SUBORDINATE LEGISLATION COMMITTEE

Tuesday 15 January 2008

Session 3

£5.00

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

CONTENTS

Tuesday 15 January 2008

SUBORDINATE LEGISLATION COMMITTEE
2nd Meeting 2008, 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 GAVE EVIDENCE:

Bruce Crawford (Minister for Parliamentary Business)
Ken Thomson (Scottish Government Constitutional and Parliamentary Secretariat)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 15 January 2008

[THE DEPUTY CONVENER *opened the meeting at 11:00*]

Scottish Government Responses

The Deputy Convener (Gil Paterson): I thank members for attending. I have received apologies from Jamie Stone and John Park. I remind members to turn off their mobile phones.

After our previous meeting, on 8 January, the committee wrote to the Scottish Government about seven Scottish statutory instruments. Members have seen the responses.

Management of Offenders etc (Scotland) Act 2005 (Members' Remuneration and Supplementary Provisions) Order 2008 (Draft)

The Deputy Convener: Are members content to draw the draft order to the attention of the lead committee and Parliament on the grounds that are set out in points (a) and (b) in the summary of recommendations?

Members *indicated agreement*.

Housing (Scotland) Act 2006 (Prescribed Documents) Regulations 2008 (Draft)

The Deputy Convener: Are members content to draw the draft regulations to the attention of the lead committee and Parliament on the grounds that are set out in points (a) and (b) in the summary of recommendations?

Members *indicated agreement*.

Inquiries (Scotland) Rules 2007 (SSI 2007/560)

The Deputy Convener: Are members content to draw the rules to the attention of the lead committee and Parliament on the grounds that are set out in points (a) to (c) in the summary of recommendations?

Members *indicated agreement*.

Foot-and-Mouth Disease (Export Restrictions) (Scotland) (No 2) Regulations 2007 (SSI 2007/562)

The Deputy Convener: Are members content to draw the regulations to the attention of the lead committee and Parliament on the grounds that are set out in the summary of recommendations?

Members *indicated agreement*.

Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2007 (SSI 2007/565)

The Deputy Convener: Are members content to draw the amendment regulations to the attention of the lead committee and Parliament on the grounds that are set out in points (a) to (c) in the summary of recommendations?

Members *indicated agreement*.

Scottish Police Services Authority (Staff Transfer) (No 2) Order 2007 (SSI 2007/576)

The Deputy Convener: Are members content to draw the order to the attention of the lead committee and Parliament, on the ground that the meaning of article 3(2)(b) could be clearer?

Members *indicated agreement*.

Zoonoses and Animal By-Products (Fees) (Scotland) Regulations 2007 (SSI 2007/577)

The Deputy Convener: Are members content to draw the regulations to the attention of the lead committee and Parliament on the grounds that are set out in the summary of recommendations?

Members *indicated agreement*.

Draft Instruments Subject to Approval

Agriculture and Horticulture Development Board Order 2007 (Draft)

11:03

The Deputy Convener: Are members content to ask the Scottish Government for an explanation of points (a), (b), (c) and (e) in the summary of recommendations?

Jackson Carlaw (West of Scotland) (Con): And point (d) as well.

The Deputy Convener: Did I miss that? Sorry for that flip of the eye—I meant paragraphs (a), (b), (c), (d) and (e). Are we content to ask for explanations of those points?

Members *indicated agreement*.

Quality Meat Scotland Order 2008 (Draft)

The Deputy Convener: Are members content to ask the Scottish Government the questions that are set out in the summary of recommendations? I inform members that a second point has been added since the summary of recommendations was first produced, so members are contemplating points (a) and (b). Are you content with them?

Members *indicated agreement*.

Instruments Subject to Annulment

Local Authorities' Traffic Orders (Procedure) (Scotland) Amendment Regulations 2008 (SSI 2008/3)

11:05

The Deputy Convener: Are members content to ask the Scottish Government to clarify whether, if a private act left open to local authorities a range of options on matters to be covered by traffic orders or was silent on the issue, it could be said that the act "authorised" matters to be covered in orders, and, if so, whether the practical application of new regulation 8(1A) of the Local Authorities' Traffic Orders (Procedure) (Scotland) Regulations 1999 (SI 1999/614) is sufficiently clear? I am not sure whether my question was sufficiently clear.

Ian McKee (Lothians) (SNP): We want clarification on that point.

The Deputy Convener: Are members happy to seek that clarification?

Members *indicated agreement*.

Individual Learning Account (Scotland) Amendment Regulations 2008 (SSI 2008/1)

Public Service Vehicles (Traffic Regulation Conditions) Amendment (Scotland) Regulations 2008 (SSI 2008/2)

School Crossing Patrol Sign (Scotland) Regulations 2008 (SSI 2008/4)

The committee agreed that no points arose on the instruments.

The Deputy Convener: That concludes our consideration of instruments. However, members will note from the annex to the summary of recommendations that minor points that arise in relation to the draft Agriculture and Horticulture Development Board Order 2007, the draft Quality Meat Scotland Order 2008 and SSI 2008/3 will be raised informally with the Scottish Government. Are members content for us to proceed in that way?

Members *indicated agreement*.

11:07

Meeting suspended.

11:30

On resuming—

Regulatory Framework Inquiry

The Deputy Convener: I welcome Bruce Crawford MSP, who is the Minister for Parliamentary Business; Ken Thomson, who is director of the Scottish Government civil and international justice directorate and the constitutional and parliamentary secretariat; and Al Gibson, who is a policy adviser in the constitutional and parliamentary secretariat.

The committee is taking evidence on its inquiry into procedures for the scrutiny of subordinate legislation. It seeks to understand the issues so that it can make a recommendation to Parliament. Today we want to explore the Scottish Government's views on the recommendations that our predecessor committee made and, in particular, on its recommendation that the current procedures for the scrutiny of subordinate legislation be replaced by a new procedure, which is called the Scottish statutory instrument procedure or SSIP.

We have two options, Mr Crawford. You can make a statement if you so desire or we can go straight to questions.

The Minister for Parliamentary Business (Bruce Crawford): I would be grateful if you would give me time to make a short opening statement to explore the various options that exist and to outline our position, as that will probably help to drive the discussion. Is that okay with you?

The Deputy Convener: That would be okay.

Bruce Crawford: I welcome the opportunity that the committee has given me to reflect on the work of our predecessors and on the report of your predecessor committee, which contains a wealth of detail. The regulatory framework is a subject in whose technical detail it is only too easy to get stuck. I hope that I will be able to avoid doing that and, instead, to focus on the areas in which I believe there is a great deal of common ground and those in which I, like my predecessor, have concerns about the recommendations of your predecessor committee.

I have seen the extremely useful note that was prepared as background for the committee's informal session. It identifies the issues under the headings of procedures, planning and timetabling, amendments, emergency procedures and consolidation. I hope that it will be useful if I set out my thinking on each of those areas as briefly as I can. I will also refer to a table that I hope members have in their papers, which I mentioned to the convener last week. It is a piece of work that I asked to be undertaken to give me a clearer understanding of the weight of numbers of the different types of statutory instruments. I will refer back to that.

Let me begin with the areas on which I think there is good common ground between the committee and the Government. For example, broadly speaking, I support what the report of the previous session's committee recommended on consolidation and amendments. On emergency procedures, it is clear that there is common ground on the need for the Government to get emergency orders in force as quickly as necessary. Although the current system works reasonably well as far as the Government is concerned, I am willing in principle to discuss whether improvements could be made to how we address situations in which SSIs might need to be brought into force urgently.

On timetabling, I support the proposals for parallel consideration and for extending the 21-day rule to 28 days. On planning, your predecessor committee was right to identify the lack of advance notice as a problem. Statutory instruments are different from bills. The Government and the Parliament need to work together to ensure that instruments are well scrutinised and the process is well managed.

The report recommended that the Government should co-ordinate the making and laying of instruments across its departments and develop a tracking system. Such a system is now in place and is beginning to provide some useful information for us in Government as we plan SSIs. In principle, I would like to be able to share that information, which offers data on the number, type and size of SSIs, with the Parliament. I understand that our officials have already had discussions on that area of activity, and I think that it would be worth while continuing those discussions. Such indicative information should be shared on an informal basis as part of constructive working between our respective officials.

A six-week forward look provided monthly would work better than a quarterly report and would help to improve the system. My rationale for favouring that approach derives principally from the character of the SSI programme and the bedding down of the tracking system. Offering the Parliament a three-month forward programme on a quarterly basis would mean that committees would have little advance notice of SSIs that the Government proposed to lay at the beginning of the period and that there would be increased scope for alterations to the indicative programme. Moving to a six-week forward look would reduce the potential for turbulence. A more regular report, covering a shorter, six-week period would go some way towards addressing the issues that I

have identified. My officials can discuss the proposal in detail with the committee's officials, if that would be helpful.

Our SSI tracking system will continue to develop and should deliver further improvements to the Government's management of its SSI programme. We are happy to work with the Parliament to keep the system under review and to exchange SSI information with a view to ensuring that the needs of both parties are met. Although I am not attracted to the recommendation that there should be a three-monthly report, and we should not think that it will always be possible to iron out bulges in the programme, there is common ground that will allow us to create a better system and to share information, which will help with planning.

As the convener outlined, I do not agree—for a number of reasons—with the recommendation in paragraph 29 of the SLC's report, which relates to the SSIP. Although I am sure that we can improve the SSI system, I do not think that the existing procedures are unfit for purpose—they are not so broke that they cannot be fixed, and we do not need to throw them away. The proposed SSIP is not a single procedure, as it includes separate procedures for emergency and urgent orders and does not cover all existing orders. Under the current system, almost all orders that are subject to substantive procedure fall into only two of the eight available procedures. Saying that the SSIP is one procedure to replace eight is a bit like comparing apples and oranges.

Let me explain what I mean. I could argue that the committee's determination under the SSIP of whether an SSI requires to be debated creates further procedures that simply reflect the existing procedures. I also believe that the distinction between affirmative and negative procedure is important and should not be lost. I will say more about that.

I have some positive things to say about the report. My reading of it suggests that the SSIP was proposed to get away from a situation in which many orders come into force before they have been scrutinised at all. I agree that that is important. However, the problem is caused not by procedure but by timetabling—the combination of the 21-day rule and committees working in sequence, rather than in parallel. Moving to a 28-day rule and parallel working should improve matters a great deal; it should certainly improve committees' ability to scrutinise orders.

As I said, the distinction between affirmative and negative procedure is worth having, although we may want to update the language a bit. I agree with Professor Colin Reid, who told the previous Subordinate Legislation Committee:

> "the choice of scrutiny procedure should continue to be determined by the parent Act; anything else is a recipe for delay, confusion and dissatisfaction".

I also agree with him when he says:

> "the Parliament has the best opportunity to ensure that the Executive is given adequate power to do its job but is also properly constrained"

by committee members at the time when the primary legislation that creates order-making powers is being considered.

During consideration of the Nature Conservation (Scotland) Bill, in which I was involved, we persuaded the Executive to replace a number of order-making powers under the negative procedure with powers under the affirmative procedure, because we thought that that was more appropriate. The Executive at the time accepted that advice.

Let me turn to the table that I mentioned earlier—I hope that all committee members have it. The point is made in the first column. Affirmative procedure is when the Parliament decides that scrutiny is definitely required; negative procedure means that scrutiny may be required, which Parliament can decide case by case.

I will take the committee through the table as I understand it. I think that it builds on the SLC report. Starting at bottom, classes 6 and 7 involve no substantive procedure and so cannot be compared to the SSIP. They are not part of the SSIP, so they would need to be added to it if the committee wanted to go in that direction—two extra procedures already. That relates to my apples-and-pears point: the committee is not really comparing like with like.

At the top of the table is affirmative procedure. Class 8 is really a subclass of class 1, as both involve the same affirmative procedure. In class 8, the Government takes a draft of the instrument to the committee, but that additional process is only to see whether the committee approves. The procedure really starts when an instrument is laid formally before Parliament, which takes us to class 1. In effect, they are the same procedure.

It is worth noting that the Parliament has wanted to develop and use a super-affirmative procedure to give the committee the chance to reflect on what might be a difficult policy area. This might not be the best example, but class 8 procedure was used for the instrument dealing with the voting papers for the Scottish Parliament elections, which the minister brought to the Parliament for consideration before formally laying the order because no consensus could be found. That is not necessarily the best example considering the outcome, but the process was shown to work.

Classes 2 and 4 are rarely used, as members can see from the papers in front of them. I am willing to explore whether we can find ways of modernising the relevant primary legislation so that we can do away with those classes. However, doing so would not make much difference in reality. As members can see, the numbers of instruments passed under classes 2 and 4 are so small as to be de minimis—in fact, there is a zero under class 4, as well as under class 3.

I hope that, by going through that information, I am showing that there is a lot more common ground between what the committee wants to achieve and what we have at present. With some discussion between Government officials and the committee officials, we could modify the existing system so that it kept all the good stuff without having to go to the full SSIP. Modernising the existing procedures is the way to go. It will not be far away from the SSIP, but I do not think that the current system is so broken that we need to throw it away. As I said, I am more than willing to have discussions between Government and committee officials.

I will make one further point: the difference between affirmative and negative procedure is stark considering the orders that we are talking about. One example of an instrument under affirmative procedure would be the Budget (Scotland) Act 2007 Amendment Order 2007 (SSI 2007/551), which dealt with about £30 billion. Negative procedure is used for lower-level orders that are much more technical. They can still be important, but they are generally lower-level instruments, such as the Sheep and Goats (Identification and Traceability) (Scotland) Regulations 2006 (SSI 2006/73). Perhaps those two instruments show the different nature of the processes. However, I am more than willing to go into further detail during questions, and I will ask my officials to chip in as and when they feel comfortable.

The Deputy Convener: Thank you for that refreshing contribution. It is clear that you are open to suggestions about improvements that could be made. I take that on board, but could you highlight some of the benefits of current procedures that you would like to retain?

11:45

Bruce Crawford: There are dangers in losing the affirmative procedure, which should be retained. If the procedure were lost, Parliament would lose its ability to affirm certain instruments; it is important that Parliament has the opportunity to do that. The loss of the procedure would put a heavy onus on the committees to decide which instruments merit debate. In those circumstances the committees would be even more reliant on the Scottish Government providing sufficient forward planning information to equip them to carry out that function. Otherwise, they might have to rely on the Scottish Government's assessment of when debate is warranted. That does not necessarily fit properly with the idea that the committees should be the driving force of scrutiny in the new process. We should not necessarily leave it to the Government—I might think that that is a cracking idea, but I do not think that it is good for the institution if we travel in that direction.

The current system gives us a balance. It provides the flexibility to deal with the many different purposes for which the Government must use its delegated powers and allows for scrutiny by the Subordinate Legislation Committee, or by Parliament as a whole, both through the creation of the powers in primary legislation and through their exercise in secondary legislation. It also brings clarity to the process. The clarity argument should be at the front of all our minds, because we must bear in mind the importance of enabling people outwith the Parliament to see what we do. Having negative and affirmative instruments helps to bring clarity to the process. I do not know whether my officials want to add anything to what I have said, but they should feel free to do so if they wish, if the convener is happy with that.

The Deputy Convener: I am happy with your answer.

Ken Thomson (Scottish Government Constitutional and Parliamentary Secretariat): I am happy for members to make progress with the questions.

The Deputy Convener: If the Parliament decides to implement the new SSIP or something very like it, what would the implications be for the Government?

Bruce Crawford: The committee needs to be aware that there are implications not only for the Government but for the committee. In particular, as I have said, the new SSIP would lay a heavy onus on the committee with regard to the number of things that it would need to look at to decide which instruments could proceed quickly and which ones would go the full 40 days.

The new SSIP also raises issues about timetabling. If recess days do not count for the computation of the 40 days, the impact could be significant. For example, there are only 33 days between the return of the Parliament after the summer recess and the October recess. That would mean that for instruments to come into force at the end of October they would have to be laid in draft in early July. It would not be straightforward to adjust policy preparation and drafting processes to such a timescale, and it would probably raise considerable difficulties for instruments that

required co-ordination with Whitehall departments. A 40-day maximum laying period would add considerably to the timetable for the making of individual SSIs. The Government could not rely on that period being reduced for more routine instruments, because we would not know which ones those were, as the Subordinate Legislation Committee would not have had the chance to consider them and a positive response from the committee could not be guaranteed. In any event, time for consultation would have to be built into the SSI preparation time.

Overall, the proposal would subject a range of instruments to a degree of scrutiny that would not be justified. The exceptions to the SSIP would be too limiting in that regard. Of course, the time for the forward look would have to be added. If there were a three-month forward look, you would have to add to the 40 days the three months for the planning process, but if there were a six-week forward look, you would add the six weeks on. That is a long lead-in time.

The Deputy Convener: Thank you for that. The current system adds to the confusion, as there are eight different procedures involved. The answers that you have previously given lead me not to pose that question to you. You are obviously of a mind that there are ways and means to tidy the situation up and make it easier to understand.

Bruce Crawford: I have already reflected on that. Ken Thomson may want to say something about it.

Ken Thomson: We found the previous committee's report useful in setting out the eight types of instruments, which helped us to draw up this table showing how many of them get used, for what and why. There are certainly ways in which we could streamline the existing set of procedures, and there are probably also ways in which we could help people to understand the system a bit more. The language of affirmative and negative is familiar to people who have dealt with SSIs for some time but is maybe not quite so familiar to people looking at the Parliament's business from the outside, as the minister said.

The flexibility that the existing procedures provide is valuable, and the table tries to show that in setting out the different types of instrument that are used. However, do we need all eight types? As the minister has said, probably not. There is certainly scope to streamline the procedure a bit and to modernise the language.

Ian McKee: I would like to consider an issue that we put to officials at an earlier, informal session, which relates to instruments that are subject to annulment. It seems to me as a new member of the Parliament that rarely, if ever, is an instrument that is subject to annulment actually annulled. That might mean that everything is working really well, or it might mean that there is something wrong with the procedure that is impairing the efficient workings of the Parliament. One suggestion is that the Parliament should be allowed to agree to a conditional annulment—an annulment that is suspended or made subject to certain conditions—in order to give the Government the chance to produce a new instrument. What are the Scottish Government's views on that suggestion?

Bruce Crawford: One of the interesting things about having a minority Government is that the relationship between the Government and the committees has changed. That is not necessarily noticeable in a visible way, but the nuance of the relationship has changed. Previously, because of the sheer weight of numbers on the committee, the Government had a reasonable expectation that most of its subordinate legislation would be recommended by the committee. However, there have already been a couple of attempts at annulling negative statutory instruments this time round, and we are learning from that. There needs to be a greater lead-in to allow the issues that need to be teased out to be teased out. That, in itself, creates a different relationship between the committees and the Government.

If an instrument that had been laid were opposed by a committee, there would be nothing to prevent the Government from revoking the order and re-laying it. That mechanism would be available to enable the Government to produce an instrument that might find support from the committee. However, your specific point was about suspending annulment. I understand that the committee has expressed concerns about the way in which the current system deals with the annulment of SSIs—in particular, the consequences for annulment under the negative procedure when an instrument has already come into force.

Such difficulties would be less acute if the Parliament were to extend the period for its consideration of an instrument from 21 days to 28 days and if the Subordinate Legislation Committee and the lead committee were able to consider the issues in parallel. That would significantly increase the amount of time available to the committee to scrutinise the SSI prior to the expiry of the minimum period before it could come into force. That would help the process. However, I accept that, even if the scrutiny period were extended, circumstances might arise in which the Parliament felt that annulling an instrument might create practical difficulties.

As I have said, my officials have pointed out that existing arrangements enable the Government to revoke and re-lay instruments. However, I am

willing to give the issue further consideration, because it merits that. It would assist the Government and the committee if we could offer further practical background on the rationale behind the problem and could have the SLC's views on the process and what it would achieve. It would be useful for officials to discuss that in a bit more detail.

Ian McKee: The proposal could be more beneficial in the more conventional situation when the Government has a majority on a committee, which means in-built resistance to doing anything to rock the boat. If we had a sort of halfway house, that might encourage people to make suggestions that they might not otherwise make.

Bruce Crawford: Looking at the situation from the perspective of a minority Government is slightly different from looking at it from the perspective of a majority Government—I have never sat in that seat. If I were the Minister for Parliamentary Business in a majority Government, I am not sure whether I would think that the proposal was favourable, but I understand why the committee and members of the Parliament might think it favourable, which is why I am prepared to consider it further. Further work can be done and that can be usefully explored.

Ian McKee: The session 2 report said that the level of scrutiny that is fixed in the parent act might not still be appropriate as time passes. As an alternative to the proposed SSIP, the level of scrutiny in parent acts could be revisited and amended from time to time, possibly on the committee's recommendation. What is your view on that suggestion?

Bruce Crawford: I appreciate why the SLC might seek a formal role in post-legislative scrutiny and I note that it might wish to take the lead in promoting amendments to rectify mismatched scrutiny powers, as you identified. However, the SLC's role is to scrutinise and not to decide what scrutiny should be conducted, which is other committees' job. I might not see that nuance in the way that the committee does. I understand that my officials have confirmed to the committee that the Government would continue to work closely with the Parliament during the passage of bills to ensure that scrutiny frameworks are fit for purpose.

The committee can play an important role in post-legislative scrutiny—perhaps that could be best achieved in partnership with the relevant lead committee. I do not think that there would be anything wrong with the Subordinate Legislation Committee marking that up to the lead committee, but we should not undermine the role of other parliamentary committees in post-legislative scrutiny. There may be dangers in that, if we are not careful.

Alternatively, the SLC might be given a power to report to the Parliament or the lead committee when, in its view, a scrutiny power or framework is no longer required or fit for purpose. The committee might find that route advantageous. Does Ken Thomson want to add anything?

Ken Thomson: One thing that struck me when reading the evidence—especially that from Professors Reid and Himsworth—was the need to zoom out a bit and consider the role of the Parliament as a whole in plenary, the lead committees and the SLC, to ensure that those three elements combined and the Government do the right things at the appropriate points in the system. The Parliament in plenary has an important role in deciding to what scrutiny a delegated order-making power should be subject—that is the affirmative or negative decision—and the lead committee and the SLC have a role in performing the scrutiny when the Government exercises the power.

The member points to the need to ensure a feedback loop so that we learn from how the system works, which will mean that as we enact new subordinate powers—and if we revisit existing powers and frameworks—we keep things up to date. However, that is different from what lies at the heart of the SSIP, in which the procedure is decided at the secondary stage and not at the beginning. That would lose something that is quite important.

Ian McKee: The session 2 report pointed out that ministers often have to attend committee meetings to debate non-controversial affirmative instruments, while the only means of triggering a debate on a negative instrument is to lodge a motion to annul. Would you like to see more flexibility around which instruments are debated in committee, so that scrutiny focuses on the most significant instruments? That could be achieved by an alteration to the standing orders.

12:00

Bruce Crawford: The Parliament makes a positive decision about whether to use the affirmative or negative procedure. In any changes that we make, I would not like to throw away the capacity of committees to scrutinise properly whatever Government is in power. We are trying to put in place a process that will stand the test of time, rather than just reflect the current relationship between the Opposition and the Government. Therefore, if a committee wished to propose lodging a motion to annul an instrument, as happened in the Justice Committee in relation to the Licensing (Fees) (Scotland) Regulations 2007 (SSI 2007/553) just before I arrived here, so that it can interrogate the relevant minister appropriately, it should have the right to do so,

because that is the important part of the scrutiny. I guess that you are suggesting that there could be a more formal process whereby, if there were no opposition from a committee, a negative instrument could be moved at a distance. I do not know how we could achieve that, but I am happy to consider it further.

Jackson Carlaw: I have a couple of questions, minister. It does not require much imagination to anticipate your thoughts on the first. The SSIP recommends that failure to lay an instrument before Parliament on time should invalidate the instrument. What is the Government's view on that?

Bruce Crawford: If I recall correctly, there are issues about the procedure. Sometimes, there are instruments that do not get approved in time. I think that there have been 21 instances where we have gone over the time limit. I do not think that that is healthy. We have to find ways of avoiding that. I ask Ken Thomson to respond to your question.

Ken Thomson: I want to ensure that I have understood the question. The suggestion is that, if an instrument were not laid in time, it would be annulled automatically. An instrument might not be laid in time when you are trying to do something very fast in an emergency: an instrument might be made and there might be a gap before it was laid. To give you the answer that I think that you were expecting, sometimes that is useful and necessary if we have to respond very quickly to a public health issue. As a matter of practice, officials try to avoid and minimise laying an instrument late, but it is right that we should be held to account by the committee and explain what happened and why. We might need to consider how we operate the current systems so that, if and when we have to break a rule, we always account for why we thought that that was necessary.

We might be able to devise the rules in such a way that we do not have to break a rule. It would be better to have a rule for emergencies, rather than have to break a rule in an emergency. I am speculating.

Jackson Carlaw: Such exchanges make gripping reading, I might add.

Bruce Crawford: There have been about 20 to 25 SSIs that breached the 21-day rule. Ken Thomson was suggesting that perhaps it would be more palatable to move to a more specific formal procedure so that we do not find ourselves embarrassed in that way. If the committee wants to take forward that discussion, I am happy to see where we can get to on it.

Jackson Carlaw: My other question is on the anomaly of rules of court and local instruments, which are not subject to amendment. If they came under the SSIP, they could be, which would be unacceptable. The previous Subordinate Legislation Committee addressed that anomaly by suggesting that such instruments should no longer come through Parliament. Having heard evidence from various parties, the legal people have said that it is absolutely essential that they come through Parliament, although I have never found the explanation for that wholly persuasive.

On the other hand, those who have said, "No, it's absolutely unnecessary," have tended to be those who are associated with proposing the SSIP. They feel that it would be better practice in any event for rules of court and local instruments not to be laid before Parliament. I am casting my keekers at your table of examples and, as you rightly say, there are plenty such instruments, which, under an SSIP, would be able to be amended. Do you have a view on all that, given that such instruments sit on the fringe of the committee's business?

Bruce Crawford: Thank you for raising that point, which re-emphasises my apples and oranges argument. Although I have a view, I will also ask the officials to respond to the technical point about which classes of SSI require no procedure.

If you look at the examples in the table, you will see under class 6 the Food Protection (Emergency Prohibition) (Radioactivity in Sheep) Partial Revocation (Scotland) Order 2007 (SSI 2007/38), which pertains to the food protection order that was introduced after Chernobyl. Under class 7, the Licensing (Scotland) Act 2005 (Commencement No 4) Order 2007 (SSI 2007/472) brings certain licensing conditions into force.

Transparency provides a good argument for why such instruments should remain part of the SSI process. I spoke earlier about flexibility, scrutiny and transparency—the people out there need such transparency to be able to see that Parliament is doing its job in scrutinising such instruments. If those instruments were not part of the more formal SSI process and just arrived in the Scottish Parliament information centre via a less visible process, we would not be serving the people in wider Scotland as well as we could. There might be other technical arguments around the matter, which either of my officials will be much better at explaining than I am.

Ken Thomson: I start by disclaiming that last remark because I do not pretend to be a procedural expert—the committee heard from such experts previously. From a policy perspective, the reason why the court rules, for example, are laid before Parliament is to do with their status and visibility. The importance that the Lord President attaches to that process makes me

think that he must have a reason for that. I think that Jackson Carlaw said that that reason was not entirely clear. I will not pretend to speak for the Lord President because that would be very dangerous—unconstitutional, even—but we could discuss that question further with the people who help the Lord President in such matters.

I can see arguments on both sides. As I said, the process for dealing with such instruments is about visibility and status, but there might be other ways of achieving that. On the other hand, as an official, I would be reluctant to come back to the committee with a proposal with which I knew the Lord President was unhappy. It might be that we need to have a three-way conversation.

Ian McKee: I got the impression from the evidence that the reason why the witnesses wanted such instruments to be laid before Parliament was because the instruments then became part of the law of the land and people could look them up and refer to them. That seems slightly spurious if we are not allowed to comment on them in any way. Although that gives the instruments the authority of Parliament, that is power without responsibility, is it not? I will not go any further with that quotation.

Bruce Crawford: The important feature of laying an instrument before Parliament is that it gives the instrument credence and standing. To take that away would diminish the standing of such instruments—I suspect that that is where the Lord President was coming from. There is good reason for instruments being laid before Parliament. Perhaps Ken Thomson wants to say more about that.

Ken Thomson: I was going to use exactly the same example. In previous roles, I have been involved in preparing annual reports that get laid before the Parliament, which gives such documents a status and formality that matters in some ways. However, as has been said, if I were to lay an annual report before Parliament, the Parliament could not—or indeed would not want to—amend it, but it is still visible and people know where to find it. Making local instruments and court rules into SSIs is not the only way to do that, however, which is where there might be room for discussion.

Richard Baker (North East Scotland) (Lab): I have a couple more questions about the proposal to pass some instruments within 40 days. You made it clear that that would be impractical in many ways. Would that still be the case if there were sufficient scope for urgent and emergency instruments where necessary?

Bruce Crawford: Yes, because the Government could not know in its preparation time which instruments might need the committee's urgent consideration. In the normal process, we could not know which of the SSIs the committee was prepared to treat as presenting no difficulty and which as controversial. If we were to introduce an extra procedure, we would have two procedures at the beginning of the process. I ask Ken Thomson to say a bit more about urgent and emergency instruments.

Ken Thomson: I go back to what the minister said earlier about adding a three-month period beforehand, and then a 40-day period. That would be quite a long time. You would have to be thinking in April or May about the orders you wanted in October—that is an extreme example because of the long summer recess. I suspect that there would be more exceptions than would be desirable—there might be more exceptions than there were instruments in the general procedure—which would indicate that the process was not working in the way in which it should.

Richard Baker: The committee's session 2 report said that some instruments could be passed in less than 40 days, which might help the Government to manage its schedule. However, you are saying that because you cannot predict—

Bruce Crawford: We would not know how long the process would take when we were preparing our positions; nor would we know how much extra preparation and extra material we would need to provide to the committees involved. The committee would be much more reliant on what the Government was saying to decide whether a particular instrument should be examined in more detail or be allowed to pass in less than 40 days. A lot of fine judgments would have to be made, and a lot of assumptions about what the committees wanted and needed.

Richard Baker: For negative instruments, you proposed a move to their coming into force in 28 days, rather than 21 days, but not 40 days. What is crucial about the extra 12 days?

Bruce Crawford: The 12 days would be applicable to the affirmative procedure. It would allow greater scrutiny by the committees—which the Government supports—at the same time as introducing parallel consideration by committees into the system. I do not think that we had envisaged the negative procedure moving away from 40 days and allowing the instrument to be annulled.

Ken Thomson: I would add one comment to that, which goes back to a point made by Mr McKee. One of the problems with the existing system is that it is possible—indeed it quite often happens—that an instrument can come into force before the Parliament has completed its scrutiny within the 21 days. Whatever new system we put in place, it would be desirable if that happened

less often. Under the existing system, if you went from 21 days to 28 days, and you processed in parallel, the lead committee and the Subordinate Legislation Committee would be much more able to complete their scrutiny. It is not just the addition of an extra seven days; it gives you longer than that.

Richard Baker: My final question is on the proposal for an indicative forward programme, which the minister has mentioned. Publication of a three-month programme is proposed. Why would shorter intervals make regular publication more feasible?

Bruce Crawford: As I said in my opening remarks, a six-week programme would be much more appropriate. It would give the parliamentary committees greater opportunity to scrutinise the number, type and size of SSIs than would be the case with a three-month programme. If an SSI was planned for introduction at the end of that three-month period, by the time you got to the end of that three months, the chances are that some of the issues would have dropped off, and therefore the accuracy of the information would not be as good as it might be. A six-week programme would help the committees in a way that a three-month one would not. I understand where the three months came from, but six weeks would be a better option for committees.

Richard Baker: Would making it a more informal process help?

Bruce Crawford: An informal process would be helpful. Regardless of who the Government and the Opposition are, a bit of trust needs to build up between them. If, in a formal process, a minister said that the committee would get so many instruments in a given period and that did not happen, some committees—not this one, I am sure—might like to give the minister a kicking. That would not necessarily help to build trust and relationships between whichever Government was in place and those committees.

12:15

Helen Eadie (Dunfermline East) (Lab): Minister, you have handled your questions really well, so forgive me if I have not concentrated enough. I have tried to listen carefully, but if there is any element of duplication, please put me down gently.

The SSIP would allow agreed technical changes to be made to instruments during the laying period without adding to the overall 40-day period. Does the Government see that as a significant advantage?

Bruce Crawford: No, but I see the idea of certification as an advantage. The idea that a technical change can be made by a certification process when the committee convener and minister agree that it is required is a welcome suggestion from the SLC report. I agree with much of what has been said on that, and there is scope for development in further discussion between officials. That particular point is significant, and I welcome the opportunity to develop and discuss it further.

Helen Eadie: The previous Executive suggested an arrangement in the current system for minor changes to draft SSIs to be agreed between the Subordinate Legislation Committee and the Government, with the changes being made by way of printing. Would you support that, and what sort of changes might that system be used for?

Bruce Crawford: You will need to explain to me what you mean by "by way of printing".

Helen Eadie: It is more to do with the technical changes that would be proposed.

Bruce Crawford: I will let Ken Thomson refer to that. It is obviously down to a specific level—I know what certification is, but I am not sure what printing is.

Ken Thomson: When we talk about amendments to statutory instruments, two things tend to be raised in the minds of people on the Government side of the discussion. The first is: does the committee envisage being able to amend the substance or policy of an instrument? I do not think that you are suggesting that, although for the avoidance of doubt I will say that we do not think that that would be a good idea. Secondly, however, there is scope for finding ways of making legal or drafting changes—improvements that would not affect the policy. Printing would be one way of doing that and certification would be another.

I know from my work in other parts of the Government that there is some frustration in the system. Committees often come up with points that are valid but do not seem to the Government to be so telling as to require the order to be withdrawn and resubmitted. That causes frustration in Parliament because you think that we are not listening to the points that you are making. If we could find a way of improving the feedback without affecting the substance of the policy, that would be good.

Bruce Crawford: Thank you for drawing that point out, Helen. I had not appreciated the nuance that exists.

Helen Eadie: Finally, if the SSIP were implemented, in what circumstances would the Government expect to classify instruments as urgent? Would that be similar to current breaches of the 21-day rule?

Bruce Crawford: That would be difficult to quantify. It would depend on the nature of the instruments that were formerly subject to affirmative procedure. There were 59 of those during 2006, and most Governments would probably argue that most of them were urgent. To be blunt, I suspect that, if the process allowed some instruments to be laid for 40 days and some for a shorter time, I would press to have as many as possible laid for the shorter time in order to expedite business from the Government's perspective. I would probably be encouraged to look for more emergency procedures because that would mean that I could have a faster system and the Government would get its business done more quickly—although that would not necessarily serve the Parliament well.

Ken Thomson: In devising such systems, we are trying to balance different factors that are hard to balance. First, from the Government's point of view, there is the need to deliver its business and demonstrate that it is carrying out its policies. That points to speed, which is the temptation that the minister was referring to. If a minister thought that an instrument was important, they would say that it was urgent as well, although important and urgent are two different things.

Secondly, there is a need for quality of scrutiny, not just by the SLC but by the lead committee and by the Parliament as a whole at the stage when it creates the powers.

Thirdly, there is a need for clarity. We need to ensure that everyone who is involved in the process understands it. Perhaps more important, those who are not involved in the process but who look at it from the outside also need to understand it.

Fourthly, some flexibility needs to be built into the process. For example, the instruments in the table that the minister has provided range from an order that dealt with the Government's whole annual budget to one that—this was the favourite of my colleague who drafted the order—defined the design of a lollipop sign. Any new system needs to be able to accommodate that full range.

We need to bear in mind the difference between importance and urgency. Requiring a much longer period would provide the Government with a temptation to claim that important things were urgent because it wanted to get them done faster.

The Deputy Convener: Before asking the final question, I think that I can speak for the committee in welcoming the positive statements that have emanated from the Government. They suggest that the Government has been doing some work on the issue and that it recognises that there is room for improvement. Does the Government have any plans of its own to legislate to replace the transitional order that governs subordinate legislation?

Bruce Crawford: Actually, I would like to be able to ask that question in reverse. I think that there is scope for discussion on whether it is more appropriate for such legislation to be introduced by the committee—and whether it has the capacity—or by the Government. In my view, provided that I will receive support from the committee for our general thrust and direction, the highly technical nature of such legislation means that it would probably be better introduced as a Government bill. Otherwise, I suppose that many of our officials would end up providing support to the committee anyway. I would hesitate to introduce a bill, however, if I was not sure, when all the cards were on the table, that the committee was travelling in the same direction as the Government at the end of the day.

The Deputy Convener: Again, I think that I can speak for the committee in saying that the minister's desire for continuing dialogue at official level is helpful to committee members, as is his use of words such as "modernising". We have had a fairly good session.

Bruce Crawford: You are making me sound like Mr Blair.

The Deputy Convener: We will not compare you to anyone else. I welcome the open mind with which you have approached the process. That is all too rare.

Bruce Crawford: I am genuinely open-minded about the matter.

The Deputy Convener: That is good.

I thank committee members and the minister for attending today. We have had a good meeting and we look forward to more dialogue with you.

Bruce Crawford: Thank you very much. I am most grateful to the committee.

Meeting closed at 12:23.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Tuesday 22 January 2008

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by RR Donnelley and available from:

Blackwell's Bookshop

53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

Scottish Parliament

RNID Typetalk calls welcome on
18001 0131 348 5000
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by RR Donnelley