SUBORDINATE LEGISLATION COMMITTEE

Tuesday 11 December 2007

Session 3

£5.00

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

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SUBORDINATE LEGISLATION COMMITTEE
15th Meeting 2007, Session 3

CONVENER

*Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

DEPUTY CONVENER

*Gil Paterson (West of Scotland) (SNP)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*Jackson Carlaw (West of Scotland) (Con)
*Helen Eadie (Dunfermline East) (Lab)
*Ian McKee (Lothians) (SNP)
*John Park (Mid Scotland and Fife) (Lab)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Christopher Harvie (Mid Scotland and Fife) (SNP)
Elaine Smith (Coatbridge and Chryston) (Lab)
Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Judith Morrison (Legal Adviser)

THE FOLLOWING GAVE EVIDENCE:

Sylvia Jackson
Iain Jamieson
Murray Tosh

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 11 December 2007

[THE CONVENER *opened the meeting at 14:15*]

Decision on Taking Business in Private

The Convener (Jamie Stone): I welcome everyone to the Subordinate Legislation Committee. We have not received any apologies; I expect that we will see John Park in due course. I ask everyone to turn off any mobiles or BlackBerrys that they have switched on.

We move swiftly to item 1. We are going to take oral evidence today and next week. It is suggested that the committee take stock of that evidence in private at the end of the meetings. Are members therefore content to take in private item 7 on today's agenda and any future discussions of the evidence that we have heard?

Members *indicated agreement*.

Regulatory Framework Inquiry

14:16

The Convener: We come to item 2, whereupon we welcome Murray Tosh, member of the previous Subordinate Legislation Committee; Sylvia Jackson, former convener of the committee; and Iain Jamieson, the adviser to the committee's inquiry in the previous session. We are taking evidence on our predecessor committee's inquiry and seeking to understand the issues so that we can make recommendations to Parliament, which I hope that we will do in the new year. We want to explore the previous committee's thinking on the current system of scrutiny of subordinate legislation so that we can understand the reasons why you—or perhaps I should say we—recommended that it be replaced, and discuss the Scottish statutory instrument procedure, or SSIP, in more detail.

I welcome the witnesses. It is good to see our old friends again. I will kick off with the first question, which might seem a bit cheeky. The previous Executive said in its response to the committee's report that the current system works well; that it is well known; and that although there are eight procedures, they are not all necessary—[*Interruption.*] I am sorry. The Executive said that all the procedures were necessary. Do I have the right specs on? I have this problem—colleagues correct me frequently, as members know.

The Executive also said that the system offers flexibility to deal with all eventualities. What are your views on that? Who would like to go first?

Sylvia Jackson: Hello. It is nice to be back, if only temporarily. When we were developing the report—the former committee was pretty unanimous in its recommendations—some of the big issues were the complexity of the system, the number of procedures and the fact that not all the procedures were used. Although the system seemed complex, on many occasions it basically came down to whether affirmative or negative procedure was being used. I think that Stewart Maxwell MSP, who was also a member of the previous committee, would agree that the biggest issue was getting amendments made. We could see the changes that needed to be made—on technical issues; substantial policy issues do not fall within the committee's remit—but found that they could not be made without the instrument being withdrawn and relaid, which we saw as a waste of time.

Murray Tosh: As the committee will be aware, the procedure for dealing with subordinate legislation in the Scottish Parliament is entirely the Westminster system. It would be remarkable if it

were fit for purpose, because every other aspect of the government of Scotland, by the mere fact of devolution, was clearly regarded as not fit for purpose and requiring to be re-examined and rebuilt more or less from first principles. It always struck me as a fairly depressing commentary on the innate conservatism of the Scottish civil service that it fought to the last drop of blood to retain this scrap of the ancien régime.

Our system of subordinate legislation has been seen as unsatisfactory at Westminster, where the Joint Committee on Statutory Instruments has been created. The House of Lords, in particular, has made a determined attempt to subject subordinate legislation to proper scrutiny. We concluded that that was required in the Scottish Parliament, too.

The simple fact is that if a statutory instrument comes into force after 21 days and it spends 20 days in the Subordinate Legislation Committee, there is not time for the policy committee to give it adequate scrutiny. In the first two sessions, committees complained repeatedly that their workloads did not allow them to squeeze in work on subordinate legislation, but when they had time to consider it, the timescales were inadequate. One of our important recommendations was that there should be parallel scrutiny, so that subject committees could start to consider policy matters right away, without having to wait until the instrument was a day short of being in place.

Even for affirmative instruments, the timescales are not good. We thought that, essentially, the distinction between negative and affirmative procedure was an irrelevance, but that the whole work of the Subordinate Legislation Committee and its dialogue with the Executive had come to be taken up with the issue.

The job of committee members is not easy, as they are dealing with lawyers who—with all respect to the lawyers present—create the impression that the system is a Rolls-Royce machine that works tickety-boo and that we amateurs do not know anything about it. The truth of the matter is that, when members start out, they do not know much about it. However, by our final year we had gathered a degree of experience and confidence. When we brought civil servants here—not the civil servants who are responsible for subordinate legislation, who have a good song to sing, but the bill teams—and asked them what governed their choice of procedure, we found that they were interested in the policy delivery and wording of instruments, but that in many cases they had not given much thought as to whether instruments should be negative or affirmative. At that stage—the stage when legislation was being made—they were pretty flexible and took a great deal from the committee, especially in the last year of the session, when a massive volume of complex legislation was going through the Parliament.

The distinction in principle between negative and affirmative procedures is artificial. It is a glory of the British constitution and belongs in a museum with all the other glories of the British constitution. In the new session, with no secure majorities, the committee should take the opportunity to assert Parliament's right and ability to scrutinise subordinate legislation, where committees think that there is a need for them to do so on either technical or policy grounds.

The Convener: I see that you have lost none of your style, Mr Tosh. Does Iain Jamieson have anything to add on this point?

Iain Jamieson: I endorse what both the previous committee members said. There are two other issues. First, the existing procedures give the impression that they suit all types of circumstances, but they do not, because their means of delivery is by the parent act, which specifies the procedure and is inflexible. Even if an open power is specified, usually there is a choice between only two options, and that choice is made by the Executive, not the Parliament.

The advantage of the proposed new Scottish statutory instrument procedure is that, within the envelope of general procedure, it leaves it to the Parliament—to the lead committee—to determine the appropriate procedure for an instrument. If the instrument is particularly important, the lead committee can recommend that a debate should be held on it. Although it is not dressed up like that, in effect, the debate would be on whether the instrument should be approved. If an instrument is not contentious, the procedure allows for it to be dealt with in a truncated way. The timescale can be reduced, so that the instrument does not have to lie for 40 days.

Secondly, the background paper suggests that we recommended four procedures, but that is not correct—we recommended only two procedures. The general procedure would allow the Parliament to make provision in its standing orders for cases in which it might not be appropriate for the lead committee to consider the policy of an instrument. We were thinking particularly of commencement and consolidation orders. That gives the impression of being a different kind of procedure, but it is not. We recommended a general procedure and an exceptional procedure.

The Convener: Will you expand on the issue of timescales, which have been mentioned? Many of the concerns about the current system centre on a lack of forward planning by the Government and timetabling issues once an instrument has been laid. Could those concerns be resolved by

changes to the current system rather than by adopting an entirely new system? Is there a halfway house?

Sylvia Jackson: Will you explain what you mean? The committee discussed forward planning during the inquiry. I just want clarity on whether you are saying that there should be forward planning without changing the system.

The Convener: Could we tweak the current system rather than adopt an entirely new system?

Sylvia Jackson: Obviously, I hope that parts of the report will be taken up, but whatever happens there must be a bit more forward planning. We were given examples of where forward planning takes place—in the Welsh Assembly, for example. It must be accepted that the Welsh Assembly essentially deals with subordinate legislation, so it can be argued that it has time for forward planning, although it may not have as much time in the future. When the committee conveners came before us, Roseanna Cunningham in particular argued that there must be forward planning. I think that in the report we suggested a period of three months.

Murray Tosh: Things must be easier at the moment, because the flow of statutory instruments is inevitably much reduced at the beginning of a session. However, the existing system could be made to work better if the timetabling issue was resolved by allowing parallel consideration. My recollection is that, in its response to the committee's report, the Executive was reasonably sympathetic to that suggestion. That would be worth doing.

The concern is still that simply planning things a bit better and making the system work a little better procedurally will not necessarily give committees the opportunity to consider in depth instruments that they see as significant. I do not know how many statutory instruments went through the Subordinate Legislation Committee in the previous session—perhaps around 700, although the figure may not be that high—however, a lot certainly went through. When policy committees are in full swing, instruments—sometimes many—will go through those committees every couple of meetings. No one is trying to say that the Parliament and its committees ought to consider every statutory instrument in great detail, but it is not currently possible for committees really to get to grips with instruments and to spend a lot of time considering them, especially under the negative procedure.

I recall one particular example, although several were quoted. Sometimes an instrument that is straightforward in legal, technical terms can involve significant allocations of expenditure. Two or three years ago, the Environment and Rural Development Committee was incensed that it could not scrutinise a budgetary grant for agricultural support for less favoured areas, because it did not have the time to consider the negative instrument that was involved. The cry that came from the committees was that there should be a way to flag up instruments, because every now and again something among those instruments might matter, although most of them are as dry as dust and technical and people are not remotely interested in them—we were not. An issue might matter to a locality, a social group or an economic interest in the country, and a committee may have the time and the will to consider the instrument in detail. That is an important part of scrutiny that we thought did not happen at all. One does not get to that simply by tweaking the existing system.

The Convener: Thank you very much. That was a robust reply.

Ian McKee (Lothians) (SNP): I would like Iain Jamieson to clarify something that he said. He mentioned two procedures. I am still trying to get to grips with things. How would we differentiate between urgent and emergency procedures? How would the system work technically?

14:30

Iain Jamieson: There is no difference in the procedure: both apply to the different kinds of instrument that qualify for exceptional treatment. Basically, exceptional treatment means that an instrument has to be made before it is laid. That has to be done for one reason or another—whether because of a food emergency or other urgent matter or because legislation has to be kept in line with Westminster. The advantage of the general procedure is that all instruments are laid in draft form. I would liken the exceptional procedure to the Parliament's existing negative procedure.

I turn to a matter that Murray Tosh raised. The committee's predecessor committee gave detailed consideration to whether a halfway house could be found. In view of the problems that it identified with the existing procedures, including their lack of effectiveness, the committee could not find a way of doing that. Although it agreed that existing procedures could be tinkered with—for example, by extending 21 days to 28 days—it also agreed that such tinkering simply moved the problem forward. Twenty-eight days is not dissimilar to 21 days; it gives the Parliament no better chance of negativing an instrument. The committee felt that the full 40 days was required.

The Convener: You outlined some of the key benefits of the Scottish statutory instrument procedure. Do you have anything to add at this stage?

Murray Tosh: Only briefly, convener. No member of the Subordinate Legislation Committee should feel badly about taking time to get to grips with how the system works. I was on the committee for four years, but I would not pass myself off as any kind of expert. Subordinate legislation is complex; new issues always arise.

I am not sure whether the point on urgent and emergency issues was entirely clarified. When the committee looked at the matter in the previous session, we found that the emergency procedure should apply in cases such as a foot-and-mouth disease outbreak when an instant response was required, or if a fishing zone closure was urgently required because of amnesic shellfish poisoning. However, if we were simply up against a UK-determined deadline to implement a European directive, we agreed that we would not feel comfortable calling that an emergency, given that the matter would have been in the European system for five years.

Those are examples of the distinction that we made between instruments that come under the emergency procedure and those that are urgent or pressing. Emergencies are emergencies, but there are also other things that you might have to do quite quickly.

The Convener: Very good. Thank you.

Helen Eadie (Dunfermline East) (Lab): Hello everyone. It is nice to see you back—even with the beard, Murray. I did not recognise you when you came into the room.

The Convener: The Subordinate Legislation Committee should stick to the strictly legal aspects of the instruments that are put before us—hirsute or otherwise.

Helen Eadie: I did not make a sizist or circumferentially-challenging remark, convener, but a complimentary one.

Murray Tosh: I hope that beards are not now matters of policy, convener.

Helen Eadie: The SSIP would require that most instruments were laid in draft for up to 40 days. However, at some points of the year, there are fewer than 40 days between recesses. The Government would have to lay a draft instrument before the summer recess for it to come into force in the new year. Is that workable?

Sylvia Jackson: The bunching together of instruments in the 40 days before the recess has always been a problem. We all worked to the deadlines that were set—as one does when faced with an examination—but we could see neither any co-ordination between Government departments nor a forward plan. Forward planning would get over some of the problem; instruments would come forward in a much more regulated manner.

We also need to remember that, under the new system, not every statutory instrument would require 40 days. That point got lost in our report. Some instruments go through quite quickly, with no need for the full 40 days.

Iain Jamieson: There is a small point that I want to pick up. The background briefing makes reference to a period of 40 sitting days, but the relevant period is 40 calendar days, although no account is taken of any time during which the Parliament is in recess for more than four days. If that four-day period were extended to seven days, however, most of the recesses could be included in the 40-day period. The summer recess would not be covered, but there has always been a problem with that. As Sylvia Jackson said, we thought that if there was proper planning before instruments were laid, as there would have to be, the bulge would disappear or could be minimised.

On planning, the inquiry report recommended that an advance programme should be drawn up every three months that should give an indication of the content of instruments. That proposal is flexible. The Executive is just beginning to work up a programme. Once it has had experience of working up a programme, it could reach the target of producing one three months in advance, but at present the period would be more likely to be two months.

There might be sensitivities to do with divulging the content of instruments—the Executive might not want to divulge to the Parliament the areas on which it intends to lay instruments. I do not know why it would not want to do so, given that it might have to go out to external consultation on some instruments. If there were sensitivities, it might be sufficient in certain cases for the Executive simply to give an indication of the power under which the instrument would be made, as that could give the lead committee an indication of how important the instrument was likely to be and therefore allow it to do some advance planning. A period of three months was chosen so that the lead committee could look at its diary, see what instruments it might want to debate and schedule a timetable for that, but the timescale is flexible. The report indicated that such matters should be laid down in standing orders, but an understanding on them could be reached between the Parliament and the Executive until things settle down.

Helen Eadie: Under the SSIP, the Parliament would lose the power to positively affirm important instruments. What is your view on the loss of the affirmative procedure?

Murray Tosh: I do not think that anyone will lose any sleep over that. As a member who has spent eight and a bit years in the Parliament, Helen Eadie will know that important parliamentary debates on affirmative instruments take place at

about 5 to 5. Someone speaks to the motion for about two minutes to score a political point, a minister stands up and slaps them down and the Parliament then votes along party lines. No one would argue seriously that the affirmative role of the whole Parliament plays any significant part in the passing of such instruments.

In committee, affirmative instruments are dealt with through formal resolutions to approve them but, in substance, that is no different from not annulling a negative instrument. The only substantive difference is that the minister might have to spend several hours waiting for a committee's agenda to reach the point at which he must move a motion. We thought that one of the most brainless aspects of the existing system was the requirement on ministers to move motions that no one would oppose and on which there would be no discussion. We thought that it would surely make sense to dispose of that nonsense altogether and to require the presence of a minister only when a committee wanted to have a debate and a vote. Such occasions would be well known about in advance and could readily be predicted. There is no requirement for ministers to kick their heels waiting for non-debates. We thought that that proposal might commend itself to the Executive. Perhaps it might commend itself to ministers—who knows?

Sylvia Jackson: Murray Tosh is right to identify some of the problems with the existing system. However, an issue that I felt would be raised if you move to the new system, and I think that there was a general feeling that it would be an issue, is that the clerks of the various committees would have to be very alive—I am sure that they are—to which instruments are the important ones that need to be brought forward for debate. I am sure that there would not be a problem, but it is important to highlight that a lot more would rest with the committees and, in particular, with the clerks, because instruments would no longer be flagged up as affirmative instruments. The committee must be aware of that issue, but I do not see why it cannot be got over.

Iain Jamieson: There are two additional points. Helen Eadie asked why we propose getting rid of the affirmative procedure and whether that would be getting rid of something of significance. I look at the matter from a different point of view, as I do not think that we are getting rid of the affirmative procedure: we are giving the choice of procedure to the lead committee so that it can decide when it wants to debate an instrument. The report, because of the terms in which we are discussing the issue, states that there would be a motion to not approve the instrument. However, as Murray Tosh has pointed out, it is, in effect, a motion on whether to approve the instrument. One of the changes that the committee might want to make is to bring that out.

Within the envelope of the proposed general procedure, we have left it to the Parliament and the lead committee to decide on the appropriate procedure for an instrument. The proposed procedure is the only one that gives such flexibility to the Parliament. It restores to the Parliament something that is lost by the Executive deciding on the appropriate procedure without reference to the Parliament.

Richard Baker (North East Scotland) (Lab): My question addresses an important issue. The super-affirmative procedure was used in the previous session, for example in relation to the Further and Higher Education (Scotland) Bill. We had a feisty debate on the variation of fees for medical students from England. It was clear when the Executive introduced the bill that the designation of the super-affirmative procedure was important in addressing the concerns about the part of the bill concerned. It was important that, at that stage, the decision was made to use the super-affirmative procedure. How would such issues be affected by the proposed new procedure?

Iain Jamieson: You are right that the super-affirmative procedure is perhaps the most effective means of scrutiny that the existing procedures allow, but the Government confined its use to very few occasions. The blunderbuss of the super-affirmative procedure is not required. Its only advantage is that the Parliament considers and comments on a draft instrument. The Executive must then consider the comments before it lays another draft. If, under the proposed general procedure, the instrument is laid in draft, comments can be made without the need for a statutory procedure that requires the Executive to consult and to consider the comments—the Executive is bound to consider the comments anyway, if the points are raised in a debate.

The super-affirmative procedure is the peak of the existing procedures, but its use is rare. I can think of only about five occasions over the past 10 years when the Executive has used it.

14:45

Sylvia Jackson: I am looking to Iain Jamieson to reinforce that I am correct, but I should point out that the super-affirmative procedure, as we had it, was essentially to do with the policy side. What we are suggesting with the new procedure is more to do with the technical changes that we feel can be made more easily using a draft. Obviously, the lead committee will be able to do various positive things as well, but you should not get confused with the super-affirmative procedure which, from

the point of view of the Subordinate Legislation Committee, also had that policy side.

Essentially, the Subordinate Legislation Committee deals much more with the validity of statutory instruments, for example whether an instrument follows what the bill said it should do, and whether it is clear. Often, it is not terribly clear, which is why we made suggestions for technical changes. There are often mistakes, such as wrong numbering. That is the type of thing that we want to be streamlined, so that an instrument can go straight through without having to be taken away and brought back again. It is important to separate the policy and the technical issues.

Richard Baker: Inevitably, the effect of making a change is that one is affected by the other, which is why I asked the question.

Murray Tosh: It is important to bear it in mind that the question of the super-affirmative procedure arises when you are considering bills. Effectively, it is about this committee or the lead committee trying to judge at what point in future an issue might be appropriate for the super-affirmative procedure. In practice, almost every time this committee recommended the super-affirmative procedure, the Executive refused to agree to it. We did not press any amendments to the bills, and the subject committees rarely attempted to do so. I do not remember them doing it, although I would not say that they never did it because I could not say it categorically. However, almost no super-affirmative procedures were agreed to.

As Iain Jamieson said, the super-affirmative procedure is like a blunderbuss. If we were to try to put it in everywhere, the Executive would resist it. Who wants to do massive consultation on everything? That is not what we were trying to achieve. What we were trying to do was empower committees to consider the instruments that, in the reality of the time in which they were considering them, seemed to them to raise significant policy and political issues. The super-affirmative procedure might be a way to improve on what we have at the moment, but it would not be an ideal way to proceed. It is far better to empower the committees in general and let them be selective about what they want to consider.

Helen Eadie: I go back to your answers a moment ago about the impact on the lead committees. Murray Tosh rightly points out that I have been a member of various committees for eight and a half years. I remember two or three occasions on which we have had some debates. Nora Radcliffe raised subordinate legislation procedures in the chamber, and had a decision reversed. My experience is that there is a real pressure on time for committees to debate issues. That is evidenced by the Public Petitions Committee and the range of petitions that were waiting at various stages to be discussed. Given all the other pressures on committees, is there a danger that the scrutiny of subordinate legislation could be reduced?

Murray Tosh: Absolutely not. We never recommended that committees must consider hundreds and hundreds of instruments in great detail. All we are saying is that committees should have the power to consider anything on which they think evidence requires to be taken, and that they should have the time to do that. Obviously, in deciding whether to do that, committees would have to bear in mind their priorities and workloads.

I am well aware that committees were very pressured in the first two sessions of Parliament, and that there were fewer opportunities to consider subordinate legislation than there might have been. No one who has been on a committee would try to burden the committees with further work—quite the reverse. In our judgment, giving committees the right to consider something that they think is important when they find themselves constrained by time is to give them an important piece of additional armoury.

Sylvia Jackson: Also, towards the end of the Parliament's first eight years, most MSPs noticed that bills were becoming less substantial and more was being put into subordinate legislation. Therefore, subordinate legislation was becoming more important because important aspects were being included in it. That change combats your feeling that there was a danger that scrutiny might reduce, in that committees were thinking, "Gosh! We need to keep an eye on these things."

Iain Jamieson: That point is behind advance planning. Lead committees can plan their workload to fit in consideration of important instruments along with their existing work only if they get information on what instruments are likely to go before them within the next two or three months.

Helen Eadie: I guess that, in some lead committees, we plan up to six or eight months ahead. I take on board what you have said. To some extent, you have answered the next question, but I will let you see whether you want to add anything. What are your views on making greater use of the open procedure under the current system, whereby parent acts specify a range of procedures and allow the Government discretion as to which to adopt?

Murray Tosh: Allowing the Executive to choose the procedure might have marginal advantages for the Executive, but it does not help a committee if it decides that it wants more time to consider something, gather evidence and do a bit of consultation. I think that that is what was wrong

with the open procedure, but Iain Jamieson might remember other points.

Iain Jamieson: No, I think that that was the main one. The open procedure looks attractive because it gives the option of which procedure to adopt for a particular instrument according to its importance, but that is the Government's decision, not the Parliament's. That is the important point: the Government chooses which procedure is appropriate. That brings us back to the fundamental point that the Parliament is delegating its legislative power to the Government. The Parliament should be able to impose its own conditions on the type of procedure and type of scrutiny that it considers appropriate for the way in which a power is exercised, but the Government gets the privilege of being able to so legislate. Apart from under the Westminster model, no other country in Europe allows the Executive to make legislation.

Sylvia Jackson: In another way, the open procedure could be worse than the existing system, because the choice of whether an instrument is affirmative, negative or whatever would depend on when the decision was made and, if there was no forward planning, that would not give committees long to get their act together to consider something that they thought important.

Helen Eadie: That is helpful. It has been suggested that the rules of court and local instruments should continue to be made as SSIs, to provide transparency and give users clarity about their status as law. Why did the report suggest that they should no longer be SSIs? What would the alternative be?

Murray Tosh: We did not think that the rules of court were properly part of the Parliament's work and the response that we had indicated that the legal profession wanted to keep it that way. I am sure that, if the Subordinate Legislation Committee wishes to do some agency proof-reading work for the legal profession, it would be a valuable contribution to make. As I understand it, the rules do not go to lead committees for the policy issues to be addressed, and it seemed to us that they were properly part of the business of the courts rather than the business of the Parliament.

I do not remember there being many local instruments, although I remember a series of parking orders and regulations on the uniforms that parking attendants in varies cities wore. It seemed to us a bit daft that Parliament was required to approve what a traffic warden in Dundee should wear. We thought that it should be possible for people in Dundee City Council to determine that for themselves. From that first principle, we developed the general sense that we did not really want to know about local issues because they were matters for local people.

Sylvia Jackson: Gordon Jackson was a great one for arguing the corner on those instruments.

Iain Jamieson: It is important that rules of court and local instruments are publicised. In his replies, the Lord President made the point that he wants to latch on to the fact that SSIs are published. That would be a way of ensuring publication, as he has no means of publishing them himself.

We thought that we were doing the Lord President a favour by saying that rules of court should not be subject to the general procedure, which would mean laying them in draft. There might well be sensitivities about that, but there might be changes in the offing anyhow once the new judiciary arrangements are implemented.

The Lord President said that he welcomed the scrutiny that the Parliament's legal advisers and the SLC gave his rules of court because it picked up procedural points. That being the case, by all means incorporate court orders into the general procedure and allow them to be treated like commencement orders—laid in draft and subject to the technical scrutiny of the SLC but not to policy scrutiny—apart from those that the Lord President might be given power to deal with in the future. If we are talking about procedural roles, that is fine.

Local instruments are in a different category. They are rarely seen—in fact, I do not think that they are normally seen at all by the Subordinate Legislation Committee. That brings me to another point. The existing procedure could be reduced to three categories of instrument: negative, affirmative and not laid. However, not laid does not really make sense because instruments that are not laid, such as commencement orders, are seen and commented on by the committee. So, that third category does not make any sense.

Ian McKee: My question is on what has gone before. This might sound silly; I am still trying to get to grips with the issue. Under the new procedures that you propose, if an SSI is considered by the committee is it still a question of accepting it or annulling it, or are you suggesting that when the clerk has identified that there could be a point of substance at issue, the committee can amend it?

Sylvia Jackson: Under the suggested new procedure, the SSI would come to the committee in draft form to allow the committee to make technical changes. There would then be a special procedure—an agreement, as I remember, between the convener and the minister or whoever, or a protocol that could be developed—so that it would become a full instrument.

Iain Jamieson: We envisage that an instrument would come before the Parliament in draft form. If neither the Subordinate Legislation Committee nor

the lead committee had any comment to make on it, the instrument would not have to wait for 40 days before commencement; there would be a protocol that would enable the Executive to make the instrument and bring it into effect immediately. If, however, the SLC had comments on it, for example regarding making technical changes to which the Executive agreed—remember, it is always the Executive's instrument—a fresh draft could be made, but it would not lose its place in the queue; it would still run. If the lead committee did not have any comments, the instrument could still be made within the 40 days.

15:00

If the errors in the instrument were purely printing errors, that would be a separate matter that would apply not to draft instruments, but to the ones that are covered by the exceptional procedure, because they are already made. Just as Her Majesty's Stationery Office will allow the Executive some leeway in correcting printing errors in an instrument, it was thought that the SLC could suggest to the Executive changes of a printing nature. If an instrument was in draft form, it could be altered quite easily.

Ian McKee: So you are talking only about technical changes? It would not be because you thought that a fine should be £100 rather than £1,000—

Iain Jamieson: No. It is technical.

Murray Tosh: Those are matters for the policy committee to raise with the Executive. This committee's concern was—members will have come across this—that reports are received on instruments that identify flaws. There will be some that can be resolved and others to which the Executive will respond by saying, "Yes, we accept the committee's point, but we are not going to change it—it is fit for purpose." We did not see any rhyme or reason in that; we thought that there should be a way, built into the system, to comb out right at the outset technical flaws that we, and the Executive, could see—typographical errors and references to the wrong section in a parent act, which the courts would have to interpret if anyone challenged them. That is why it is quite important to grasp that we were saying that we would draw those things to the Executive's attention and, by agreement, amend them. We never envisaged that we would set this committee on a head-to-head with the Executive on any policy matter—it would not be competent for that to happen.

Ian McKee: I thought that some of the examples you gave made it sound as if that was the case, but maybe I have misunderstood.

Murray Tosh: No. The policy committees might have policy differences with the Executive and, therefore, wish not to approve an instrument, but that can happen at the moment. The Subordinate Legislation Committee does not have the power to move to annul an instrument or to refuse to approve it; members simply comment on it. It is the lead policy committee that has that power. The expanded role that we envisage for this committee is, by agreement with the Executive, to comb out the deficiencies and improve the quality of the legislation—for which, of course, the entire Parliament is ultimately responsible.

The Convener: Before we return to substantive questions, Jackson Carlaw will ask a quick supplementary question on that particular point.

Jackson Carlaw (West of Scotland) (Con): In the proposal for SSIP—the way that you want to go forward—it looks as if the rules of court issue is an anomaly that you have had to deal with. The Lord President and the Law Society of Scotland have given evidence, and you are taking it slightly casually, in the sense of not giving much credence to the status that they think is conferred by the fact that rules of court have come through the Subordinate Legislation Committee and the Parliament. They do not—obviously—want it to be subject to amendment, which would be the case under SSIP. To what extent are you making your recommendation because it is an anomaly that you need to get out of the way as it is an inconvenience, as opposed to because you genuinely think that their concerns are not material?

Murray Tosh: We took the view that it is an anomaly and that they should be responsible for it themselves. When we had the response from the Lord President that they wished to continue within the system, we did not feel very strongly about that. Although they did not convey just that force in the rationale that was advanced for keeping it within the system, we felt that, if it was their firm preference to keep it with this committee—keeping it within the system—that view should be accommodated. It was not all that obvious that it was work that belonged with the committee or with Parliament.

Jackson Carlaw: If the rules of court procedure did stay with the Parliament, how would it fit in given the broader application of the proposed SSIP?

Murray Tosh: Iain Jamieson touched on that earlier.

Iain Jamieson: It would fit in in the same way as commencement orders would. The rules of court would be laid in draft and scrutinised by the Subordinate Legislation Committee. If the committee picks up errors in the way in which the rules of court are drafted, it reports those errors to the Lord President and, if he approves the errors,

he can change them. The committee does not make amendments to instruments; it is always the maker of the instrument who amends it.

The Lord President can adjust the rules of court or ignore the suggested changes; it does not matter, because the rules of court will not go before a lead committee and there is no policy consideration of them, as there is no policy consideration of commencement orders or of consolidation instruments.

I want to go back to a point that Murray Tosh made. We suggested that all the technical points should be dealt with by means of amendments because we wanted to free the committee from being bogged down in dealing with minor drafting errors. For the first eight years of the Scottish Parliament, the committee seemed to be concerned with a list of bad drafting points in SSIs. We thought that if there was a procedure whereby such points could be identified, the convener or the clerk of the committee could write to the Executive about them. The points raised would be endorsed by the committee, of course, but they would not have to be spelled out as they are at present.

The committee could then focus on the big issues and technical scrutiny of instruments, such as the extent of sub-delegation. It could do a report about that rather than one that is cluttered with minutiae. It is almost as if it was in the Executive's interest to make mistakes in instruments to keep the Subordinate Legislation Committee fed with small points.

The Convener: Well, well.

Sylvia Jackson: Although some of the technical issues might be minor, they might make things difficult for the user of the instrument. That was a significant issue. An instrument would often go through, even if it had bigger errors, because the error would not have altered how the Executive thought it would be interpreted. The Executive would accept such an instrument even if it was not written in the best way, and we would wait until the instrument could be looked at again and reworked.

The proposed new procedure would get over that and instruments would be as clear as possible.

The Convener: Thank you. We must get back on schedule.

Ian McKee: You have probably answered this question already, but do you have any comments to make about your report recommending that the Parliament should be provided with a three-month forward programme of subordinate legislation? The previous Executive indicated that it would have severe problems with that, on the grounds of resources, inability to know what will be laid three months in advance, potential for inaccuracy, and the extended consultation period that would be required. Do you have any further comments on that?

Iain Jamieson: You are right—the report made the important recommendation that advance planning should take place. I have said that there might be leeway over the three-month period and over the content. We said that it was important for the lead committee to know the content so that it could make a sensible judgment about how important an instrument would be but, as I have said, the Executive might find that sensitivities arose about divulging too much information. I query that, but you will have to work that out with the Executive.

The whole point of advance planning is that, to improve the quality of instruments, it is necessary that the Executive knows in advance what instruments are coming up in the next two or three months. The Executive must know, so why does it not share the information? What is the problem about sharing it? Perhaps the Executive thinks that if it shares its programme, the Parliament will hold it to that, but the programme would be only an indication of what it had in mind. It could add to that list later, as and when issues arose, but such a programme would cover most of the instruments that the Executive had in mind.

Ian McKee: The Government has promised to develop a tracker system that would provide notice less formally. Is that what you were thinking of?

Iain Jamieson: Yes, but I do not know what the tracker system will contain. I do not know whether it will contain information about the powers under which an instrument will be made and the likely content of instruments or whether it will say just that 10 instruments that deal with health are coming up, which would be no use. The Health and Sport Committee must know the nature of the instruments, so that it can plan its workload.

Ian McKee: The committee needs to see the beef.

Iain Jamieson: Exactly.

Richard Baker: As we are talking about needing to see the beef, the Rural Affairs and Environment Committee, of which I was a member for a few months, dealt with a huge amount of regulation on the common agricultural policy, for example, that originated with the European Commission. The point has been made that on the timetabling for such regulation, of which there is a lot, the Executive is at the Commission's mercy. Could that be an impediment to having an effective forward programme?

Murray Tosh: I do not think that European legislation is a problem, given the time that it takes

to be shaped and implemented. Nothing comes out of a clear blue sky from Europe, unless it is primarily the Westminster Government's responsibility and—as has sometimes happened—that Government has not remembered to involve the Scottish Executive in delivery. Occasionally, something appears at relatively short notice from Westminster and a Scottish version is required to be introduced. That is what was referred to as a non-emergency but urgent case in which a common deadline must be met. In general, the stuff that comes through Westminster and, indeed, most instruments require a massive amount of work. The Executive's principal work is to produce legislation and implement the law and we were not convinced that a major difficulty existed.

The situation is a bit like my experience of being on the Parliamentary Bureau. We were given the plenary business for the next two weeks, but if we asked the Minister for Parliamentary Business what was likely to happen on a Wednesday afternoon five or six weeks down the road, she always knew. That was subject to change, of course, but the Executive could negotiate days for Opposition business and knew roughly when bills would be debated in the chamber. The Executive had that all mapped out, but it did not want to give too much information out because—understandably—it did not want to be accused of changing the timetable too often.

That is a bit like the subordinate legislation position. Executive officials know what work is on their desks. They know when they must finish it and when it will go to ministers for decisions and clearance. Ministers receive documents in their boxes and must return them by a specific time. Broadly, the Executive knows the forward work pattern—it just does not want to be nailed down to that. It is important for both sides to agree how that system will work sensibly without regarding any of that as a great point of honour. If we could achieve that, the proposal would work.

15:15

Sylvia Jackson: There were certainly many breaches of the timescale on European directives. Murray Tosh was right to say that much of that was to do with when instruments were received from Westminster—or so we were told—or with liaison between the two Governments not being as good as it could have been. The problem was more to do with that than with any other particular issue—and it could be tidied up.

Iain Jamieson: Yes. Westminster, not the Commission, was the problem. I do not know what happens now, but the Executive often used to wait to see how Westminster legislation would be drafted before producing its own draft. That makes sense in many ways, because we want a common approach to conditions in environmental legislation, for example. Such instruments would fall into the urgent category if they were up against the deadline.

Ian McKee: If for one reason or another the Government was unable to provide a forward programme, there would be difficulties for lead committees in deciding which instruments to debate.

Iain Jamieson: Yes, that is exactly right.

Ian McKee: If there was no forward programme the proposed new SSI procedure would not work.

Murray Tosh: That is true, but if the Government could not programme its work the existing system would not work, either. The Government programmes its work.

Iain Jamieson: It programmes its work but it does not share the information. The point is to force it to share information.

The Convener: We live in changed times.

Richard Baker: Murray Tosh referred to the proposal for parallel consideration of instruments by the Subordinate Legislation Committee and the lead committee and to the recommendation that the Subordinate Legislation Committee be allowed to consider the instrument once before the lead committee does so, so that serious concerns can be expressed. What do you think about the proposal?

Sylvia Jackson: The purpose of the parallel procedure is to allow more time for the consideration of instruments, by having the Subordinate Legislation Committee consider an instrument at the same time as the lead committee does. However, I think that we were unanimous in saying that it is important that lead committees should wait until the Subordinate Legislation Committee has had a chance to consider an instrument once, because there might be a big issue to do with validity—for example, if an instrument did not follow the parent act as it should do. Big issues often need to be raised with the Executive and we thought that it was important that the Subordinate Legislation Committee should still be able to flag up such issues to the lead committee.

Richard Baker: You said that you did not see tweaking the current system as a panacea. However, the previous Executive suggested that the period before which a negative instrument comes into force—currently 21 days after the instrument was laid—could be increased to 28 days. Would such a change to the current system address your concerns, by giving the Subordinate Legislation Committee more opportunity to report on an instrument before it came into force?

Murray Tosh: To give the committee more time would be an improvement, especially if parallel consideration was also allowed, which would mean that the policy committee had most of the 28-day period to consider an instrument. Currently lead committees might have only one of the 21 days in which to consider an instrument, if we assume that the Subordinate Legislation Committee refers the instrument on day 20. If there is no synchronisation between committee meetings, that might make the period longer than 20 days, in which case the instrument would come into force before the lead committee could consider it.

However, we thought that a 28-day period could still cause difficulties. Given that currently some instruments operate within a 40-day period and some within the 21-day rule, why not have all instruments operate within an envelope of 40 days and allow committees to select instruments that they want to take time to consider? Such an approach would enable the vast majority of instruments to be considered in something like 21 days—perhaps even faster—while giving committees a little extra time. We thought that a 40-day period, which would match the current approach to instruments that are subject to the affirmative resolution procedure, would allow a sensible approach to matters that a policy committee thought were politically significant and merited the allocation of precious time.

Iain Jamieson: Extending the period from 21 days to 28 days is a very good example of how tinkering with the existing procedures will not do. The underlying problem with the 21-day rule is that the instrument will come into effect before the Parliament has had an opportunity to disapprove it. Extending the period by seven days might allow the lead committee to recommend to the Parliament that it should agree to an appropriate motion, but it does not allow the Parliament time to deal with that. By the time the instrument comes to the chamber, it will already have come into effect.

Members are faced with a problem. The Subordinate Legislation Committee will have tinkered around and allowed the lead committee to make a recommendation within the 21-day period, but the Parliament will not have been given enough time. If, for instance, the instrument is one that appoints somebody to a post or abolishes a health board, how can the Parliament vote not to approve the instrument—saying that it should be annulled—if the appointment has already been made or the body has already gone? That does not make sense. That is the whole problem with the existing procedures. They are totally ineffective.

Richard Baker: I have been in that situation: a committee was asked to consider an instrument that had already come into effect. I take it that, in your view, the general SSIP could not operate with a laying timescale of 28 days, rather than 40?

Murray Tosh: The reason that has just been given is pretty conclusive on that point. That longer period would give the policy committee more scope. We have operated in a culture in which, once the committee has approved an instrument, that is it. I do not think that Parliament has ever voted an instrument down. That has not been how the system has worked. However, even in the observance of the formalities, it seems proper that legislation that requires parliamentary approval should go through the actual process of approval before it comes into effect. Otherwise, is the Parliament not a bit of a joke?

Jackson Carlaw: Ian McKee's inadvertent enthusiasm to get answers to questions about making amendments has covered the ground of the two questions that I was about to ask.

The Convener: I would say so—along with the robust and enthusiastic answers of our panel.

Ian McKee: Sorry.

Jackson Carlaw: It is all right. My scone has been stolen and eaten, but I am quite happy.

The Convener: There is nothing to which this new Government will not stoop. John Park has the next three questions.

John Park (Mid Scotland and Fife) (Lab): I think that they are still on fertile ground, but we will see.

What was the previous committee's views on the frequent breaching of the 21-day rule by the Executive?

Murray Tosh: It is difficult to give a general answer. Often, there was a specific reason, which, when it was shared with us, made sense. If it was an emergency, it was an emergency. If it was to do with a mismatch between Westminster and the Scottish Executive, although we could never quite put our finger on who was responsible, we could understand the situation. It will presumably work much better in the future, given that two Scotsmen are in charge of the respective Governments. [*Laughter.*]

In cases in which there was no explanation, but a fulsome apology was given, we tended to accept it. Sometimes, however, things just happened without a convincing explanation. It was just poor management. I am not sure whether Iain Jamieson can impose any discipline on that answer, but it seemed that sometimes there were good reasons and sometimes there were not.

Iain Jamieson: I agree with that. We hoped that, with advance planning, the Executive would know when instruments had to be produced, which

would reduce the number of times when it breached the 21-day rule—even under the existing procedures.

Sylvia Jackson: We recommended in our report that an Executive note should accompany an instrument under the emergency procedure, that the committee would consider the reason why an instrument was made in such a way, and that a report could be sent to the Parliament if the committee decided that the reason was not good enough. As Murray Tosh said, in our time on the committee we were sometimes given good reasons, but sometimes we were not—largely because of the European issue that Richard Baker raised.

John Park: Under the proposed procedure, there is the option for an urgent procedure. How would an instrument be defined as urgent, and what was the previous committee's view of what should happen if the Parliament disagrees with the Government's designation of an instrument as urgent?

Murray Tosh: I will let Iain Jamieson deal with the question about designation, but if the Parliament disagreed with the assessment that an instrument was urgent, that would be a political matter that would be subject to an appropriate level of debate through the normal channels. In a Parliament with a minority Government, you might find that such things happen.

However, when the Executive called something an emergency, it generally seemed to be an emergency. I do not think that there was an issue when foot-and-mouth disease broke out and the Executive had to make arrangements for the disposal of carcases and the control of the disease.

I imagine that any problems will be resolved largely by common sense, but there could be political differences. For example, have you had amnesic shellfish poisoning orders this session?

Members: No.

Murray Tosh: Then you are indeed fortunate—blessed, I might say.

There are issues that involve the kicking of political footballs. If such an issue arises, the Parliament has a vote, and those who win win and those who lose put out press releases. I do not think that anything substantive changes. Iain Jamieson might be better able to answer the question of how an instrument is designated as an urgent or emergency instrument.

Iain Jamieson: The question of emergency instruments is easy enough. We indicated in the report that such designation should be identified in the parent act. When food legislation goes through the Parliament and there is obviously a need for quick procedure to be adopted, for example, the parent act could say that instruments under it could be emergency ones. Those would be the only cases of instruments being designated as emergency instruments.

Urgent cases, by definition, cannot be identified in advance. The reason why a particular instrument was urgent could depend on myriad circumstances within the Government. I imagine that it would not be picked up in advance planning. If something was picked up in advance planning, it would follow another procedure. An urgent instrument would deal with something that cropped up quickly.

A good example is the implementation of EC directives. With advance planning, the Government could anticipate that some regulations would have to come into effect within three months, but if there was a slip-up, with Westminster taking longer to prepare its instrument and the Government wanting to keep in line with the Westminster legislation, the Government would have no alternative but to introduce an instrument that was already made. In that case, it would have to lay a statement of reasons before the Subordinate Legislation Committee as to why the instrument was urgent. The committee's job would be to scrutinise that in the same way as it would scrutinise instruments under the 21-day rule. Executive officials could be questioned about that but, as Murray Tosh said, it is ultimately a political matter.

John Park: The new procedure would have increased timescales. Do you think that that would tempt the Government to use the urgent procedure more frequently? Do you have any views on what sanctions could be brought against the Government if that was to happen?

15:30

Murray Tosh: Ultimately, the sanction against the Government would be a negative vote in Parliament if Parliament felt that the Government had pulled a fast one. Although that would be difficult, the Government cannot argue that new regulations on national health service pensions, for example, are urgent. With all due respect to those who are regulated by regulation, most regulations are pretty routine provisions that come from the parent act. When the parent act is passed, we know that 25 different sets of regulations will come through the system. The Government cannot say that it has suddenly rewritten everyone's pension rules so the matter is urgent. By definition, urgent matters will be issues on which the Government can point to something extraneous or external. For example, if the Government has just realised that the deadline for implementing a directive is 21 January and it is

now 17 December—I hope that that is more than 21 days—the matter could be considered urgent. Those things will be self-evident.

If we were to go back through the record of the previous parliamentary session, we would find that, by and large, although we gave the occasional verbal rap over the knuckles for what we thought was poor practice, most of the time we received an explanation that we could understand. Any degree of mystery that existed was in the relationships with Westminster and the United Kingdom Government because those were bound by protocols, which may or may not prove robust enough in the new political regime. There may be more transparency about some of those mismatches in future, but they will be the stuff of politics rather than of legislation.

Sylvia Jackson: To be fair, the presence of an Executive note in the proposed emergency procedure and the fact that the Subordinate Legislation Committee could report to Parliament that a good reason had not been provided would provide quite a safeguard.

Iain Jamieson: Also, as I mentioned before, if the Subordinate Legislation Committee is given more time to consider issues properly, it could produce a special report on why urgent instruments come before it—

John Park: The issue is about tightening up the procedures so that there is more transparency earlier on in the process.

Iain Jamieson: Exactly.

The Convener: Earlier on, Jackson Carlaw moaned the loss of his scone. As convener, I had understood that I would be afforded two scones but your full answers have taken away my second scone.

Murray Tosh: Would that be the scone of Stone?

Helen Eadie: We could have mince pies instead of scones.

The Convener: Do members have any final questions that they would like to ask our guests?

Ian McKee: Again, I apologise.

As far as I could gather, the earlier answer on the power to make amendments applied to the work of this committee. However, if the SSIP recommendations were adopted, they would apply to lead committees as well. For the sake of my education, will you clarify what the outcome would be if a lead committee decided that a matter was important enough to warrant debate? If the lead committee did not conclude that the instrument was a jolly good thing and should be passed, would the alternative be that it should present the matter to the rest of the Parliament for further debate? If lead committees are unable to amend instruments, it remains a case of either all or nothing.

Murray Tosh: Ultimately, that will be the case in the vote. We considered carefully whether lead committees should be allowed the right to amend statutory instruments, but we thought that that would fly in the face of the principle of subordinate legislation, which is that the Parliament has already delegated the policy issue to the minister. However, in our opinion, simply saying that ministers should decide the detail is not enough. Our committee and the committees from which we took evidence felt that there had to be an opportunity for lead committees to consider provisions that raised significant policy issues.

I go back to my earlier example, which concerned an instrument on the allocation of, I think, £60 million—it might have been £30 million but it was a reasonably tidy sum of money—for agricultural support through the less favoured areas support scheme. The lead committee on that instrument had wanted to get a briefing on it in advance, talk to some of the interested parties who would bid for and receive the money, interview the minister, ask about the ministerial decisions—why certain criteria and not others were used and why money was given to this category or that area—and basically scrutinise what the minister had done under the powers that were delegated to him. Because it was a negative instrument, it became a fact within 21 days, so the policy committee had no power to do what it wanted and felt that it had not been able to do its job in an area that it was interested to scrutinise.

Scrutiny is not only about voting; it is about the questions that members ask, the evidence that they take and the debate that they foster. It may lead ultimately to a committee deciding that it does not like how the Executive has allocated money and proposing an alternative allocation, even though the money has been allocated already. In such a case, the committee would lodge a motion to annul the instrument. If the motion were agreed to, it would lead to a debate in the Parliament. However, that never happens. I think that the last such decision was taken by the Westminster Parliament in 1967. Negative instruments are not annulled; because of the way that they work, they simply come into effect. The committee in the case that I mentioned could not give the policy area the attention that it wished to.

That is why we have proposed a longer time—if committees want it—for them to pursue issues that they want to consider. That provision is important for lead committees—policy committees—because it tells them that they can clear the technical, humdrum, routine stuff away as quickly as they want. They do not have to have a debate, hear

from the minister or have a formal motion; they can clear the decks. However, if the subordinate legislation that comes over their desks now and again involves significant issues that they would like time to consider, we would like them to have three months' notice of it, 40 days to take evidence and the opportunity to call the minister before them. If the minister deserves a hard time, they can give him one and, if they want to force a vote in the Parliament, there are mechanisms that allow that.

Ian McKee: As I understand it, the only vote that we can have in the Parliament is to annul an instrument. Is that not the case?

Murray Tosh: No, the annulment vote takes place in the committee. I assume that, if a committee agreed a motion to annul, it would be subject to being overthrown in the Parliament.

Ian McKee: If the committee voted that there should be some fairly substantive changes in an instrument—

Murray Tosh: No, the committee cannot do that. The committee can say that it does not approve the instrument. It is a matter of great regret that, at no point in our eight years have we—and now you—ever had the confidence to do that. There have been statutory instruments of which the Parliament has disapproved, such as the order that set the boundaries for the Cairngorms national park. There is clear evidence that a majority of members wished a different area to be designated. We can argue about the rights and wrongs of that—that is not the issue today—but it was a great pity that the Parliament did not throw that order out because, as a consequence, the Government would have been required to introduce another one that reflected the view of the majority of the Parliament's members and the people from whom evidence was taken. From recollection, I think that that was an affirmative order, which required a positive vote of the Parliament.

That is what happens at the moment and is what would continue to happen. The only vote that can be forced is one to disapprove an instrument. It would be fascinating to see what would happen if the Parliament so voted. The motion could probably be qualified to say in what respect the instrument was found to be unsatisfactory, but the Parliament would not be able to amend the instrument. The Parliament would be saying that it disagreed with the Government's exercise of its delegated powers and telling it to delegate them a little bit better. I have no idea what instrument that should be done on, but the mere exercise of the power would be a significant demonstration of parliamentary authority. It would command enormous Executive respect, because the Executive would not want it to happen twice.

Ian McKee: Is that not what we can do with annulment now, though?

Murray Tosh: Yes, but nobody has had the bottle to do it since 1967, which was the last case. That is what I am saying. It beggars belief that, in a democratic system of devolved legislation, Parliament has not seen fit to reject anything that any minister anywhere—here or at Westminster—had done for 40 years, although people moan about subordinate legislation. There must have been some times when ministers got it wrong or Parliament disagreed with them, but our culture is to say, "It is delegated to the minister; let the minister do it."

That is not in our report, incidentally. This is me talking for myself about the politics of the matter.

Ian McKee: But how will changing legislation give people bottle if they do not have it to begin with?

Murray Tosh: Indeed. It might well be that if the new SSIP is introduced people might still not be willing to challenge the Executive. However, it should be challenged, and there are many ways of doing so. As I said at the beginning, it is not just about taking the issue to a vote, but about forcing the debate, questioning, interviewing, gathering evidence and having the ability, for example, to say to the minister, "But last week we spoke on the record to the NFUS, which disagrees with your criteria. How do you defend your allocations?" Such scrutiny makes ministers defend their territory. Of course, at the end of the process, the decision might not be challenged, but if the minister does not give a good and convincing explanation for how he or she has exercised his or her responsibilities, the committee should defeat him or her in a vote. That is how things ought to work. Ministers should never take Parliament for granted.

Sylvia Jackson: As I was trying to say earlier, the new system would place a lot more responsibility on the committees. Although a three-month planning schedule would make things easier, the lead committees would still have to take a hard look at what instruments were coming up. However, the main point is that committees would have more time to consider instruments. Moreover, if committees have more responsibility placed on them, they will feel more of an onus and have more interest in pursuing some of these matters.

The Convener: Thank you. It is evident that our witnesses have seen the light, colleagues.

After next week's evidence session with the Minister for Parliamentary Business, we will take stock and reflect on what we have heard. As I said at the outset, we hope to reach some conclusions early in 2008.

I thank our witnesses for taking the time and trouble to give us very full and informative evidence. On behalf of the committee, I wish you all a safe journey home and the compliments of the season.

Delegated Powers Scrutiny

Public Health etc (Scotland) Bill: Stage 1

15:42

The Convener: Without further ado, we move to item 3. As I do every week, I draw members' attention to the summary of recommendations.

After considering this bill two weeks ago, we wrote to the Scottish Government on a number of issues relating mainly to the use of negative procedure. We sought further justification for the breadth of the powers sought, in particular the ability to amend primary legislation through powers that are subject only to negative procedure, and we now need to decide whether sufficient justification has been provided.

One option is to reserve our position on the acceptability of the Scottish Government's proposals and to recommend to the lead committee that it press the Government for additional justification in respect of some of the issues that we will discuss shortly. Another option is to propose that, where we accept that a broad power is required, such powers are made subject to the additional parliamentary scrutiny afforded by affirmative procedure.

On section 12, "Lists of notifiable diseases and notifiable organisms", are members content with the Scottish Government's response? In light of the additional information provided, are we prepared to accept the delegation of an unfettered power to remove entries from the list in schedule 1, subject to negative procedure?

Helen Eadie: I would like to reserve our position and, indeed, feel it appropriate that we press the Government for additional justification with regard to the matters that have been highlighted. After we have received that information, we can consider whether the affirmative procedure should be used.

The Convener: Is that an appropriate point to make to the lead committee?

Helen Eadie: Can we not press the Government on this matter?

The Convener: I seek advice from the clerk on whether we can do that within the timescale.

Gillian Baxendine (Clerk): Yes. I believe that there will still be time if we ask the Government to respond before our next meeting.

Helen Eadie: That would be satisfactory.

The Convener: Are members agreed?

Members *indicated agreement*.

15:45

The Convener: On the Scottish Government's response on the meaning of

"any other clinically significant pathogen found in blood",

which is an issue that Ian McKee raised, are members content to draw the lead committee's attention to the potential ambiguity in the operation of the provision, for further examination?

Members *indicated agreement*.

Ian McKee: The issue is important. We should strongly draw the lead committee's attention to the provision, which I think is flawed. It gives the clinician the responsibility for deciding what something means, as opposed to the legislator.

The Convener: We are grateful for your professional knowledge.

On section 19, "Notifiable diseases etc: further provision", are we satisfied with the Scottish Government's response or should we press for the scope of the provision to be narrowed, or for exercise of the power that would have the effect of amending primary legislation—including the bill—to be subject to the affirmative procedure?

Helen Eadie: Our legal advice suggests that it is important that we press for the provision's scope to be narrowed.

The Convener: Do members agree?

Members *indicated agreement*.

The Convener: On section 25, on supplementary investigative powers, are members satisfied with the Scottish Government's response or should we press for exercise of the power that has the effect of amending primary legislation—including the bill—to be subject to the affirmative procedure? Can I take it that we feel the same way as we did about the power in section 19?

Helen Eadie: Yes. Exercise of the power should be subject to the affirmative procedure.

The Convener: Do members agree?

Members *indicated agreement*.

The Convener: On section 56, "Compensation for voluntary compliance with request", and section 57, "Compensation for persons subject to certain orders", are members satisfied with the Scottish Government's response? Do members agree to let the matter rest, on the basis that any use of the power for matters of substance would not be within vires?

Members *indicated agreement*.

The Convener: On section 89, "International Health Regulations", are members content to draw the lead committee's attention to the broadly framed power, which is subject to the affirmative procedure? The committee might also want to draw the committee's attention to the Scottish Government's concession that it will lodge amendments at stage 2.

Members *indicated agreement*.

The Convener: Are we content to put the Scottish Government on notice that if it does not lodge such amendments it should give further consideration to limiting the scope of the power as drafted, given that the affirmative procedure offers no opportunity to consider amendments? The procedure offers only the opportunity to approve or reject draft regulations.

Members *indicated agreement*.

The Convener: We come to my favourite section: section 91, "Insect nuisance". Do members accept in principle that it is for ministers to determine whether the scope of the nuisance may be narrowed through exception of premises? If so, do members agree that it would be appropriate for the power to be subject to the negative procedure?

Members *indicated agreement*.

The Convener: On section 94, "Power to make further provision regarding statutory nuisances", do members agree that the delegation of the power is acceptable in principle, subject to the addition of a requirement to consult local authorities prior to bringing forward draft legislation for approval by the Parliament? We read the legal brief.

Helen Eadie: We should encourage the Scottish Government to amend the provision. Consultation with local authorities on such issues is important.

The Convener: Do members agree?

Members *indicated agreement*.

The Convener: On section 95, "Enforcement of statutory nuisances: fixed penalty notice", are members content to recommend to the lead committee that the exercise of the power in proposed new section 80ZA(11)(e) of the Environmental Protection Act 1990 be subject to the affirmative procedure, following the model in the Clean Neighbourhoods and Environment Act 2005?

Members *indicated agreement*.

The Convener: On section 98, "Disclosure of information", are we content with the power, given that there appear to be adequate safeguards in the bill? That was an important point for us.

Helen Eadie: My concern is that, as our legal advisers commented, remedies would be restricted to a motion to annul or judicial review. Would that be sufficient? What protection or

reassurance would such an approach give to individuals? Should we ask further questions on that basis?

The Convener: Unless the clerk can advise us otherwise, I think that it would be appropriate to add that small point to our list of questions for next week.

Gillian Baxendine: What further question do we want to ask?

Helen Eadie: I want to know whether the option of lodging a motion to annul or seeking a judicial review would give sufficient protection or reassurance if the minister modified the definitions that are mentioned in our legal brief.

Judith Morrison (Legal Adviser): We could perhaps ask the Executive whether it might lodge further amendments to ensure that those concerns are addressed on the face of the bill. That might be the way forward.

Helen Eadie: Yes, that would be helpful.

The Convener: All right. We are agreed on that.

That concludes agenda item 3. It is only right to thank members, our clerks and the legal team for the work that they have put in. That was our first bill, although I dare say that we will see it again. As the bill is very wide, we have all had a bit of a steep learning curve in understanding the difference between negative and affirmative procedures. Thank you very much indeed.

Scottish Government Response

Foot-and-Mouth Disease (Export and Movement Restrictions) (Scotland) Regulations 2007 (SSI 2007/518)

15:51

The Convener: We move to agenda item 4. From now on, I will refer to the summary of recommendations, paper SL/S3/07/15/2.

Are members content to draw the regulations to the attention of the lead committee and Parliament on the grounds outlined in the summary of recommendations?

Helen Eadie: I tried to ask this question earlier, but we ran out of time. We are drawing attention to a variety of errors—I do not know how minor they are as I am new to the committee—but do we have timescales within which such errors will be corrected? It is all very well for the Government to say that it undertakes to correct errors at the earliest opportunity, but the question for us is how soon that will happen.

The Convener: I imagine that they will be corrected fairly speedily.

Judith Morrison: In this particular case, a new foot-and-mouth instrument will be considered by the committee next week. However, that does not address your general point.

Helen Eadie: The general issue has arisen in many of the instruments that we have considered recently. We should ensure that such errors are attended to within a reasonable timescale.

The Convener: By force of timing, this issue will be live for some time yet.

Ian McKee: As was mentioned earlier, such matters should be tracked so that we receive a report at some time on whether the undertakings have been put into effect. I think that we have agreed to that.

The Convener: Indeed we have.

Instruments Subject to Annulment

Water Environment (Drinking Water Protected Areas) (Scotland) Order 2007 (SSI 2007/529)

15:52

The Convener: We move to agenda item 5. On the first instrument, are members content to ask the Scottish Government the two questions contained in the summary of recommendations?

Members *indicated agreement*.

Seeds (Fees) (Scotland) Regulations 2007 (SSI 2007/536)

The Convener: I was about to move on to the instrument on fishery products, and almost missed the one on seeds. The Greens will take issue with me. I am so sorry. Seeds are very important to us all.

Are members content that we should ask the Scottish Government whether the reference to "regulation 4(1)" in the provision relating to interpretation—paragraph 1 of schedule 1 to the regulations—should be to regulation 3(1), as there is no list in regulation 4(1) and, if so, to explain what it considers to be the effect of the incorrect reference?

Members *indicated agreement*.

The Convener: We shall also raise minor points informally with the Scottish Government.

Fishery Products (Official Controls Charges) (Scotland) Regulations 2007 (SSI 2007/537)

The Convener: Let us now consider—I have got it right this time—the Fishery Products (Official Controls Charges) (Scotland) Regulations 2007.

The committee agreed to raise minor points on the instrument.

Meat (Official Controls Charges) (Scotland) (No 2) Regulations 2007 (SSI 2007/538)

The Convener: Are members content to ask for the clarification as per our summary of recommendations and—we have missed this out but we should have included it—to raise minor points with the Scottish Government?

Members *indicated agreement*.

The Convener: I hope that everyone read the provision on land mammals in those regulations.

Licensing (Vessels etc) (Scotland) Regulations 2007 (SSI 2007/545)

The Convener: This is a short but interesting set of regulations. The summary of recommendations suggests that we should

"ask the Scottish Government for an explanation (in relation to the meaning and effect of the drafting of the regulation) why regulation 3 is drafted such that it refers to a vessel on which alcohol is being sold 'but which, by virtue of regulation 2, does not require to have a premises licence' still constituting 'relevant premises' for the purposes of Part 8 of the 2005 Act, given that—

(a) regulation 2 does not provide for vessels not requiring a premises licence, but provides that it is not an offence to sell alcohol on vessels in certain circumstances, and

(b) section 1(1) of the 2005 Act provides that alcohol is not be to sold on any premises except under and in accordance with either a premises licence, or an occasional licence granted under the Act."

Is that agreed?

Members *indicated agreement*.

The Convener: You look stunned.

Ian McKee: The triple negative stunned me.

The Convener: Perhaps the committee ought to visit one of these vessels to see for ourselves how such things work.

Registration Services (Fees, etc) (Scotland) Amendment Regulations 2007 (SSI 2007/531)

Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2007 (SSI 2007/535)

The committee agreed to raise minor points on the instruments.

Police (Promotion) (Scotland) Amendment Regulations 2007 (SSI 2007/528)

The committee agreed that no points arose on the instrument.

Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2007 (SSI 2007/533)

The committee agreed that no points arose on the instrument.

The Convener: Members may wish to note that this is the fifth time that the principal order—the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003 (SSI 2003/453)—has been amended. Therefore, we can chuck this instrument towards the consolidation working group.

Food Labelling (Declaration of Allergens) (Scotland) Regulations 2007 (SSI 2007/534)

The committee agreed that no points arose on the instrument.

The Convener: As this is the 12th time that the principal regulations—the Food Labelling Regulations 1996 (SI 1996/1499)—have been amended, we will also send this instrument to our friends in the consolidation working group. They must really love us.

Instruments Not Laid Before the Parliament

Water Environment and Water Services (Scotland) Act 2003 (Commencement No 7) Order 2007 (SSI 2007/530)

15:57

The Convener: We move to agenda item 6. Are members content with the instrument and to raise a minor point informally with the Scottish Government?

Members *indicated agreement*.

Act of Sederunt (Rules of the Court of Session Amendment No 10) (Miscellaneous) 2007 (SSI 2007/548)

The Convener: Again, are members content with the instrument and to raise a minor point informally with—this time—the Lord President's office?

Members *indicated agreement*.

Act of Sederunt (Fees of Messengers-at-Arms) 2007 (SSI 2007/532)

Act of Sederunt (Lands Valuation Appeal Court) 2007 (SSI 2007/539)

The committee agreed that no points arose on the instruments.

The Convener: We come to agenda item 7, so we will now move into private session as agreed at the outset of the meeting.

15:58

Meeting continued in private until 16:17.

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