process.

Jane McLeod (Scottish Executive Legal and Parliamentary Services): I understand that the less favoured area support scheme regulations are made under section 2(2) of the European Communities Act 1972. There is a choice of procedures—affirmative or negative—when an instrument is made under that act. I do not know why the Executive chose the negative procedure, but the choice was available in that case. I imagine that, for other instruments in relation to which that choice exists, there might be scope for discussion between the Executive and the relevant committee to determine, in advance of an instrument being made, the appropriate procedure in each case.

Murray Tosh: I am grateful to Jane McLeod for drawing out that distinction. The minister clearly understood that the committee had that degree of discretion; however, in fact, it is the Executive that has the discretion. The opportunity for the committee to discuss with the Executive which procedure might be chosen would be an interesting extension of the work that we have been doing. That might be something on which the Executive could get back to us. We have not looked in any depth at areas in which the Executive can exercise that discretion, and it did not come out strongly from the response that the Executive was willing to discuss with committees where that discretion might be exercised jointly with committees. It would be useful if we could develop that in correspondence and exchanges following today's meeting.

Gordon Jackson (Glasgow Govan) (Lab): I am trying to follow what Murray Tosh is suggesting that we do. How common is it for the parent act not to specify whether the affirmative or negative procedure is to be used? You say that there is room for discretion when an instrument is made under the European Communities Act 1972. Does that apply to many instruments?

Jane McLeod: No, it is relatively uncommon to have that open kind of procedure. Most parent acts specify whether the procedure is to be negative or affirmative.

Gordon Jackson: So, that discretion is quite unusual.

Jane McLeod: Yes. It does arise in acts other than the European Communities Act 1972, but I cannot recall them exactly just now.

Murray Sinclair: The Scotland Act 1998.

Jane McLeod: Of course. The Scotland Act 1998.

The Convener: I think that there is a slight disagreement in that the European example is perhaps more common than you say. Aside from that, the principle that Murray Tosh was asking about—which I was trying to pursue as well—is how we can move further with this particular aspect in the future.

Ms Curran: The point that I was making to Murray Tosh is that it is about the style of the partnership that we have with the committees. The procedure for instruments is determined by their parent act. Nonetheless, if an issue was important to a committee, there would be some evidence of that as the parent act was going through Parliament and the Executive would be open to the views of the committee if it said that it wanted more scrutiny of the issue. However, that would be during the process of the parent act.

Murray Tosh: But what if the parent act was passed 10 years ago? It might be pre-devolution primary legislation or legislation that was incapable of being interpreted in that relaxed way. We know now that there is possibly some discretion in the case of regulations that derive from European directives. However, I presume that that discretion does not exist for regulations that derive from our own legislation. The whole point is that we are dealing with subordinate legislation; we are not going back to the primary legislation. If regulations are determined by the parent act to be subject to the negative procedure, you cannot change that; you cannot exercise any discretion, as we understand it.

Ms Curran: The procedure will be prescribed by what we have inherited, but that happens in all sorts of circumstances that we have to address. I am saying that you should not throw out the baby with the bath water. Do not, in an effort to address that, tie our hands too much as we try to improve the processes, which will lead to much better implementation.

Murray Tosh: We thought that we were trying to exercise that discretion in ways that did not tie your hands. Perhaps we should return to the convener's question about how we would be tying the Executive's hands.

Mr Stewart Maxwell (West of Scotland) (SNP): Frankly, minister, I do not understand the line of argument that you are pursuing on a number of points. You seem to be suggesting that the SSIP is less flexible than the current system. I am lost as to why you would make such a suggestion when the SSIP is clearly much more flexible. It provides absolute flexibility for committees.

The current system ties committees down to the affirmative or the negative procedure—they have no choice once that is established in the parent act. In the example that Murray Tosh mentioned, once it was agreed in the parent act, there was nothing that the committee could do to change that. It was stuck with the situation that it found itself in.

I also do not understand why you argue that everything can be discussed during the parent act's passage through Parliament. Week in, week out, the Executive sends us responses to say that it does not want to tie something down in the bill and so has to leave it to subordinate legislation because it is not sure what will happen. Is that not the point? In tying subordinate legislation to the affirmative or the negative procedure in the parent act, the Executive does not allow committees to take account of anything that is unforeseen at the time of the parent act. The SSIP would allow the committees to do that.

Ms Curran: I do not agree with that. With respect, Stewart, we need to be clear about the difference between policy and procedure. There will be times when committees agree that the power to make subordinate legislation should be passed but, given its significance, the instrument should be debated in Parliament and therefore subject to the affirmative procedure. We believe that that power should still exist. There are times when we think that it is appropriate for instruments to be subject to the negative procedure. We regard that as flexibility, because of the range of instruments. For example, a commencement order is straightforward and does not need such a high degree of parliamentary scrutiny.

Mr Maxwell: Sorry, minister—nobody is suggesting that it does. The point about the SSIP is that it would provide flexibility for little or lots of scrutiny depending on its appropriateness. It would not tie down commencement orders to lots of scrutiny. My point is that once a parent act is passed, providing for affirmative or negative procedure, nothing can be done if subsequent information or additional evidence comes to light.

Ms Curran: But that is a policy issue. My point is that it is inappropriate to have just one procedure for both something like a

commencement order and more important subordinate legislation. That is a matter of principle, and it is for the Executive—the owners of the policy—to determine the level of scrutiny that is appropriate to the procedure. It is legislation that the Parliament is passing, and—

Mr Maxwell: No, it is for Parliament to decide.

The Convener: Let the minister finish.

Ms Curran: And the legislation rests with the Executive. That is our argument.

Mr Maxwell: I think that it is for Parliament to decide, rather than the Executive.

Ms Curran: The Executive owns the policy.

Mr Maxwell: I accept that, but let us move on to a slightly tangential point. The Executive response says that "the Parliament sees merit" in the affirmative and negative procedures. Where did you get that information from? Have you done a survey to show that support? I am not aware of any such survey.

Gerald Byrne (Scottish Executive Legal and Parliamentary Services): It is that the Parliament has used both procedures in a well understood way.

Mr Maxwell: But you said that the Parliament sees merit—

The Convener: Just a second, Stewart. I want everybody to ensure that an answer has finished before they ask another question. Gerald, have you finished answering?

Gerald Byrne: I have.

Mr Maxwell: I thought that he had as well.

The Convener: I was just making sure.

Mr Maxwell: The Executive seemed to suggest—well, more than suggest—that the Parliament sees merit in the current system. My question is simple: where did you get that information from? What evidence do you have to supply to the committee to show that the Parliament sees merit in the current system?

Gerald Byrne: I think that what we said was that the Parliament sees merit in both the affirmative and negative resolution procedures, because both have been used. Parliament has pressed for different procedures in different circumstances, and as the minister said in her opening comments, it seems to be a well understood system. Both procedures have been used. That is our evidence.

Mr Maxwell: That does not answer the question. Frankly, it is nonsense to say that people see merit in something because they have used it when that is the only thing that they can use.

Gerald Byrne: The point is that both procedures have been used. The negative resolution procedure has not been discarded by Parliament as something that does not offer sufficient scrutiny in appropriate circumstances. That is our argument.

Ms Curran: The committee will be well aware that, in undertaking our response, we consulted widely in terms of our experience of taking procedures through committees. We have received no evidence of momentum—from across the Parliament or from other committees—in favour of the changes that the committee is recommending.

Mr Maxwell: So you consulted widely with the Parliament.

11:00

Ms Curran: Stewart, if you bear with me, I will be very clear; do not put words in my mouth. What I am telling you is that we consulted across departments and looked at the legislation that is going through the Parliament and at the work that is being undertaken. I see that Stewart Maxwell is about to speak; I would appreciate it if he would hear me out. We got no evidence back.

In undertaking work, you know that we have bill teams that engage systematically with the clerks. We considered the evidence of the work that has gone through the Parliament already and concluded that there is no momentum for the change that the committee is proposing.

Gordon Jackson: We are almost talking about the same thing, but not quite. When we talk about flexibility, we should be asking, "Flexibility for whom?" I can understand why the Executive wants things to be the way they want them to be, but I am a little puzzled by the Executive's assertion that

"the Parliament sees merit in both procedures".

The Parliament has used both procedures but, as Stewart Maxwell said, we have had little choice in that. That is all that we have ever had to use. I understand about consulting across departments, but that sounds to me like Executive departments rather than the Parliament.

Our experience is that subject committees expressed concerns about the current system and generally supported the proposal for change. Indeed, members who tend to speak in debates supported the proposal for change. Of course, if we were to ask MSPs what a negative or affirmative procedure is and what the difference is, most would say that it was something to do with subordinate legislation and they would then glaze over slightly, so I am not making too much of that

support. The topic is not exactly discussed over every cup of tea.

I am still really curious about the phrase "the Parliament sees merit". I cannot see where that comes from. It is not an answer to say that we have been using the procedures for all these years, or that the minister's department sees merit in not changing. I understand that the Executive likes things the way that they are because it can make decisions, rather than the Parliament or committees, but it seems to be overegging the pudding slightly to say that the Parliament sees merit in it.

Ms Curran: Of course, I have responsibilities as an Executive minister and I will speak for the Executive. It is the Executive that has consulted and looked at that, but I thought that I had made it clear that, in the process of consultation, the Executive engages with committees—primarily with the clerks, but also with conveners. My conclusion is that there is no momentum for change.

The committee has probably done more systematic evidence collecting than I have from the subject committee conveners, but it seems to me that the conveners want to address the issue of the time that they get for scrutiny. I do not anticipate that people will want to knock on my door and talk to me about procedures that often. I have not picked up any support for changing to the SSIP. I would have to say that people are probably not terribly well informed about it, so I would not conclude that some members are organising a campaign in support of our position either.

Some of the academics' comments about the recommended changes show that the change would be significant. I counsel against it, and I do not think that there is great support for it throughout the Parliament. I ask Murray Sinclair to come in at this point.

Murray Sinclair: I want to justify the thinking behind that proposition. We did not do a consultation, but the proposition is based on a lot of experience, as the committee will appreciate. As the minister mentioned, the experience is in particular that of bringing to the Parliament and its committees, including this committee, bills that confer powers to make subordinate legislation. The working premise is that we will use the tried and tested affirmative and negative procedures.

However, on lots of occasions, this committee and the subject committees at stage 2 have queried whether either of those two procedures is particularly apt. There is then a discussion and a debate and, ultimately, the Executive—and the committee—take a position on which procedure is apt or whether another form of procedure would be better suited to the particular power. It is on the basis of that experience that we take the view that the current system works well. Where there is an exceptional need for a different procedure—for example, I referred earlier to the procedure by which national parks are designated—it can be thought through and tailor-made to suit the particular aspects of an instrument.

The Convener: I invite Murray Tosh to ask about time and workload for committees.

Murray Tosh: The only point that we did not raise—we covered all the rest—was that we thought that one of the advantages of the proposed open procedure would be that committees and ministers could have discussions when ministers had to turn up at committees rather than requiring them to attend to move motions on every affirmative Scottish statutory instrument. We thought that the proposed procedure would be attractive to ministers, but apparently it is not because it would be too inflexible for them. Perhaps the minister will comment on that at greater length.

Ms Curran: I am happy to comment. I appreciate and am grateful for your concern for ministers' workloads. However, I return to the key point, which is about the accountability of the Executive to Parliament: if there is a demand for a certain level of scrutiny, ministers should be present.

Gordon Jackson: You refer to a demand for a certain level of scrutiny. My difficulty, on which I seek your comments, is with the timing of that demand. A parent act is passed and it exists for many years—I am not talking about Westminster stuff; even our own acts exist for years. Provision will be made in the parent act for subordinate legislation, and this committee might say, "That looks as if it might be quite a serious issue, so we think that the procedure should be affirmative rather than negative." However, five years down the line, when the subordinate legislation is made, the issue might not be so serious after all.

If the procedure were more flexible, we could decide when the subordinate legislation was being made what level of scrutiny it required. The parent act might have provided for subordinate legislation to be made under the affirmative procedure because its subject was thought to be serious. However, even if the subject turned out not to be serious, the minister would have to go to all the relevant committee meetings and the subordinate legislation would be subject to the affirmative procedure for time immemorial.

Better still, matters might arise that the Parliament thinks are very serious but which, with the best will in the world, were not predicted to be serious when the parent act was passed. You say that scrutiny ensures Executive accountability and

that the Executive makes the policy that seems right at the snapshot in time when the parent act is passed. However, I think that I speak for colleagues when I say that we want there to be flexibility when the subordinate legislation is made. Years might pass between the passage of the parent act and the making of the subordinate legislation, or subordinate legislation under the parent act might have been made eight times and has not been considered important, but on the ninth occasion, it really matters. Does Murray Sinclair see the point that I am trying to make? We want that flexibility to take account of the time gap between the two.

Murray Sinclair: I see your point entirely. As you will appreciate, when we confer a power to make legislation by subordinate means, we understand the constitutional importance of trying to be as clear as we can about how we will use that legislation. We are rightly scrutinised and tested on that. As I said earlier, as part of that scrutiny and testing process, we have to present ever more drafts of regulations and be far clearer about what we have in mind. As part of that process—if it works properly, and I suggest that it does in nearly every case—questions about the extent to which the power should be used in both comparatively unimportant circumstances on some occasions and really quite important circumstances on others help to determine what form of procedure is prescribed.

There are quite a lot of examples of what have been described as open powers, when it is perceived in advance that a power could be exercised both when a high level of scrutiny would be appropriate and when a much lower level of scrutiny would be appropriate. There are various ways in which we can deal and have dealt with those cases—for example, we can make the power open in toto so that there is a choice of procedure, about which, as the minister indicated previously, we can engage with committees before we exercise any such power. In some cases, we can say that the exercise of the power should be subject to the affirmative procedure when it meets certain criteria, as specified in statute, and that otherwise it should be subject to the negative procedure.

There have also been cases in which a power, when it is first exercised, is subject to the affirmative procedure, but subsequently every exercise of the power is subject to the negative procedure. That demonstrates the degree of flexibility in the current system. We would argue that, if we are all doing our jobs properly in making clear why we need a piece of subordinate legislation and how we will use it, part of the process is to work out what procedure would be appropriate. In some cases the procedure is tailor-made; it is not necessarily one that has been taken off the shelf. The current process enables such decisions to be made about whether the procedure is tailor-made or otherwise.

Gordon Jackson: I understand that, but my difficulty is that, to some degree, the process that you describe demands the gift of prophecy: it demands the ability to see into the future. The process might often work well; I am not saying that if we continue to have negative and affirmative instruments, by and large the wrong procedure will be picked—we do our best to prevent that from happening. Why do you feel the need to tie the procedure down? I do not want to use the word "flexibility"—we get terribly confused about flexibility, as the question arises, "Flexibility for whom?" However, if the decision as to how much scrutiny of subordinate legislation is required could be made when instruments are made, that would give ministers freedom. Why does the Executive feel the need to make a prediction, bearing in mind that all predictions turn out to be wrong to some degree?

Ms Curran: I come at the issue from a slightly different perspective. If we adopted the committee's proposal, and you were on a subject committee, you could find that there was a difference between the committee and the minister. The committee might say that it felt that an instrument required a lot of scrutiny and should go to Parliament, but the Executive could say that it did not.

Gordon Jackson: Absolutely.

Ms Curran: I do not know whether that is the right way to go. My key point is connected to the policy; it is about the policy of what we are trying to do.

I apologise for whispering to my officials a minute ago; I hope that I was not rude. I was trying to work out how often there is a gap of five years between a parent act and its subordinate legislation.

Gordon Jackson: I did not mean that. I meant that something might be done umpteen times but only becomes important later.

Ms Curran: I appreciate that. I was trying to see how much of a problem there is and to grapple with some of the issues. I would like to think—this is certainly my experience of legislation—that there is a coherent link between what is done in the parent act and the implementation of the act as it goes through the various procedures. That is a key link.

I have a note that says that the academics were surprised by the proposal on the application of the negative resolution procedure, as it represented an apparent weakening of parliamentary control. That is an important point, and is one package of arguments.

Another package of arguments is that if the SSIP proposal is adopted, you will need to start creating exceptions to it: it is necessary to consider emergency procedures.

Gordon Jackson: I take your point, and I understand the Executive mentality—I do not mean that rudely; I mean that I understand the Executive mindset. At least, although I have never been there, I am trying to understand the Executive mindset as best I can.

Ms Curran: I am sure that it is a matter of time.

Gordon Jackson: Thank you. I have now lost my train of thought—that happens when I move into fantasy.

I understand your point that, all of a sudden, there will be differences that you do not like. For example, situations could emerge in which a committee says that we should have scrutiny of an instrument but the minister says that that would not be appropriate. The power to decide on scrutiny would pass to the committee, which could force it to take place. I do not know whether such disagreement would happen often, but members can lodge motions to annul instruments anyway—they can force scrutiny on any instrument. If the Parliament, individuals or committees feel that there is a real issue—

Ms Curran: Is not that an extreme action for a committee to take? Members might agree with the instrument but they would have to lodge a motion to annul it to get a debate. That is bizarre.

Gordon Jackson: I do not know how many other members have done so, but I once moved a motion to annul an instrument at a committee, even though I was not a member of that committee. I mention that as an example. So, is it—

Ms Curran: My point still stands.

The Convener: Minister, that is naughty.

Ms Curran: Sorry, convener.

Gordon Jackson: Is it really to be thought of as a difficulty that sometimes a committee will want scrutiny that the minister does not want? Is that not a small price to pay for having flexibility at that end of the process? You will obviously say no, but I nevertheless put the question.

Ms Curran: I think that that question can be inverted, too. I keep making the point, which to me is self-evident, that the level of scrutiny should be determined by the policy that the Executive is trying to implement. For some things, we have to be seen to have parliamentary scrutiny.

11:15

Murray Sinclair: That is vital. As the minister says, it is all part of the policy. If we suggest to the Parliament that, as a matter of policy, something should be done through subordinate legislation—through a power conferred by an act as opposed to through a power in the act itself—it is really important that we are clear about what we are doing. We should have a debate about that and, as part of the debate, we should ensure that whatever procedures we apply are apt, whether affirmative, negative or any of the others—even new ones that we could make up.

We all accept that we do not have a crystal ball, so we do not know that any part of the policy in a particular act will necessarily stand the test of time. However, we would have to make exactly the same sort of judgment as we make when we introduce legislation and discuss it in Parliament.

The Convener: I want to move on but first I would like to summarise.

From what we are hearing from the Executive, you think that there is a principled reason why you should be the ones to determine whether the affirmative or negative procedure is used. However, you also seem to be saying that you accept that there ought to be a bit more flexibility in some instances. You talked about engaging with committees and about the open procedure. I would like you to give examples of that and to clarify exactly how many times it has happened.

In answering Murray Tosh's questions, you said that you were willing to look into a particular situation—one that Stewart Maxwell mentioned as well. An instrument might be subject to the negative procedure but—because of the time allowed, because of the vagueness of the power, or because of something that understandably happened as the bill progressed—a committee might decide that the instrument was serious enough to warrant discussion and to have the status of the procedure changed from negative to affirmative. If we are to stay for the moment with what you are proposing, how can we make the system more flexible? What do you mean by "open procedure"; how will you engage with committees; and how will you address Stewart Maxwell's point so that the system can be made more flexible when something that is to be dealt with under the negative procedure becomes important to a committee?

Murray Sinclair: As I think I said, by "open procedure" we mean that there is a choice of procedure. That choice could be given at large—by which I mean that there would be no set criteria in the statute against which the procedure would be decided—or there could be a choice of procedure depending on a range of criteria set out

in the statute. In the latter case, it would be fairly clear when we should use the affirmative procedure, the negative procedure or whatever other procedure might be thought appropriate. In the former case, we would ordinarily expect to set out a policy statement indicating in which circumstances we would decide that the affirmative procedure was more appropriate than the negative procedure.

I confess that I cannot today give you statistics on the open procedure. Jane McLeod mentioned section 2 of the European Communities Act 1972, and I know that we have a stated policy on when we use affirmative or negative procedure. We can let you have that. Another example would be the Scotland Act 1998—and Jane has just whispered to me about the Smoking, Health and Social Care (Scotland) Act 2005 and the National Parks (Scotland) Act 2000. We can give you more statistics if you wish.

As the minister said, when we consult on draft regulations in relation to which there is such a choice, we are sure that there will be scope for engaging with both the Subordinate Legislation Committee and the subject committee to work out whether ministers' proposed choice of procedure is correct. That is how I see the open procedure working.

Stewart Maxwell's question was about more flexibility in the existing system, to allow for changing circumstances—when our crystal ball has gone wrong. As the minister suggested, we feel that—as with all other policy aspects of a bill—we should try to get our scrutiny and accountability provisions correct from the beginning. If we get those provisions wrong, the only thing that we can do is introduce further primary legislation down the line.

As I say, our essential point is that we need to ensure that, when we are conferring powers to make law by subordinate means, we must know what we are going to do and ensure, in so far as we can, that we get the scrutiny and accountability provisions right, as we endeavour to do with all other aspects of policy.

The Convener: Given what you said earlier, I was hoping that you might say that you were willing to explore with us ways of getting more flexibility into the system. The nature of one of the powers makes it difficult to know what some of the outcomes will be.

Ms Curran: As a point of principle, we would not rule out working with the Subordinate Legislation Committee in any way to try to improve the system. We do not support your proposals because the disadvantages outweigh the advantages—we can go through the reasons for that again, if you want. However, that would not prohibit any discussion with the committee at any time to try to improve our procedures. I am not quite sure how the committee intends to take forward its work, but I would like to move fairly quickly with regard to some of our proposals, which have come out of some of the evidence that you have gathered. We will try to address issues that you think need to be addressed. However, we must be careful to ensure that, in addressing one problem, we do not create another set of difficulties.

Any changes that you might recommend could have huge and serious implications for the Executive's workload, but we would be more than happy to engage with the committee in that regard. We appreciate the knowledge of the issue that you have built up, based on the evidence that you have gathered.

The Convener: I was merely repeating what you said when you answered Murray Tosh's point.

I ask one of the witnesses to clarify the Executive's stance on exceptional procedures.

Gerald Byrne: We noted that you said in your report that there would be a need for an exceptional procedure for emergency instruments that were identified in the parent act and other urgent instruments, in relation to which the Executive would have to justify its use of the exceptional procedure to Parliament at the time.

Our point is that those exceptions show that a degree of complexity is creeping into the committee's proposals. That reflects our general principle, which is that there is a range of types of statutory instruments that require various procedures in various circumstances. The committee's proposals with regard to exceptional procedures, which look quite like our current procedures with regard to the negative resolution procedures, reflect that requirement.

The Convener: Sorry—can you go over that last bit again?

Gerald Byrne: Basically, I am saying that the committee's proposals on exceptional procedures reflect some of our comments on the requirement for a range of procedures to scrutinise secondary legislation in order to reflect the various circumstances in which instruments will be made.

We do not have any particular comments on the proposals for the exceptional procedures. I think that they are bound up in our overall comments on the SSIP.

Obviously, we would have to develop a new range of circumstances in which the proposals in relation to urgent instruments were acceptable to the committee and the Parliament. For example, I see that the response from the Food Standards Agency suggested that most of its business would

relate to emergency instruments. I think that a lot of bodies would claim that most of their business was either urgent or emergency.

The Convener: You seem to be arguing that this category was drawn too tightly.

Gerald Byrne: I think that you identified one or two circumstances in which the proposal would be used, particularly in relation to keeping in step with Westminster secondary legislation. I expect that you would find that there would be pressure to develop a range of circumstances in which the use of the exceptional procedures could be sought by the Executive or other bodies that make statutory instruments.

The Convener: As we have no further questions on that issue, let us move on to the issue of the 40-day period and the Executive's suggestion that the 21-day period might be changed to 28 days.

Ms Curran: We thought that that was a constructive response. As I said earlier, we think that there are issues of timing. The advice that I have received is that the committee's proposal on the 40-day period would cause us considerable difficulties in keeping the show on the road. I can give an in-depth explanation of those practical issues if the committee wants. The proposal would create a real difficulty. It would create gluts in the system—that is one way of putting it.

However, we take the committee's point, and we think that our proposal could address some of the issues that have been raised. Our recommendation tries to address the issue without creating real difficulty for how the system currently works.

The Convener: As I think other committee members will confirm, we want to provide for as much parliamentary scrutiny as is necessary—the Executive states the same on the first page of its response—so the suggestion that the clock should not be stopped for recesses is a proposal with which the committee would not, I think, be particularly happy. The Executive seems to have made that suggestion at the same time as suggesting that it wants parliamentary scrutiny.

Murray Sinclair: We understand the reasons for the committee's proposal, but the essential point is as the minister said. On our proposal for moving to 28 days, we were struck by the fact that subject committees, because they do not consider an instrument until after it has been considered by the Subordinate Legislation Committee, often consider the instrument after it has come into force. That led us to think that we could perhaps prevent that from happening—or at least reduce the risk of it happening—if we moved to 28 days and accepted the committee's proposal that policy committees and the SLC should be able to work on an instrument in parallel. In effect, that would mean that the lead committee would have four weeks and the SLC would have three weeks to consider the instrument. In many cases, that would enable, we hope, the lead committee to react to the SLC's report on the instrument before the instrument came into force. We thought that the proposal for parallel working, taken together with our proposal to move to 28 days, would represent a real improvement in scrutiny.

The Convener: Is the Executive's position basically that it would not be worth trying to move to 28 days if days during recesses do not count towards that period? There would be no merit in trying what would amount to a reduction in parliamentary scrutiny by allowing the recess period to count.

Gerald Byrne: As I recall, our comments on the recess period were directed more towards the bulges that occur just before recesses, particularly at new year and at Easter. We suggested that allowing some of those recess days to count might smooth the workload of committees slightly. The suggestion probably requires a bit more working through, but it was directed more at that issue than at the other more general points about timescales to which Murray Sinclair referred.

The Convener: The committee has discussed on previous occasions the question whether the recess period should count. However, given that we very much want as much parliamentary scrutiny as possible, I think that our genuine feeling would be that we would welcome a move to 28 days but that we would not particularly like the proposal to include recess days. Perhaps my colleagues can join in and say what they think about the matter.

Mr Maxwell: I agree with the convener that allowing recess days to count would create problems at the other end. In effect, instruments would come into force during the recess, before committees had a chance to consider them. The bulge would occur after the recess rather than before it. Committees would need to consider all the instruments very quickly after, instead of before, the recess. I am not sure what the advantages of such a proposal are.

Murray Tosh: I want to ask about the gluts to which the minister referred. I am not clear why working to a 40-day timeframe would create gluts but working to a 21-day or 28-day timeframe would not create gluts.

Ms Curran: I will refer that question to Murray Sinclair. I should say that "glut" is not the formal term but my interpretation.

Murray Tosh: Whatever word was used, the implication was that adopting a 40-day timeframe would create blockages in the system and that there would be periods when there would be too

much work. We know that that happens. I do not follow why the problem would be worse with 40 days than with 28 or 21 days.

11:30

Murray Sinclair: I hesitated because I did not remember the context in which the minister had used the word "gluts". A 40-day period before an instrument came into force would create problems with the delivery of policy and Executive legislation—a long lead-in time would be required. From our perspective, that would be particularly difficult during recess, especially the summer recess, because we would have to allow for the possibility that the instrument could not come into force for 40 days. That would have a serious impact on our ability to deliver law in cases that would not always be exceptional or emergency. Instead of moving to a default system of 40 days, we would prefer to use and improve the current procedure, which is well tried and tested. That is why we have proposed extending the period to 28 days. It would mean our losing seven days, but that would be manageable—certainly more manageable than a 40-day gap.

The Convener: Stewart Maxwell made the point that if we do not stop the clock for recesses, we will end up considering some orders after they have come into force. We do not think that that is a good idea. Would one of the witnesses like to respond to the point?

Gerald Byrne: To be honest, I do not think that we saw counting recess days as laying days as a magic solution to the problem of bulges. We do not think that moving to a 40-day period would make the problem worse or better. It is possible that we would end up moving the bulges around. To some extent, bulges are caused by the annuality of orders and the fact that they have to come into force on particular dates. The problem is best addressed by planning and discipline in laying orders, rather than by moving to a 40-day period or by counting recess days. It was thought that counting recess days might help for some orders, because then they would not all arrive on the same day. I take the point that it is possible that they would all arrive on a different, slightly later day, towards the end of the recess. None of the proposals is seen as a magic solution to the problem of bulges. The problem has arisen because of the way in which orders are made and the fact that some have to come into force on particular dates, especially 1 January and 5 or 6 April.

The Convener: That leads us nicely on to the issue of timescale and planning.

Mr Kenneth Macintosh (Eastwood) (Lab): I will preface my question by offering some thoughts on the Executive's general approach to the committee's recommendations. One reason for the tone of some of the questions this morning is that the committee put a lot of work into its report. The Parliament is still relatively new, but we are working with quite an antiquated system. Many of us believe that we have an opportunity to change that.

I fully understand that the Executive is worried about changing the balance of power or control. Whatever concerns the committee has about scrutiny of legislation, the important issue is the delivery of policy. I understand why the Executive wants to stick with the certainty of the current system, rather than opt for the unknown of the proposed new system, but there may still be room for manoeuvre. I do not want to reopen the previous discussion, but the proposed SSIP still has potential. It does not have to involve excessive scrutiny of every instrument. If every instrument, from a commencement order to an order dealing with a very complicated policy issue, were debated in committee, the Executive could become bogged down, but that does not have to happen. Mechanisms could be included in the SSIP to give the Executive some control of which instruments are debated. Many of us will be disappointed if the Executive is unable to see the advantages of moving to a more streamlined system, in spite of the certainty that the current system offers.

Having said that, I point out that the committee was unanimous in saying that, whether we move to a new system such as the SSIP or not, we should have better forward planning. That would help everybody in their work. Paragraph 9 of the Executive response says:

"the Executive accepts some of the underlying issues … particularly around planning and timescales for work".

As such, I was disappointed that it did not agree with the idea of forward planning. The submission says that the Executive agrees in principle but that, in practice, the programme

"cannot be planned to the extent anticipated by the draft report",

and that the Executive cannot produce a finalised work programme three months in advance and doubts whether the issue should be dealt with in standing orders.

Will the minister expand on that? It sounds like the Executive is rejecting the idea despite accepting it in principle. I would hope that we could get a commitment at least to being given some idea of the Executive's forward work programme, three months in advance or otherwise.

Ms Curran: Those are interesting comments, especially those about tone. I sincerely hope that

the committee does not think that we are dismissing its proposals out of hand or that we are just hiding behind procedures, saying, "Those have been our procedures for eight years and we're not shifting from them." The committee knows that I have no difficulty in disagreeing with people when I feel the need, but I can say in all honesty that we have given the proposals, and the arguments behind them, considerable thought.

I do not believe that the proposals would do what the committee argues that they would, but that discussion needs to be continued. I emphasise how important it is that we work with committees, both subject and mandatory. That is vital because the committees are close to the detail that sometimes we do not see. We want to continue the conversations.

I believe that we have moved considerably on the committee's recommendations. I thought that the committee would be positive about the moves that we are making, despite some disagreement about the big stuff. As I say, we are not the only ones to disagree—others do too. We can argue about this another time, but we do not think that there is enough detail in the recommendations. The argument that the process could be streamlined if necessary shows the need for greater detail.

We genuinely want to co-operate with the committee, because it is making serious points that need to be addressed. The committee is right that there is no need for us to bog ourselves down in procedures that do not work. We need to be open minded and progressive. We take the point about forward planning, but at this stage we are trying to deliver what we can.

I believe that there have been similar proposals in the past, but that the work never quite took off. My understanding is that there was an agreement with a previous Subordinate Legislation Committee to consider the subject, but it did not make as much progress as we wanted. We want to commit to the work, but we do not want to put anything in standing orders because it would tie our hands. Nothing is in standing orders at Westminster either, but its work is delivered more effectively.

Mr Macintosh: My understanding is that Westminster is moving towards a system similar to the one that we are recommending.

The Executive does not object to forward planning in principle. Is it just that there would be practical difficulties? Do you not think of things three months in advance?

Murray Sinclair: As the minister said, no one could disagree with the idea that there should be proper forward work planning. As she said, we have come to a Subordinate Legislation Committee and had that discussion in the past. We are genuinely making movement on that.

As the committee will appreciate, a system would need to be cross cutting. In some areas, such as environment and rural development, there is already a fair degree of co-operation and forward planning in which the committee is involved. However, we need a system that will work across the board. There is no point in creating a system that will not be fit for purpose, so we have been trying to consider the issue from the perspective of the office of the solicitor to the Scottish Executive, which is in a perfect position to have a cross-cutting system, because ultimately it is responsible for all SSIs. We seek a system that will allow for a degree of work tracking and will include an important element of forward planning—over three months and perhaps even longer. There have been some difficulties in achieving that. Jane McLeod knows more about those.

Jane McLeod: I do not know much about the technical difficulties, but it is true that OSSE is working to develop an SSI tracker system, on the back of the Executive's electronic records management system. Our attempts have run into one or two difficulties along the way, but the work is still on-going. The tracker system would be partly for internal management purposes, to ensure better timetabling of such work within the Executive and to get our policy colleagues signed up to the discipline of strict timetabling. It would also serve the purpose of enabling forward planning and passing of information to the SLC on our future plans. Progress on the work tracker is the key to being able to provide the committee with proper forward planning information. It is the tool that will enable us to get information from the whole Executive into a central pool, from which it can be disseminated.

Mr Macintosh: I welcome those remarks. Your tone is much more positive than that of the Executive response.

Ms Curran: We are keen to develop the protocol, which will continue to have some status. I will ask my officials to engage with the committee on how that will work.

Mr Macintosh: That is welcome.

I move on to the issue of annulment and parallel consideration. As the minister knows, the current system is that the SLC reports to the lead committee and only the lead committee can lodge a motion to annul a piece of subordinate legislation. There is a practical difficulty, because the SLC does not have time to consider fully some subordinate legislation. We would like to have parallel consideration so that, like the lead

committee, we can take the full 40 days to consider a measure.

However, there would be a flip-side to our no longer reporting to the lead committee. Recommending that an instrument be annulled is a very drastic step that this committee, like the lead committee, would not take lightly. If we felt strongly that that should happen, usually we would report our observation to the lead committee, which would move that the instrument be annulled. I cannot imagine a situation in which the lead committee would not act on a recommendation from this committee that an instrument be annulled. Given that the lead committee would always act on our recommendation and that we are removing that possibility, because parallel consideration would not give us time to make such a recommendation, surely the SLC should have the right to move that an SSI be annulled.

Gerald Byrne: In our response we suggested that, for the sake of clarity, it would be better if one committee had the right to recommend annulment to the Parliament. Generally, that committee will be the lead committee, acting in the light of advice from the Subordinate Legislation Committee. The Executive would not want to be too hard and fast on the issue; it is for the Parliament to consider what it wants. We have given our view, for what it is worth. I understand that individual members can also lodge motions to annul. However, when it comes to committee recommendations, we would find it easier if the Parliament had one voice.

Mr Macintosh: I accept your comments—it is for the Parliament to decide on the issue. I understand that members can only ask a committee to lodge a motion to annul.

Gordon Jackson: I did that once, unsuccessfully.

11:45

Mr Macintosh: Gordon is our expert on moving to annul.

On whether the Subordinate Legislation Committee could ever make a technical amendment to a bill, I can understand why the Executive is hesitant in principle, never mind in practice, about any moves to accept amendments. However, at the same time, the committee has specifically ruled out making policy changes by means of an amendment and is proposing only that technical amendments might be made. Further, this committee would not move the amendment. It would make an observation and recommend that the Executive make an amendment; it would be up to the Executive whether to do so. Currently, the Executive says that it accepts the committee's arguments and will take the next legislative opportunity to rectify the situation. We are suggesting the introduction of a system whereby the Subordinate Legislation Committee could accept technical amendments that were moved by the Executive.

In your response, you sort of accept that suggestion. You say that you would be willing to reprint if there were minor drafting errors. Obviously, there is not much of a line between accepting that and accepting amendments—there is a bit of a difference, but not much. Further, as I said, in the end, the decision whether to make the suggested amendment would be entirely up to the Executive. The committee's proposal is merely a mechanism by which the Executive could use the Subordinate Legislation Committee to provide a service that would improve the quality of bills. If the Executive does not accept the committee's recommendations—which happens sometimes—we would still have the opportunity to recommend annulment to the lead committee. We would not necessarily do that any more or less than we currently do.

I think that there is quite a strong argument for making such an improvement to the current system. I stress that it would take no control away from the Executive. Would it be possible for the Executive to move slightly from its current position, which is that it will accept only minor printing changes?

Ms Curran: When we had discussions about this some time ago, I was struck by the arguments for such a change and the need for that level of technical amendment, particularly in circumstances in which mistakes have been made and it is clear that something needs to be clarified and that not making a change could result in consequences that none of us would want. I was quite insistent that that point must be addressed. We might have a debate about how we do that, but we have accepted the argument that we need to do so. We have made a proposal that we hoped would find favour with the committee. Again, perhaps I was too hopeful.

Mr Macintosh: You say that you accept our position, but your explanation feels like a rejection. Perhaps Murray Sinclair could expand on the matter.

Murray Sinclair: The thinking behind some of the words that we used in our response could be teased out.

The points that the Subordinate Legislation Committee makes usually fall into three categories. The first category contains points with which we agree and in relation to which we believe that it is important that a change be made. If we take that position, we have to lay another order, which is one of the things that we want to avoid. The second category contains points with which

we agree but in relation to which we do not believe that it is important that a change be made, because the order will work even if it includes the error. In that situation, we will leave the order as it is until we have an opportunity to address the matter on another day. The third category contains those points with which we do not agree. By far the majority of points fall into the first two categories. Our proposal is to allow those points to be dealt with using a different form of parliamentary procedure. It is important to stress that it would still be a parliamentary procedure. It would apply in cases that meet certain restrictive criteria that we will have to tease out but which will essentially ensure that the procedure deals with only minor and drafting points and changes that would not affect the policy that the order delivers.

Under the new procedure, amendments would be authorised against criteria. We have suggested that the procedure would involve the agreement of the Subordinate Legislation Committee, certified by its convener, and that of the Executive, certified by the minister in charge and would give effect to the amendments in the order as made. The law would then reflect the changes, and members of the public would see that in print.

As the minister says, our proposals were designed with the committee's concerns about the current system's lack of flexibility when dealing with technical points very much in mind.

Mr Macintosh: So the only difference is that the minister would not come to the committee to move an amendment but instead would issue a certificate.

Ms Curran: Yes—in agreement with the convener.

Murray Sinclair: Yes, there would be an agreement. We would have to agree a process. For example, you might send us a letter on Tuesday, we might respond on Thursday, and we might be able to identify where there is scope for agreement on amendments for which there should be a certificate. That certificate could be in place for the following week.

Ms Curran: And that process would be sufficient to give legal status.

Murray Sinclair: Yes.

Mr Macintosh: But without slowing down the 40-day process.

Ms Curran: Yes.

The Convener: How quickly could such a change to the process be put in place?

Ms Curran: Do you want our definition of quickly?

The Convener: Is it weeks or months?

Ms Curran: It might be useful if I could meet you and any other committee members, perhaps not in a formal committee setting but in a formal meeting, to discuss the outcomes of this morning's meeting. We might have significant differences, but there is a shared agenda. On the point that we have just been discussing, and one or two others, we could discuss that shared agenda and make proposals.

We will be influenced by the committee, and our view is that we can move ahead on some issues. That is as a result of the committee's deliberations—which is a constructive thing to report to Parliament. If I am honest, I have an interest in that: I do not want to be in a position of not responding properly to committees.

We might have to think further about some of the broader and deeper areas of disagreement. After Christmas, minds will be turned towards finishing legislation rather than towards producing new procedures, but we could find a way of taking things forward, if that would be acceptable to the committee.

The Convener: That would be very acceptable.

Gordon Jackson: The new process that Murray Sinclair has outlined would have to be teased out, but it would obviously work. A statutory instrument would be published, sent to us for discussion, and then possibly changed by means of certificate. Would setting up that new process require primary legislation? It might.

Ms Curran: We would have to take advice on that.

Murray Sinclair: As the minister has suggested, having discussed these issues today, we will have to produce a paper that gives our proposals in more detail.

Gordon Jackson: Do you see my point, though?

Murray Sinclair: I certainly do.

Gordon Jackson: The procedures are serious and we are seeking to change them. I wonder whether the new procedure would have to be in primary legislation before it had the force of law.

Murray Sinclair: We will give further thought to how we could make the change and to whether it could be done incrementally.

Ms Curran: We can pursue that with the convener.

Gordon Jackson: I just wanted to ask the question.

The Convener: It was a good one. Murray Tosh, was your question similar?

Murray Tosh: It was the same question—which means that only one of us is raising our game. I do not know which one.

The Convener: Okay. Can I ask for the panel's views on consolidation, which you will know is an on-going issue for the committee? You said that it should be for lead committees rather than the Subordinate Legislation Committee to determine whether an instrument is a pure consolidation, as we recommended in our draft report.

Gerald Byrne: To some extent we regard consolidation as a policy matter rather than a procedural issue, because the consolidated instrument would need to be checked for its policy content.

When there is a consolidation, the Executive considers whether the substance of what is being enacted is identical to what we are consolidating or whether we have taken the opportunity to update or tweak the legislation, which means that it is no longer a consolidation. That is where we are coming from, which is why our initial view is that it is probably a matter for the lead committee, owing to its policy expertise in the subject area, rather than for the Subordinate Legislation Committee, which would view it as a technical exercise.

The Convener: Euan Robson wants to come in on the matter. He brings fresh eyes to it, as he has just joined the committee.

Ms Curran: Lucky him.

Euan Robson (Roxburgh and Berwickshire) (LD): For primary legislation, the Lord Advocate usually leads on consolidation and an ad hoc committee is set up. I say "usually", but my recollection is that there has been only one such consolidation: the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003. Would it not be appropriate to have a parallel process for consolidated statutory instruments? Someone other than the minister with policy responsibility would lead on the consolidation and there would be a different forum from the lead policy committee. In effect, the same type of procedure that is in place for primary legislation would be in place for secondary legislation.

Gerald Byrne: I take the argument. I confess that I do not know how much consolidation of secondary legislation has taken place and whether it would demand a different procedure from that for the consolidation of primary legislation. As you say, there has been only one example of a consolidation act in primary legislation, so the procedure has been used only once. You might want to reflect further on whether that gives us enough evidence that that is the right way to do it and whether secondary legislation raises different issues.

Our view is that there might be more scope for consolidation of secondary legislation and that, given the policy content of any proposed consolidation, members of the lead committee would probably be the right people to consider the matter in the first instance. However, there is a general recommendation that a working group should be set up on the subject and the Executive has indicated its willingness to co-operate in any way with the Parliament on that.

Gordon Jackson: I again want some information. Obviously, we think that consolidation is important as it improves the availability of law to people. It is not very good when someone has to trace the law through seven different SSIs. I understand your point that some consolidations are pure consolidations but in others the Executive decides that, as the legislation is being consolidated, it will introduce changes. Do you have any gut feeling for how often that happens, in percentage terms? Are they normally pure consolidations or is it more normal to take the opportunity to tweak the policy? The procedure that needs to be set up will depend on the answer to that question.

Gerald Byrne: I think that stopping us tweaking the policy would be almost impossible.

Murray Sinclair: Any proper consolidation will be more than a mere editing job and will involve more than bringing bits of the statute book that have been enacted in 10 different places and putting them into a single statute. A consolidation will involve that, but it will involve more than that.

Gordon Jackson: Usually.

Murray Sinclair: Usually. For primary legislation that will certainly be the case, as one aim is to ensure that the language is sufficiently modern and fit for purpose, because much of the legislation will have been around for a long time.

I cannot say what is usual in the context of the consolidation of subordinate legislation, because we do not do very much of it.

Gordon Jackson: Indeed.

12:00

Murray Sinclair: There are issues about what we have in mind when we talk about consolidation and about whether the full scrutiny process would be appropriate if we moved to something more than a mere editing job in consolidating subordinate legislation. A working group was set up to investigate those issues, but it has not yet reported. It is perhaps something that we need to resuscitate.

The Convener: The minister and her officials will be glad to know that we are near the end. We

have two more questions, the first of which is about rules of court.

Mr Macintosh: For the minister's benefit, I point out that currently rules of court come to the committee as SSIs but the committee has no powers to amend or annul them. From our perspective, that is an unusual relationship. We have looked at the status of all SSIs, which also include local road acts and local SSIs, and we are thinking about whether they should be SSIs. The Executive suggests that they should be, because acts of adjournal and sederunt may amend primary legislation. What amendments do they make to primary legislation? I cannot imagine that they do much more than amend the technical implementation of acts.

I am also looking for a particular assurance. I believe that a civil justice system review is under way and we would welcome an undertaking from the Executive to consider the matter in conjunction with the SLC. The relationship with Parliament is slightly awkward, as the courts will not accept our having powers to amend. We should consider the matter in the round.

Ms Curran: I am happy to give the commitment that we will be involved in discussions on the review. We will work out how that is done, and we will need to think through all the implications.

Murray Sinclair: The extent to which such instruments are used to amend primary legislation is limited.

Gordon Jackson: I can understand that. I have dealt with them all my life and I have never thought of them as amending primary legislation, so I was a little surprised by the issue.

Murray Sinclair: There are sometimes forms in primary legislation—changes could be that limited.

Mr Macintosh: That is what I understood. The titles written down sound formal and significant, but we are just talking about court procedures and paper.

Ms Curran: We will come back to the committee on that.

The Convener: Finally, would the Executive prefer to keep the status quo on local instruments?

Gerald Byrne: On local instruments, we felt that a range of issues needed further consideration. Having launched into an answer, I think that Murray Sinclair might be better placed to respond, but I can tell the committee that local instruments cover a range of situations from local road closures up to major issues. We hesitated about taking them out of the current numbering and publication system without having worked out in more detail what to do instead.

Murray Sinclair: That is right. Local instruments cover a huge range of issues, and the feeling from the people in the Executive who are responsible for the various orders was that the current system works well. There was no pressing desire to change it.

Gordon Jackson: We thought that we were doing everybody a favour, but nobody wants rid of the system.

Ms Curran: You have a good heart.

The Convener: The evidence from the Queen's Printer for Scotland was that it is making changes to publish all SSIs on the Office of Public Sector Information website. Is that another area that we could talk to the Executive about?

Ms Curran: Yes.

The Convener: I am pleased to say that we have finished our questions. We thank the minister and her officials.

Ms Curran: Thank you too—I look forward to our continued conversation.

The Convener: Thank you. We will suspend for about five minutes to get ourselves together for the next part of the meeting.

12:04

Meeting suspended.

12:10

On resuming—

Delegated Powers Scrutiny

Bankruptcy and Diligence etc (Scotland) Bill: as amended at Stage 2

The Convener: I bring colleagues to order. Item 2 is delegated powers scrutiny of the Bankruptcy and Diligence etc (Scotland) Bill as amended at stage 2. I welcome the Scottish Executive officials who have joined us for this item. As we go through each of the new powers that were added at stage 2, I hope that the officials will be happy to provide any clarification that is needed.

On section 1, "Discharge of debtor", the committee was concerned at stage 1 that the automatic discharge of a debtor one year after sequestration could be amended by statutory instrument. We felt strongly that the power should not be left to delegated legislation. The Executive has responded to that concern and will address a related omission at stage 3. Members will find the relevant comments in paragraphs 6 and 9 of the legal brief.

Do members have any comments? Are we happy with the Executive's response?

Mr Maxwell: I had wanted to ask a general question of the witnesses before we went into the details. Some 17 new powers to make orders or regulations were added to the bill at stage 2. Why was such an extraordinary number of additional subordinate legislation-making powers introduced at stage 2?

Andrew Crawley (Scottish Executive Legal and Parliamentary Services): Essentially, the explanation is the size and nature of the bill. Naturally enough, much of the bill relates to court enforcement, which needs to fit into the existing structure. For example, we had to provide powers for the Court of Session to make appropriate procedural arrangements. Ultimately, the answer is that it is to do with the nature and size of the bill. We do not think that any of the powers is particularly unusual or objectionable, but we are happy to answer questions about any of them.

Mr Maxwell: My point was not that the powers are objectionable but that 17 of them were introduced at stage 2. Surely most of them could have been foreseen and should have been included in the bill as introduced instead of being inserted at stage 2. Did we miss something major at stage 1 that caused the Executive to add another 17 powers that had not been foreseen before the bill was introduced?

Andrew Crawley: I do not accept the premise of the question. Our view is that the number of changes that were made at stage 2 is linked to the size of the bill. It is a large bill. It deals with, for example, many court-related issues. A larger than usual number of subordinate legislation-making powers was introduced at stage 2, but we do not think that those changes are unusual. However, I accept that you may take a different view.

The Convener: I think that Stewart Maxwell is happy with that, so we will move on.

Section 12 will insert new section 28A into the Bankruptcy (Scotland) Act 1985. I think that no problems with the amended power have been highlighted, but I am open to colleagues' views. Do members have any comments?

Members: No.

The Convener: The issues seem to be straightforward.

Section 14A, "Debtor applications by low income, low asset debtors", which was inserted into the bill at stage 2, will insert new section 5A into the 1985 act. In paragraphs 22 to 27 of the legal brief, members will see some of the issues that have been raised. In particular, we might want to consider whether the affirmative procedure provides a sufficient degree of parliamentary scrutiny. We need to decide on that and whether the super-affirmative procedure is a possible alternative.

12:15

Mr Macintosh: I have a question for the officials. In the legal brief, the figures of £100 for the debtor's weekly income and £1,000 for the value of the debtor's assets are described as "arbitrary"—in other words, they are not tied to any other point of reference. That implies that new figures could be brought in by Executive amendment or subsequent legislation that departed radically from the first set of figures. If that were going to happen, I would certainly be more in favour of using the affirmative procedure, but if I could be sure that the original figures were tied in the bill to a certain level of social security benefit or some other point of reference and we could therefore expect subsequent legislation to use figures that are at least in the same ball park, there would be more of an argument for using the negative procedure.

Andrew Crawley: I will address the procedural point first. We accept that the power is significant and that it will bear directly on the lives of some quite vulnerable people. There is no question but that the affirmative procedure should be used, which would be the effect of what is in the bill.

In relation to the general policy concerns—

Mr Macintosh: I am sorry to interrupt you. You are right that the procedure in the bill is affirmative, but we are discussing whether it should be

affirmative or super-affirmative. I apologise for my misleading question.

Andrew Crawley: In that case, the answer is the reverse. Although the issue is important, it is not important enough to justify the use of the super-affirmative procedure, which has been used only once in the Scottish Parliament, as members know. It is not at all common at Westminster either.

There will be full engagement with interests outside and inside the Parliament when the power is to be exercised. Obviously, I cannot give any commitment about how ministers will use the power if Parliament agrees it because that will be a matter for them. We do not envisage that regulations will significantly change the threshold figures of £100 or £1,000; they will clarify how those figures are to be calculated, in particular what is left out of account when reaching the £100 weekly income figure. Because that is how we envisage the regulations working, we think that the proposed balance of scrutiny is correct. If there were any suggestion that we would be seeking to make significant changes to those figures in future, the proposed balance of scrutiny might have to be different. However, we can base such a judgment only on how we envisage the powers being used.

I hope that that gives some background to our reasons for proposing the affirmative procedure on that particular power.

The Convener: Is that clarification sufficient for the committee?

Members *indicated agreement*.

The Convener: Section 17 will insert a new section 39A into the 1985 act. The power was originally to be subject to the negative procedure but it has now been amended to be subject to affirmative procedure, which is welcome. Is that agreed?

Members *indicated agreement*.

The Convener: The Executive has reconsidered section 18, "Modification of provisions relating to protected trust deeds", following the committee's concerns as expressed at stage 1. Is that okay?

Members *indicated agreement*.

The Convener: The power in section 28A, "Power to provide for lay representation in sequestration proceedings", looks like an appropriate one, but perhaps we should check with the officials that the court has been consulted on the power and the powers contained at sections 15K, 15L and 73MA of the Debtors (Scotland) Act 1987, and sections 9GA, 9K, 9L and 9M of the Debt Arrangement and Attachment (Scotland) Act 2002. Will the officials confirm that for us?

Andrew Crawley: I am happy to do that. We have had a number of meetings with representatives from the Court of Session and the Scottish Court Service. We have agreed that from January of next year a joint implementation group will consider what needs to be done in relation to all the relevant powers in the bill, with a view to taking a joined-up approach to issues such as how the court reviews and assesses people's suitability to be lay representatives. Our view is that, ultimately, that is a matter for the courts rather than the Executive. We can certainly make representations to the courts about how we think that the power might be used, but we will not be in court listening to the people who act as lay representatives. We envisage that the power will be used, but we need to make representations to the Scottish Court Service just as the committee makes representations to us about how such powers are scrutinised.

The Convener: Thank you very much. Are members satisfied with that?

Members *indicated agreement*.

The Convener: We move on to section 43, "Scottish Civil Enforcement Commission". Section 201(4) was amended at stage 2 so that regulations that are made under section 43(4) are subject to the affirmative procedure. That change was made in response to recommendations by us and the lead committee. Are members content with that?

Members *indicated agreement*.

The Convener: In response to the committee's concerns about the code of practice, which is dealt with in section 48, the code will now be laid before Parliament. Is that welcomed?

Members *indicated agreement*.

The Convener: Section 62, "Disciplinary committee's powers", sets out the commission's powers to deal with misconduct or criminal behaviour by a messenger of court. Section 62(4)(c) of the bill as introduced provided that one such power was the ability to make

"an order imposing a fine … not exceeding level 4 on the standard scale or any other sum prescribed by … regulations".

The power to prescribe any other sum has been removed. Do members welcome that?

Members *indicated agreement*.

The Convener: Do members agree that there are no concerns on section 64, "Appeals from decisions under sections 52, 59 and 62"?

Members *indicated agreement*.

The Convener: New powers in subsections (1A) and (1B) of section 72, "Notice of land

attachment", have the effect that it will not be competent to register a notice of land attachment unless the debtor has been charged to pay a debt of at least £3,000 or

"such other sum as may be prescribed by … regulations".

Those regulations will be subject to the affirmative procedure. Should consideration be given to including in the bill some limitation on the power to prescribe an alternative sum?

Mr Macintosh: I am happy with the use of the affirmative procedure.

The Convener: Do members have any other points? The proposal has been made that the power could be limited such that its use would be linked to changes in the value of money. I invite Andrew Crawley to provide some more explanation.

Andrew Crawley: Are you referring to the value of money in the context of money attachment?

The Convener: I am sorry—I was referring to land attachment, which is dealt with in section 72.

Andrew Crawley: The legal adviser has just reminded me that there is such a link, as the minister made explicit when he gave evidence to the Enterprise and Culture Committee.

Our position is that because the lower debt limit in land attachment, which is now £3,000, is closely linked to the qualifying debt limit in sequestration, any review of the figure should be conducted in the round. When we make a judgment about the lower debt limit in land attachment, we will need to consider other issues—in particular, how easy or otherwise it is for people to apply to bankrupt a debtor when they might choose to attach land or buildings belonging to them. The retail price index or a similar measure of the value of money is perhaps not the most relevant consideration as far as we are concerned, but it could certainly be taken into account when all such matters are judged together.

The Convener: Are members happy with that explanation?

Members *indicated agreement*.

The Convener: We move on to section 81, "Application for warrant to sell attached land". Section 81(2) deals with the prescribed sum. The issue is similar to the one that we dealt with in section 72. Is the answer the same?

Andrew Crawley: Yes. The answer is the same, for the same reason. The limit here is essentially the same as the limit in section 72. In our view, both limits are linked to the debt limit for sequestration.

The Convener: We move on to section 81(5A), which deals with further provision about reports on searches, and section 85, "Creditor's duties prior to full hearing on application for warrant for sale". No concerns have been expressed. Are members content with the provisions as drafted?

Members: Yes.

Mr Maxwell: Have we dealt with section 81(5A)?

The Convener: I took section 81(5A) and section 85 together. We can go back, if you like.

Mr Maxwell: No, it is fine.

The Convener: We move to section 86, "Full hearing on application for warrant for sale". The power has been amended to increase the relevant minimum amount in the bill and to make the regulations subject to the affirmative procedure. Are members content with the provision?

Members *indicated agreement*.

The Convener: I will now take a number of sections together: section 116, "Interpretation"; section 117, "Residual attachment"; and section 133, "Interpretation", which is similar to section 116. At stage 1, we recommended that the powers should be subject to the affirmative rather than the negative procedure. The Executive has not redrafted the provisions in the light of the committee's recommendations. We will ask the obvious question—why not?

Andrew Crawley: In our view, the negative procedure provides the appropriate level of scrutiny for the exercise of the powers. There seems not to be a meeting of minds about the importance of the powers. We think that they are important enough to be included in the bill, but we view them as essentially housekeeping powers. If there are developments in court procedures and other forms of enforcing debt, we want to be able to pick up on those and to make the necessary consequential changes to the definitions in the bill of "decree" and "document of debt". We do not envisage that the powers will be used to make policy changes, which is why I described them as housekeeping powers. Because that is the nature of the powers as we see them, we think that the negative procedure is appropriate. If the powers were used to deliver a policy objective of the Executive, the position would be different and one might ask whether the affirmative procedure would be more appropriate. That is the position that we took when the committee first raised the issue. We have considered the representations that have been made since then, but our view remains that the negative procedure provides the appropriate level of scrutiny.

Euan Robson: I suggest that it might be appropriate at stage 3 to get on the record a statement from the minister confirming that the powers are of a housekeeping nature. The minister need not use precisely that phraseology.

The Convener: We will communicate with the officials about that.

Euan Robson: We should have a ministerial statement to that effect on the record.

Andrew Crawley: I would be happy to raise the issue with the minister. He has been very accommodating in the past, so I am sure that he will consider it carefully.

12:30

The Convener: Let us move on to new section 15H of the Debtors (Scotland) Act 1987, "Sum attached by arrestment on dependence". At stage 1, we were concerned that the power that is conferred by this section was not subject to affirmative procedure. The Executive has not redrafted the provision. Could you comment on that?

Andrew Crawley: I am not sure that I can add a great deal to what was said previously on this issue. It would be fair to say that this is not quite such a consequential power as the previous one and that, therefore, there are issues of substantive policy. Clearly, a judgment needs to be made about whether the procedure should be affirmative or negative. Certainly, we view this power as being used to ensure that the debtor protection keeps pace with developments outside the narrow area of diligence. Essentially, this comes back to a value-for-money issue that would involve considering changes in price indices and so on to ensure that the level of protection that Parliament agrees in the bill can be adjusted appropriately so that the real value of the debtor protection is maintained. As that is how we envisage the power being used, we think that the negative procedure provides that appropriate level of scrutiny. Essentially, we view the power as being relatively narrow, although we accept that the committee has taken a different view in the past and might take a different view in the future.

The Convener: In a similar vein, we thought that the power in section 162 of the bill, "Meaning of 'money' and related expressions", should be subject to the affirmative procedure. However, again, it has not been redrafted. Is that for similar reasons?

Andrew Crawley: The point is essentially the same as the one to do with the definitions of "decree" and "document of debt". We do not propose using this power to embark on the creation of new categories of money. We hope that the power will enable Scottish ministers, from time to time, to ensure that the diligence of money attachment effectively attaches money as it is. "Housekeeping" is maybe not the right word but, again, the power is consequential to changes in other areas.

The Convener: Okay. At stage 1, we recommended—I think with a view to obtaining further explanation from the Executive—that the power in section 172, "Release of money where attachment unduly harsh", should be subject to the affirmative procedure. The Executive has not redrafted this one either.

Andrew Crawley: My answer would be the same as the one that I gave in relation to other income thresholds. The purpose of this power is the same as the one that relates to those.

The Convener: Is the committee content with sections 15H, 162 and 172?

Members *indicated agreement.*

The Convener: Are members content with the power in new section 73A of the 1987 act, "Arrestment and action of furthcoming to proceed only on decree or document of debt"?

Members *indicated agreement.*

The Convener: In section 195A of the bill, "Debt payment programmes with debt relief", there is a significant power as regulations may provide for the cancellation of debt, the freezing or cancellation of interest on debt or cancellation of charges in relation to debt. We have quite a few questions on this matter. Has the right balance been struck between primary and secondary legislation? The procedure is affirmative at the moment but, obviously, the question is whether it should perhaps be super-affirmative.

Andrew Crawley: I direct you to my earlier answer about the relative importance of the issues being raised. We accept that there are some important decisions that require to be made if regulations pass under this power. However, our view is that they are not so important that they would justify the high—if not exceptional—level of scrutiny that the super-affirmative procedure would bring.

In general, I can offer reassurance about the level of engagement that the Executive contemplates as being necessary for the exercise of this power. The debt arrangement scheme is very much a collaborative project with internal and external stakeholders. A great deal of consultation and engagement has gone into getting as far as placing the power in the bill, and we envisage working with those stakeholders on adjusting drafts before we bring back a draft to the Parliament for approval.

That is the big issue to do with engagement. The scrutiny issue is that the final regulations will be quite technical—tweaky, even—when they appear before the committee. We are discussing difficult regulations that require to do some quite complex legal things. The key policy decision about enabling debt relief is a big issue that Parliament

can sign off on that basis. When we bring the regulations to Parliament, the affirmative procedure will be appropriate because, although some big issues are generated around the exercise of the power, the exercise of the power will be relatively technical—important but technical. If it were not important, we would have thought that the power was better suited to the negative procedure, given its relatively technical nature at that stage.

The Convener: Are there any further points?

Members: No.

The Convener: Section 196 is on amendments of the Debt Arrangement and Attachment (Scotland) Act 2002. There are concerns relating to whether the provision in section 196(2A) of the bill is necessary given section 7(4) of the 2000 act. I wonder whether you could clarify that for us.

Andrew Crawley: It would be rash of me to make any promises on behalf of the draftsmen. We will be happy to consider any such issues that are raised by the committee after the meeting. However, if you will forgive me, discretion might be the better part of valour on such issues.

The Convener: Okay. So you are happy to take that question away and get back to us with an answer.

Andrew Crawley: We certainly are.

The Convener: Fine. The other issue is why the procedure is negative rather than affirmative.

Andrew Crawley: I think that that follows from the fact that Parliament agreed that only the first set of regulations under this power will be subject to the affirmative procedure. Therefore, every subsequent exercise of the power will be subject to the negative procedure. A different judgment might have been made if we had been in a different situation, but it would be awkward to say that this particular gloss on the power requires to be subject to the affirmative procedure when every other exercise of the power will be subject to the negative procedure.

The Convener: Are there any further questions on that point?

Andrew Crawley: I have one comment to add, convener. John St Clair, who is the legal adviser on the issue, points out that it is the nature of this particular power that it will tend to be exercised quite often, as a scheme of this kind requires quite a lot of fine tuning. We have made two sets of regulations already, and we may well make a further two sets over the coming year. We feel that the lead committee will see quite a lot of this power and may therefore feel that the negative procedure is appropriate. That is a judgment for the Subordinate Legislation Committee, as well.

The Convener: Yes, that is right.

Mr Maxwell: I accept entirely what the witness has said about having to come back to us on your first question, convener. However, we face the problem that stage 3 will take place a week on Thursday. If the answer comes back to us next Tuesday and we disagree with it or do not like it and want to lodge amendments to the bill, we will be back in the manuscript amendment situation that we were in with the Planning etc (Scotland) Bill. I am not asking a question, but making the point that we are back in the same situation on some of these points. There is no room for any further debate. By the time the answer comes back to us, we must either accept everything or try to lodge manuscript amendments, which is not really a suitable situation.

The Convener: No. We tried to do the best that we could by inviting the officials to attend our meeting today, in order to pre-empt some of the issues. However, given the timescale, which you have mentioned, that is perhaps the best that we can do.

Mr Maxwell: Yes. I am just making a general point.

The Convener: I know, and I agree with you.

Andrew Crawley: I accept that what Mr Maxwell raises is an issue. I am sure that I speak for all bill teams when I say that, given the time constraints, we very much welcome the opportunity to come to the committee in the hope of resolving as many concerns as can be resolved within the time that is available.

The Convener: As we seem to be agreed on that, I shall move on.

On section 197A, "Expressions used in this Part", the Executive has stated that it intends to use the new power as required to ensure that the definitions in the bill keep pace with changes in court procedure and enforcement practice. As the process is largely technical, the Executive considers that the negative procedure provides the right level of scrutiny. Do we agree?

Members *indicated agreement*.

The Convener: No concerns have been highlighted on sections 197B and 197C.

In section 198, "Information disclosure", the Executive has allowed the first exercise of the power in section 198(1) to require a higher level of scrutiny. However, at stage 1, the committee felt that every subsequent exercise of the power should also be subject to the affirmative procedure. Would the Executive officials like to tell us why it should not be?

Andrew Crawley: It might be helpful to consider this power in the context of similar powers in this

bill and in other legislation. The power is similar to that which we propose to take in relation to protected trust deed regulations and the power that the Executive already has under section 7 of the Debt Arrangement and Attachment (Scotland) Act 2002. These are technical and difficult areas of law and we expect that regular adjustments will be required to ensure that the scheme continues to be effective. I have already said something about how often we have amended the debt arrangement scheme regulations and about how we envisage amending them again in the relatively near future.

When we create the framework in subordinate legislation, it is appropriate for us to come to Parliament and ask for explicit approval of our general approach. At that point, the affirmative procedure is appropriate. However, when we come back—as we expect that we will—to make periodic changes and refinements to the scheme, it would not be an appropriate use of parliamentary time if each of those exercises of the power required the affirmative procedure. In many cases, the changes will be minor tweaks, perhaps of only one line.

Of course, we cannot guarantee that every exercise of the power will be for a minor change. However, because a balance is required, it is appropriate to say that subsequent exercises of the power can safely be left to the negative procedure. That remains our view. The proof of the pudding will be in the eating. We think that that is how things have worked with the debt arrangement scheme and how it will work with this power.

Murray Tosh: From what you have said about balance, if the alternatives were only the negative or the affirmative procedure, you would argue for the negative. However, you were careful to say that, in some areas, the use of the power could raise significant matters. Is there not therefore a case for using open procedure? That would allow ministers to use the affirmative procedure when they considered—and the lead committee considered—that the power was major and merited the affirmative procedure. Should you not keep that option open for such circumstances?

Andrew Crawley: First, I should be clear that I can answer that question only in relation to the position of the bill team. As the committee will know, wider issues arise to do with the use of open procedure. You will be better informed about that than I am.

Our view on this issue is the same as our view on the use of the super-affirmative procedure. In the past, open procedure has been used only in regulations of great significance and of constitutional importance. That is not the kind of issue that this particular power raises, however important it is. We do not consider open procedure to be suitable for anything in this bill. Clearly, we think that the bill is important; but, in the great scheme of things, we do not think that it is that important. We have therefore not considered open procedure for this particular power or for any other power in the bill.

12:45

The Convener: We need to decide whether to stick with what we thought originally and state that the affirmative procedure should be used, whether we should recommend use of the open procedure, as Murray Tosh suggests, or whether we should leave things as they are.

Mr Macintosh: We should leave things as they are.

Mr Maxwell: I agree with our original comments. It has been accepted that significant changes might be made in the future. I would have thought that the open procedure was designed to accommodate that very situation. Earlier, we heard from the Minister for Parliamentary Business and her officials about the need for flexibility. I do not accept that we should be bound by the assumption that the open procedure should be used only for constitutional matters. We are trying to move forward on such matters, and the powers that we are discussing are good examples of where the open procedure would fit.

The Convener: Euan, do you have a view either way?

Euan Robson: In a word, no.

The Convener: Okay. We always tend to err on the side of caution, so I think we would prefer the powers to be subject to the open procedure. Perhaps unfortunately for the officials, they have come to the committee just after the Minister for Parliamentary Business and her officials, who talked about the open procedure.

Murray, do you want to say anything else?

Murray Tosh: Mr Crawley said that there are other interests and that his response was very much from the bill team's perspective. There might be broader interests and issues, so it would be appropriate for us to put the matter to the Executive by letter and allow time for a response to come in when those other interests and issues have been included in the discussion. If we were able to see that response next week, we could discuss whether we wished to press the matter further and lodge an amendment to the bill. We may or may not decide to do that, in the light of the answer that we get.

The Convener: Stewart, are you happy to go along with what Murray suggests?

Mr Maxwell: It is a perfectly acceptable suggestion. My only doubt is that that would take us back to the timescale problem. If we decided to lodge an amendment, it would have to be a manuscript amendment.

Murray Tosh: That would be unfortunate, but the approach worked well last week—in relation to the Planning etc (Scotland) Bill—in that the Presiding Officer accepted the reason for the manuscript amendment. The same timetabling considerations apply in the case of the Bankruptcy and Diligence etc (Scotland) Bill, so I hope that the Presiding Officer would view an amendment in a similar light. It may even be that, given an additional week to think about it, the minister in charge of the bill might be persuaded that we had a point.

The Convener: There is an alternative. We could lodge an amendment and then withdraw it, but we will discuss that later and communicate our decision to the Executive.

Section 198(2) gives examples of the power in section 198(1). No concerns arise.

Section 198(6A) is on the definitions of "decree" and "document of debt". The same point arises here. We wonder why the power is not subject to the affirmative procedure.

Andrew Crawley: The same point applies here, in relation to reasons for changing the definitions.

The Convener: Are members happy with that?

Members *indicated agreement*.

The Convener: Thank you for your attendance today and for the explanation and clarification that you have given.

Before we move on, can we decide on section 198? Do we want to lodge an amendment and withdraw it if necessary, or should we take the approach that Murray Tosh suggested and return to the matter next week?

Murray Tosh: Now that you have reminded me that there is time, I think that it would be better to lodge an amendment now and decide, in the light of the information that is given, whether we wish to press it. Last week, in relation to the Planning etc (Scotland) Bill, we had no alternative but to lodge a manuscript amendment. If we lodged a manuscript amendment next week, it is possible that those who advise the Presiding Officer would say that we had had time to lodge an amendment this week, in which case the Presiding Officer might not look at the amendment so favourably. We should lodge an amendment this week.

The Convener: That is the best way to proceed. We will consider the officials' response next week.

Mr Macintosh: Although that is a sensible approach for the reasons that Murray Tosh has just stated, I am far from supportive of the suggestion that we simply put through this amendment. I would certainly want to see the Executive response first.

The Convener: Yes. It is just that, given the timescale, this might be a better way of addressing the matter. I do like to be inclusive on this committee.

Custodial Sentences and Weapons (Scotland) Bill: Stage 1

The Convener: The next item on the agenda is delegated powers scrutiny of the Custodial Sentences and Weapons (Scotland) Bill at stage 1. We considered the bill three weeks ago, and have received a response from the Executive to our points.

On section 2, "Parole Board rules", we asked the Executive why it had opted to provide that rules may apply provisions of the Local Government (Scotland) Act 1973 instead of inserting a tailor-made power into the bill. It has indicated that there is merit in retaining substantially the same drafting approach that has been taken in existing legislation; however, it does not tell us what that merit might be.

Are we content with the Executive's response to this point?

Murray Tosh: Given that our legal advisers do not seem to be concerned about what the Executive has proposed, and in the absence of any other advice, I think that we should just accept its response.

The Convener: Then let us pass on.

On section 4(2), which relates to the power to amend the definitions of certain sentences, the committee expressed concern about the provision's potentially profound effect on the operation of the bill. Are members happy with the Executive's response to our concerns, or do you want to return to the matter at stage 2?

Mr Maxwell: The Executive has said that it is looking at the matter, so perhaps we should just wait and see what happens.

Murray Tosh: We might wish to monitor this closely to ensure that, at the end of stage 2, we do not find ourselves in the position in which we have found ourselves recently with other bills. I am not clear whether the Executive could be prevailed on to give us a clear note of the changes that have or have not been made and the reasons for making such changes, or whether we would have to do that ourselves. In any case, we should try to protect ourselves against finding that we do not have time to lodge a stage 3 amendment.

The Convener: That would be useful.

Mr Maxwell: I agree. Perhaps the clerks on the Justice 2 Committee could liaise with our clerks and keep them up to date about what amendments might be forthcoming.

The Convener: Ruth Cooper will do that.

On section 6(1), we asked the Executive why the bill refers to

"a sentence … of 15 days or more"

instead of to a "custody and community sentence". In its response, the Executive has said that it intends to look again at the section with a view to clarifying it. Do members agree to return to that matter at stage 2?

Members *indicated agreement*.

The Convener: We also raised concerns about section 6(10), which sets out the power to alter the custody part of a sentence. I believe that Gordon Jackson was interested in this issue.

Gordon Jackson: Yes, I did get rather excited about this one.

The Convener: What do you think of the Executive's response?

Gordon Jackson: It is probably okay. Although I still think that it is a pretty big issue to be left to subordinate legislation, there might well be occasions when, as the Executive points out, such changes are needed to target resources. Perhaps it is asking too much to demand that the primary legislation be taken back to the drawing board, but I think that this issue is at the boundary of what should be covered by subordinate legislation.

Of course, it could just be that I am speaking from a particular background. Am I right in thinking that Executive has changed the power to make it subject to the affirmative procedure?

The Convener: Yes.

Gordon Jackson: I am astonished that it had first proposed to make it subject to the negative procedure. Earlier in the meeting, Murray Sinclair, whose evidence was extremely helpful, said that there are very clear guidelines for dealing with important matters. How the Executive decided that this matter should be dealt with under the negative procedure is quite beyond me.

Moreover, I do not disagree with our legal adviser's point about the court's probable interpretation of the provision. It could not be used to increase the custody part to more than 75 per cent of the sentence.

That said, the legal brief points out that

"A respectable argument for an alternative interpretation can be advanced".

In my time, I have advanced a few arguments that could not even be described as "respectable". Surely legislation containing any ambiguity that gives lawyers a chance to argue about interpretation is not good legislation.

In a sense, though, it does not really matter, because if the Executive states on the record that the custody part will never be increased to more than three quarters of the sentence, that itself would be extremely important. No one else is ever going to get into court to argue that it should be higher. People do not argue for greater sentences as a general rule.

The Convener: It seems to me that if we were to consider the ambiguity, a policy amendment might be needed, so perhaps we should highlight the ambiguity to the lead committee.

Gordon Jackson: I would be happy either way. I do not think that it is quite a policy amendment. The Executive has said what the policy is and I agree with it. That is fine. What is not a policy matter, however, is the ambiguity. A future Executive could use the power for a purpose different to that of the policy. The legal advice is that there is

"A respectable argument for an alternative interpretation",

but the only alternative interpretation would come from a future Executive that wanted to use the power to increase the time in custody to more than three quarters of the sentence. That is not a policy problem. The Executive has said, "This is all that we can do," which would be binding on it in the real world. However, there is an argument that the power could be used for something more draconian. That is an ambiguity and, even if only a semi-respectable argument can be made for an alternative interpretation, that ambiguity should not be in the bill. We should say that to someone.

The Convener: Shall we put that in our report?

Members *indicated agreement*.

The Convener: On section 30(5), the committee asked the Executive for an explanation of how it intends to use the Henry VIII power to amend, add or remove licence conditions during detention in prison. The Executive has responded by offering a hypothetical example. Although the power will enable textual amendment of the bill, it relates to a largely administrative area. Do we think that that is all right?

Members *indicated agreement*.

The Convener: Members will see from paragraph 269 of the legal brief that the response to our concerns about section 36(1)(b) and (9)(a) and (b) on curfew licences is okay, but there might be aspects with which the legal team does not agree. The powers are subject to the affirmative procedure. Are we agreed about this one?

Members *indicated agreement*.

The Convener: Section 43 will insert new section 27A into the Civic Government (Scotland) Act 1982, conferring the power to modify the description of articles requiring a "knife dealer's licence". We asked the Executive whether any alternative approaches had been considered and if so why they had been disregarded. Are we happy with the Executive's response?

Members *indicated agreement*.

The Convener: Section 43 also inserts new section 27K into the 1982 act conferring the power to prescribe by act of adjournal the manner of application for a recovery order. Are we content with the power? The Executive has apologised for omitting the power from the delegated powers memorandum, and having consulted with the Lord President, it confirms that he is content. Are we agreed?

Members *indicated agreement*.

Murray Tosh: I have one question, convener, on a matter of textual criticism. Is "constrained" less happy or more reluctant than "inclined"?

The Convener: I do not know, to be honest. We will have to leave that up to the legal team. You were jesting were you not?

Murray Tosh: It is a curiosity. When I see the word "constrained" I always think that a degree of reluctance is implied, but no one is jumping up and down to say so.

The Convener: I do not think that it is a big issue.

We asked the Executive how it intends to use the power conferred in new section 27Q of the 1982 act, to provide exceptions to certain offences under the 1982 act and why it is necessary for the power to be cast as wide as it is. The Executive quotes the example of test purchasing as being the only exercise of the power anticipated.

It is thought that a power to make exemptions is reasonable and precedented. However, in the absence of further explanation by the Executive, it is not possible to be sure whether the power is wider than necessary. The use of the power will be subject to the negative procedure. Do we agree to pursue the issue and ask the lead committee to press for further clarification?

Members *indicated agreement*.

13:00

The Convener: Section 45 contains the power to create exemptions in section 141 of the Criminal Justice Act 1988. We asked the Executive to justify its reasons for taking that power and it said that the power is intended to make exceptions for the purposes of film, theatre and television and for further activities that may emerge following practical operation of the scheme. Do members have comments?

Members: No.

The Convener: On section 47, we asked the Executive to explain why it was necessary that the power to make incidental and supplementary provision should extend to enabling amendment of the bill when it is an act. The Executive responded that, occasionally, the best way to make ancillary provision may be to insert text into the act, as that makes the law clearer for readers of the act. Are we content with that? The use of the power will be subject to the negative procedure, but if it could be exercised to amend any primary legislation, including the bill when it is an act, should it not be subject to the affirmative procedure?

Gordon Jackson: We have been down this road often.

The Convener: I know.

Mr Macintosh: I am happy with the power.

Murray Tosh: Kenneth Macintosh is inclined to agree, Gordon Jackson is probably constrained to agree and I am a bit reluctant to agree, but I do not think that we really have any option.

The Convener: We will pass on.

Paragraph 17 of schedule 1 provides the power to make regulations on the tribunal, its procedure and suspension of members. The Executive's response was that there is to be no right of appeal. As for consultation, it will wait on a suitable legislative vehicle to bring the Parole Board for Scotland within the remit of the Scottish Committee of the Council on Tribunals. In the meantime, it will consult the SCCT on relevant matters that relate to the Parole Board. Are members happy that those regulations will be subject to the affirmative procedure?

Gordon Jackson: Not having a right to appeal is certainly a policy matter. If the Lord President's people have said that someone should not be there, an appeal against that could mean having someone there who people think should not be there; that is why there is a strong policy reason that, once the decision is made, it must stick. That has nothing to do with us.

The Convener: Okay. Can I happily move on to agenda item 4?

Members *indicated agreement*.

Executive Responses

Bus User Complaints Tribunal Regulations Revocation Regulations 2006 (draft)

13:02

The Convener: We raised two points about the draft regulations. First, we asked for confirmation that no transitional provisions are required in relation to the tribunal's staff and the Executive said that the tribunal does not employ staff, so no transitional provisions are required. Is that okay?

Members *indicated agreement*.

The Convener: Secondly, we asked the Executive to explain the absence of the word "Scotland" in the title. Stewart Maxwell suggested that the word "Scotland" had not been used previously and that was the case. Are we okay with that explanation?

Members *indicated agreement*.

The Convener: I take it for granted that members are happy to draw the Executive's response to the attention of the lead committee and Parliament.

Waste Management Licensing Amendment (Scotland) Regulations 2006 (SSI 2006/541)

The Convener: We asked the Executive what plans, if any, it has to consolidate the regulations. It said that it is examining means of improving waste regulation. Are members content to note the information and to draw it to the attention of the lead committee and Parliament?

Members *indicated agreement*.

Rice Products (Restriction on First Placing on the Market) (Scotland) Regulations 2006 (SSI 2006/542)

The Convener: We asked two questions about the regulations. First, we asked the Food Standards Agency Scotland to explain the purpose of the definition of "Regulation 178/2002" in regulation 2(1). The agency agreed that the definition is superfluous and said that the provision will be removed at the next legislative opportunity. Are we content to report the instrument on the ground of defective drafting?

Members *indicated agreement*.

The Convener: Secondly, we asked the FSA to explain the absence of a provision to deal with the disposal of material that is found to be contaminated.

Mr Maxwell: I ask the committee to discuss whether it agrees to write to the FSA about, or at least to raise with the lead committee, an issue that has been brought to my attention. I understand that Friends of the Earth has taken legal proceedings against the FSA in England in relation to the equivalent English regulations. Friends of the Earth states, in an e-mail to me, that the FSA's defence against the legal proceedings is based on the fact that

"The SI implements Articles 3 and 4 of the Decision by placing a statutory duty on local food authorities to ensure that ... appropriate measures are taken to verify the absence of LL Rice 601 from the UK market and to withdraw rice from the market where it is found to be contaminated with LL Rice 601."

The e-mail goes on to say that the FSA says that

"parallel legislation has been made elsewhere in the United Kingdom".

If we consider the English and Scottish regulations on enforcement—regulation 4 in the Scottish regulations—we can see that the wording is different. I wondered whether we could ask FSA Scotland about that difference. FSA Scotland has already answered questions that we have raised, and it may well be that the other regulations that FSA Scotland mentions cover the point. However, I am not sure.

I have some questions from Friends of the Earth. I do not know whether it would be appropriate to pass them to you convener, or whether you wish me to read them into the record.

Murray Tosh: If we are going to pursue this matter, the questions should be read into the record.

Mr Maxwell: In effect, it is one question broken into two parts:

"To explain clearly the reason why the Scotland Regulations do not provide for equivalent enforcement provisions to those in the English equivalent regulations, including in particular:

(i) To explain, in the light of Article 3 of the Commission Decision, the absence in the Regulations of a provision equivalent to that contained in Reg. 4(2) and 4(4)(b) of the England Regulations which would appear to impose an obligation on local food authorities to verify the absence of GM Rice in their areas.

(ii) To explain, in the light of Article 4 of the Commission Decision, the absence in the Regulations of a provision equivalent to that contained in Reg. 4(2) and 4(4)(c) of the England Regulations which would appear to impose obligation on local food authorities to secure the withdrawal of GM contaminated rice within their areas."

It would be helpful if we could raise those specific points with FSA Scotland, and pass them on to the lead committee.

Mr Macintosh: Stewart has raised the issue and read those points into the record, and I do not object to the points being passed on. However, I am slightly concerned. This is an important matter,

affecting consumer confidence in rice products and consumer concerns about GM products. I am not saying that this committee is being used by Friends of the Earth, but if a court case is going on between Friends of the Earth and the FSA, I am sensitive about our role and about our getting involved.

Having said that, Stewart has read the questions into the record and there is no harm in drawing the matter to the attention of FSA Scotland. However, I want to express my anxiety about the waters that we are treading into.

Mr Maxwell: I accept entirely what Ken is saying, and if I thought for one second that we were being used or that we were treading into areas that we should not, I certainly would not have raised the point. That is why I made it clear where the questions came from, rather than just putting them on the record without any background.

They are only questions, but they are legitimate if what is happening elsewhere casts any doubt over the validity of the Scottish regulations. If there is a difference between the English and Scottish regulations, there may be valid questions to be asked.

I do not think that the fact that the questions come from Friends of the Earth really matters. We all receive information from outside bodies who are deeply involved in particular issues, and sometimes they point out things that we are not aware of. I hope that the committee will agree that it is reasonable to ask the questions. It may well be that FSA Scotland has reasonable answers, but we should ask the questions.

The Convener: Are we agreed that we should put those questions to FSA Scotland and await a response. We have time before we go back to the lead committee and Parliament.

Members *indicated agreement*.

The Convener: Stewart, will you forward the e-mail to the clerks afterwards?

Mr Maxwell: Yes.

Draft Instruments Subject to Approval

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2006 (draft)

13:09

The Convener: No points arise on the regulations.

Murray Tosh: Shall we ask about consolidation?

The Convener: Yes, we shall ask the Executive about the consolidation of the series of instruments of which the regulations are part.

Criminal Legal Aid (Scotland) (Prescribed Proceedings) Amendment Regulations 2006 (draft)

The Convener: No points arise on the regulations.

Instrument Subject to Annulment

EC Fertilisers (Scotland) Regulations 2006 (SSI 2006/543)

13:10

The Convener: Three questions arise on the regulations. The first is why, in regulation 7(c), the requirements of article 21 of the EC regulation are expressed as alternatives to the requirements of article 6(2)(c) rather than as requirements, both of which must be fulfilled. The second question is a similar point that arises in regulation 8(c) in relation to packaging. The third is about the absence of a transposition note.

A final question would be whether we are content to ask the Executive to provide further justification for the inclusion of the due diligence defence given the absence of such a defence from the English and Welsh regulations.

Euan Robson: All those points should be followed up. There are policy problems with these regulations, and I have raised them with the lead committee. You have now raised further issues.

Annulment might be too strong a measure, but the people responsible for the promulgation—if that is the correct word—of the regulations should be asked to account for all the points that the committee has identified.

Members *indicated agreement*.

Instrument Not Laid Before the Parliament

Management of Offenders etc (Scotland) Act 2005 (Commencement No 3) Order 2006 (SSI 2006/545)

13:11

The Convener: No points arise on the order.

We agreed last week that all our considerations of the draft report of our inquiry into the regulatory framework would be held in private. The final item on today's agenda will therefore be held in private.

13:11

Meeting continued in private until 13:33.

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