

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 17 June 2003  
*(Morning)*

Session 2

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# **SUBORDINATE LEGISLATION COMMITTEE**

## **2<sup>nd</sup> Meeting 2003, Session 2**

### **CONVENER**

\*Dr Sylvia Jackson (Stirling) (Lab)

### **COMMITTEE MEMBERS**

\*Gordon Jackson (Glasgow Govan) (Lab)

\*Mr Stewart Maxwell (West of Scotland) (SNP)

\*Christine May (Central Fife) (Lab)

\*Mike Pringle (Edinburgh South) (LD)

\*Mr Murray Tosh (West of Scotland) (Con)

\*attended

### **CLERK TO THE COMMITTEE**

Alasdair Rankin

### **SENIOR ASSISTANT CLERK**

Steve Farrell

### **ASSISTANT CLERKS**

Joanne Clinton

Alistair Fleming

### **LOCATION**

Committee Room 3



## Scottish Parliament Subordinate Legislation Committee

*Tuesday 17 June 2003*

*(Morning)*

[THE CONVENER *opened the meeting at 10:02*]

**The Convener (Dr Sylvia Jackson):** I begin the second meeting this session of the Subordinate Legislation Committee on 17 March—

**Gordon Jackson (Glasgow Govan) (Lab):** Time flies.

**The Convener:** I am sorry; I have made an error already. It is 17 June.

I have received no apologies from members. We seem to have a full house.

### Interests

**The Convener:** The first agenda item is to take members' declaration of interests. Because Gordon Jackson was not at the previous meeting, I begin by asking him if he has any interests to declare.

**Gordon Jackson:** I am a practising member of the Faculty of Advocates.

### Deputy Convener

**The Convener:** Next, the committee must choose a deputy convener. As members know, the Parliament has decided that the deputy convener of the committee is to be chosen from the Labour party. Are there any nominations?

**Christine May (Central Fife) (Lab):** I am pleased to nominate Gordon Jackson.

*Gordon Jackson was chosen as deputy convener.*

## Draft Instruments Subject to Approval

### Budget (Scotland) Act 2003 Amendment Order 2003 (draft)

**The Convener:** The Executive has asked the committee to consider the order at today's meeting so that it can be debated by the Finance Committee, which is the lead committee, and then complete its parliamentary procedure.

No points arise on the order.

### Landfill (Scotland) Amendment Regulations 2003 (draft)

**The Convener:** There are no comments to make on the regulations.

## Instruments Subject to Approval

### Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (Scotland) Order 2003 (SSI 2003/244)

### Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (No 2) (Scotland) Order 2003 (SSI 2003/245)

### Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (Orkney) (Scotland) Order 2003 (SSI 2003/260)

**The Convener:** From the Subordinate Legislation Committee's previous work, I gather that a proposal has been made that we might consider different ways of treating orders similar to these three. We might consider how such orders might be made less demanding on a committee and the Parliament. Because that point has been made, I propose that we ask the clerk and the legal team to consider alternative procedures for this type of order. More orders similar to these will come before the committee and we can consider the implications of moving to a different procedure. Is that agreed?

**Murray Tosh (West of Scotland) (Con):** Before we agree to that, it is important to reflect that concerns were raised in the more substantive discussion during the legal briefing that any alternative procedures ought to protect fully members' ability to react to any Parliamentary Bureau motions giving effect to statutory instruments. When we raise the proposal with the Executive we should make it clear that our

objective will be to streamline procedures and not in any sense—whether deliberately or accidentally—to diminish a member's right to move against a bureau motion.

**The Convener:** Are we all agreed on that?

**Members** *indicated agreement.*

**The Convener:** No points arise on the orders.

## Instruments Subject to Annulment

### Plant Health (Great Britain) Amendment (Scotland) Order 2003 (SSI 2003/224)

**The Convener:** Are there any points to be made on the order?

**Murray Tosh:** There is one substantive point on this order, which applies to a number of others on today's agenda. Reference is made to the requirement to consolidate and there are points to make about the circumstances in which consolidation takes place. I might have jumped the gun with my comments; I might have been supposed to raise this later in the agenda. However, the issue is now raised.

We must be clear that the Executive and the Parliament subscribe to the same protocols on consolidation in the interests of clear and accessible legislation. We should write to the Executive to establish that it sees things in the way that the committee does. Perhaps we can improve on ways of exchanging information about where consolidation is planned and where it is under way.

**Gordon Jackson:** What do you mean by a protocol on consolidation? I have never understood when consolidation should take place. It seems to me to be totally arbitrary; every so often someone seems to say, "It is time that we consolidated this lot," or something like that. By protocol, do you mean that the process should be more formal?

**Murray Tosh:** I will let Christine take that one up because she raised the point during the legal briefing.

**Christine May:** It was suggested that it is good practice to consolidate after the fifth substantive amendment. Where there are minor amendments, such as changes to pricing or whatever, changing the instruments is relatively straightforward. However, where substantive amendments are required, consolidation after the fifth version seems to be reasonable.

**The Convener:** Are we agreed that that is a good general rule?

**Members** *indicated agreement.*

**The Convener:** The legal briefing indicates that the Executive plans to consolidate the plant health instruments sometime next year. We should ask about that when we write to the Executive, as Murray proposed. Is that agreed?

**Members** *indicated agreement.*



**Murray Tosh:** The legal brief also contains a substantial note, which is referred to the committee purely for information, about the competence of ministers' powers to amend the original order and the way in which the drafting of orders is dealt with. I will not bore everybody by reading it all out. Is it a general issue that relates to a number of statutory instruments and of which we should be aware, or is it a stray comment that we can quietly put away in the filing cabinet?

**The Convener:** The legal adviser indicates that we can file it.

**Products of Animal Origin (Third Country Imports) (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/225)**

**Adults with Incapacity (Management of Residents' Finances) (Scotland) Revocation Regulations 2003 (SSI 2003/226)**

**The Convener:** No points arise on the regulations.

**Community Care (Direct Payments) (Scotland) Regulations 2003 (SSI 2003/243)**

**The Convener:** The legal brief recommends that we consider what action to take in respect of the breach of the 21-day rule. I gather that such breaches happen from time to time. It seems that this particular case is not easily explained by the fact that the chamber office was closed on Friday 9 May. What is the committee's view?

**Mr Stewart Maxwell (West of Scotland) (SNP):** I agree with your comments. The Executive's explanation that it did not know the chamber office's hours is unacceptable and does not fully explain the reason for the breach. We should therefore take the matter up with the Executive and ask it for a proper explanation. It does not seem to me in any way reasonable or probable that the breach is due to the chamber office's being closed.

**Mike Pringle (Edinburgh South) (LD):** I agree that that seems a strange reason.

**Christine May:** It is worth the committee formally making a general point on the 21-day rule. On occasion, the reasons for the breach of the 21-day rule are acceptable—something has come in very quickly or needs an immediate response. In general, however, departments should be reminded of their duty under the 21-day rule. It is probably worth reminding folk to be vigilant on that point at the outset of the committee's work.

**The Convener:** We will send a letter to the Executive picking up on those points.

**Litter (Fixed Penalty) (Scotland) Order 2003 (SSI 2003/268)**

**The Convener:** No points arise on the order.

**National Health Service Superannuation Scheme (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/270)**

**Christine May:** The use of the word "may" in new regulation E6(4A) perhaps implies that there is an element of choice in the implementation of the regulations. That is careless wording and could be important in the context of an individual's rights.

**The Convener:** We will ask for clarification on that. Also, as Murray Tosh pointed out on another instrument, there are issues to do with consolidation, which we will raise.

**Urban Waste Water Treatment (Scotland) Amendment Regulations 2003 (SSI 2003/273)**

**The Convener:** Several points arise on the regulations. I will go through them. The first is to ask why the regulations have been drafted partly as free-standing regulations and partly by way of textual amendment to the principal regulations rather than, as is usual, wholly by way of textual amendment.

The second points relates to something, the name of which I do not think any of the committee understands. It is to ask the purpose of the full out—which, I gather, is a printing term—at the end of regulation 1(3). If members look at that regulation, they will see how far out it goes towards the left-hand margin.

The third point is to ask the purpose of regulation 2(3), which seems to be a circular provision, and the fourth point is to ask why regulation 4(2) provides that the definition in regulation 3(1) of the principal regulations is subject to regulation 2 of these regulations.

10:15

**Murray Tosh:** Would you like to explain that, convener?

**The Convener:** All I can say is that it is fully explained in the legal brief. Is that sufficient, or would you like me to give you the full explanation from the brief?

**Murray Tosh:** No.

**The Convener:** Are there any additional points to the four that I listed?

**Murray Tosh:** Is it proposed to write to the Executive and ask for clarification on those points?

**The Convener:** Yes.

**Murray Tosh:** What will that mean for the decision that we take on the regulations?

**The Convener:** As I said earlier, there was only one agenda item for which we had to complete consideration today. We will get the Executive's response and will consider the regulations again next week.

### **Sweeteners in Food Amendment (Scotland) Regulations 2003 (SSI 2003/274)**

**Christine May:** I have a common point to make on the regulations and on the Contaminants in Food (Scotland) Regulations 2003 (SSI 2003/289), the Cocoa and Chocolate Products (Scotland) Regulations 2003 (SSI 2003/291) and the Fruit Juices and Fruit Nectars (Scotland) Regulations 2003 (SSI 2003/293). No reference is made to the consultation requirements of article 9 of EC regulation 178/2002 in the preamble to the regulations and that is common to all those regulations.

There is also the provision of transposition notes, which, I understand, are common at Westminster and seem to be good practice for providing sufficiently detailed background information. There is also an issue with the explanatory notes, which, I am advised, as good practice, fill out or complete for the reader's or implementer's benefit what is necessary and the necessary cross-references. We should write to the Executive on that point, although I note that the previous committee did so without success. Nevertheless, it is worth ensuring that we comply with best practice and that regulations are as easy as possible to understand and cross-reference.

**The Convener:** There is an additional point. That is to ask why, although article 1(a) of directive 95/35/EC states that a temporary authorisation of a sweetener can be for a maximum period of two years, the regulations contain no such limit. To that extent, the regulations may raise a devolution issue. We might want to add that to the letter.

**Murray Tosh:** I am sorry—I was only half listening to Christine May. I heard her make the point about the transposition notes. Did she also raise the consultation requirements of article 9?

**The Convener:** Yes. That is everything covered for the regulations.

### **Feeding Stuffs (Miscellaneous Amendments) (Scotland) Regulations 2003 (SSI 2003/277)**

### **Food Supplements (Scotland) Regulations 2003 (SSI 2003/278)**

**The Convener:** No points arise on the regulations.

### **Ethical Standards in Public Life etc (Scotland) Act 2000 (Devolved Public Bodies) (No 2) Order 2003 (SSI 2003/279)**

**Murray Tosh:** Some minor drafting errors have been drawn to our attention. Is it intended that we make approval of the order conditional on the drafting errors being picked up or are we in a position to recommend approval of the order but draw the drafting errors to the Executive's attention subsequently?

**The Convener:** It would be advisable for us to recommend approval of the order, but draw the drafting errors to the Executive's attention. I gather that minor drafting errors occur not only in this order. They crop up in other instruments. It is an issue that we might want to raise with the Executive in an informal letter.

**Murray Tosh:** From what I assume from your response to have been the clerk's advice to you, I assume that this is a regular and recurring problem. What reasons has the Executive offered the committee in the past for flaws in drafting?

**Alasdair Rankin (Clerk):** The Executive has written to and communicated verbally with the committee about its track record on such flaws. The Executive has said that it realises that there is a problem, which it is trying to address, but it has not got there yet.

**Murray Tosh:** Have we pressed the Executive on what the problem is and on what actions it is taking to overcome the problem?

**Alasdair Rankin:** The committee has returned to the Executive several times on the issue, without making any obvious progress.

**Murray Tosh:** I must repeat the question: have we asked what the nature of the problem is and what the Executive is doing to overcome it?

**Alasdair Rankin:** We have not asked in detailed terms. The Executive has given the general answer that the flaws are minor matters that it has not yet been able to iron out, but it has not gone into the detail of individual cases.

**Murray Tosh:** Perhaps we should seek greater clarity. In attempting to explain the problem to us, the Executive might achieve greater clarity and come closer to finding answers to its difficulties.

**The Convener:** Do members agree to write a letter to the Executive to that effect?

**Members** *indicated agreement.*

**St Mary's Music School (Aided Places)  
(Scotland) Amendment Regulations 2003  
(SSI 2003/280)**

**Education (Assisted Places) (Scotland)  
Amendment Regulations 2003  
(SSI 2003/281)**

**Road User Charging (Classes of Motor  
Vehicles) (Scotland) Regulations 2003  
(SSI 2003/282)**

**Agricultural Wages (Scotland) Act 1949  
Amendment Regulations 2003  
(SSI 2003/283)**

**The Convener:** No points arise on the regulations.

**Home Energy Efficiency Scheme  
Amendment (Scotland) Regulations 2003  
(SSI 2003/284)**

**The Convener:** We should ask the Executive why the explanatory note does not include a reference to the changes made in respect of the reference to the "disabled person's tax credit".

**Education (Student Loans) Amendment  
(Scotland) Regulations 2003 (SSI 2003/285)**

**The Convener:** No points arise on the regulations.

**Accountability of Local Authorities  
(Publication of Information about Finance  
and Performance) (Scotland) Regulations  
2003 (SSI 2003/286)**

**The Convener:** There are two points on the regulations. First, why has section 13(6)(d) of the parent act—the Local Government in Scotland Act 2003—which seems relevant, not been cited as an enabling power? Secondly, why has a reference to section 13(5) of that act, which imposes the duty to consult, not been included in the preamble?

**Criminal Justice (Scotland) Act 2003  
(Saving and Transitional Provisions) Order  
2003 (SSI 2003/287)**

**Murray Tosh:** The legal briefing comments that there is no Executive note to accompany the order, but that that is not a problem in this case because the explanatory note covers the necessary detail. To cover the point of principle

that the Executive should provide a note for all statutory instruments, the Executive note could have merely referred readers to the explanatory note.

**The Convener:** We will add that point to our letter to the Executive.

**Contaminants in Food (Scotland)  
Regulations 2003 (SSI 2003/289)**

**Christine May:** I refer to my earlier comments about article 9 of EC regulation 178/2002 and explanatory and transposition notes.

**Murray Tosh:** We might also wish to refer to the regulations when we make our general point about consolidation.

**Drugs Courts (Scotland) Order 2003  
(SSI 2003/290)**

**The Convener:** No points arise on the order.

**Cocoa and Chocolate Products (Scotland)  
Regulations 2003 (SSI 2003/291)**

**The Convener:** This is another instrument to which the points about article 9 of EC regulation 178/2002 and transposition notes apply.

**Road User Charging (Consultation and  
Publication) (Scotland) Regulations 2003  
(SSI 2003/292)**

**The Convener:** There is quite a serious point on the regulations. The Executive should be asked whether the term "police area" in regulation 2(1) is intended to have a meaning different from the term as used in schedule 2 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379). If not, we should ask why it was thought necessary to include a definition in the regulations, particularly as it does not correspond with the definition in the order.

**Fruit Juices and Fruit Nectars (Scotland)  
Regulations 2003 (SSI 2003/293)**

**Christine May:** My points about article 9 of EC regulation 178/2002 and transposition notes also apply to these regulations.

**Agricultural Holdings (Relevant Date and  
Relevant Period) (Scotland) Order 2003  
(SSI 2003/294)**

**The Convener:** No points arise on the order.

**National Health Service (Charges for Drugs and Appliances) (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/295)**

**National Health Service (Pharmaceutical Services) (Scotland) Amendment Regulations 2003 (SSI 2003/296)**

**The Convener:** We should ask the Executive why, contrary to the guidance on the drafting of statutory instruments, there is no footnote reference to the drugs tariff that is mentioned in the regulations and no indication in the explanatory notes of where copies may be obtained.

**Stevenson College (Change of Name) (Scotland) Order 2003 (SSI 2003/297)**

**The Convener:** There is no Executive note on the order. Are there any other points?

**Murray Tosh:** The legal briefing mentions the use of the word "Scotland" in the title of the order and advises that the previous committee raised the issue on a number of occasions, without getting a fully comprehensible or comprehensive answer. I am interested in why the Executive thinks it appropriate to specify that the order relates to Scotland, given that the legislation will be passed by the Scottish Parliament and deals with a college in Scotland. The use of the word "Scotland" seems tautologous. If it has a purpose, I am interested to know what that is.

**The Convener:** We will ask.

**Gordon Jackson:** If Murray Tosh says so, I am sure that we asked that question, but I do not remember raising the issue or receiving an answer.

**Alasdair Rankin:** The issue was discussed, sometimes in relation to bills, but I am not sure that the previous committee took up the matter with the Executive.

**The Convener:** I am advised that we need to ask the question again, because the previous committee did not receive an answer.

**Christine May:** In addition, there is no Executive note to accompany the order, so we should again make Murray Tosh's point about good practice.

**National Health Service (General Medical Services Supplementary Lists) (Scotland) Amendment Regulations 2003 (SSI 2003/298)**

**The Convener:** No points arise on the regulations.

**Collagen and Gelatine (Intra-Community Trade) (Scotland) Regulations 2003 (SSI 2003/299)**

**The Convener:** We should ask the Executive to explain from which dates records must be kept in accordance with regulations 5(1)(b)(iv) and 5(1)(d).

**Sea Fishing (Restriction on Days at Sea) (Scotland) Amendment (No 2) Order 2003 (SSI 2003/300)**

**Cremation (Scotland) Amendment Regulations 2003 (SSI 2003/301)**

**The Convener:** No points arise on the instruments.

**Agricultural Subsidies (Appeals) (Scotland) Amendment Regulations 2003 (SSI 2003/302)**

**Oil and Fibre Plant Seeds Amendment (Scotland) Regulations 2003 (SSI 2003/304)**

**The Convener:** The issue that we raised earlier about consolidation applies to the regulations.

**Rural Stewardship Scheme (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/303)**

**The Convener:** We should ask the Executive whether the regulations have been made to correct an omission in SSI 2003/177. If so, because there was an error on the part of the Executive, we should ask what steps have been taken to make the regulations available free of charge to those who can show that they purchased SSI 2003/177.

## Instruments Not Subject to Parliamentary Control

### Pet Travel Scheme (Scotland) Order 2003 (SSI 2003/229)

10:30

**The Convener:** Although no points of substance have been noted in relation to the order, the committee may wish to raise questions on the interpretation of paragraph 1 of schedule 4, which seems pretty opaque. It is not clear whether the phrase

“who may be travelling with animals or involved in checking animals under this Order”

applies to staff or passengers. It is also unclear whether all staff who have contact must be trained. For instance, does that include the person who serves the tea? We also need to ask what is meant by “appropriately trained”. What should staff be trained in and how? We will follow up that point.

## Instruments Not Laid Before the Parliament

### Pollution Prevention and Control (Designation of Waste Incineration Directive) (Scotland) Order 2003 (SSI 2003/204)

**The Convener:** It is suggested that we make a formal point on the drafting of the explanatory note. Some explanatory notes for other instruments have been missing, but this explanatory note leaves a wee bit to be desired, as it does not make clear the purpose of the order, which is to enable the necessary implementing regulations to be made. It is also suggested that a reference to the relevant implementing regulations would have been helpful.

The legal adviser's briefing also asks us to consider whether the content of the citation of the directive—

**Alasdair Rankin:** The briefing asks whether the committee is content with the citation.

**The Convener:** Sorry. Go back, Sylvia. We need to consider whether we are happy with the citation of the directive that is designated by the order.

**Murray Tosh:** I did not understand that point, so it is worth taking a minute to consider the matter. Are you referring to the material in the second-last paragraph on page 30 of the briefing?

**The Convener:** Yes. It is observed that the full title of the directive begins “Directive 2000/76/EC of the European Parliament and the Council”, not “Council Directive 2000/76/EC”, as stated in article 2 of the order. However, the point is probably not material.

**Murray Tosh:** Are we concerned that directives made using the codecision procedure, involving the European Parliament and the Council, might not technically be the same as a “Council Directive”?

**The Convener:** Yes. That is the point.

**Murray Tosh:** How would we clarify that?

**The Convener:** We need to ask.

**Murray Tosh:** Do we ask the Council or the Executive?

**The Convener:** We ask the Executive. That is all that we can do. That will cover the point that has been raised.

**National Health Service (Constitution of Health Boards) (Scotland) Amendment Order 2003 (SSI 2003/217)**

**The Convener:** Two technical points arise. First, we need to ask why, given that the Interpretation Act 1978 does not apply to the parent act, section 105(6) has not been cited as an enabling power. Secondly, we need to ask why article 4 has not been amended to remove the reference to column 1 of the schedule, given that the substituted schedule does not have a column numbered 1. Those are purely technical points.

**Adults with Incapacity (Scotland) Act 2000 (Commencement No 3) Partial Revocation Order 2003 (SSI 2003/227)**

**The Convener:** It is suggested that we ask the Executive to explain why, contrary to the guidance on the drafting of statutory instruments, the explanatory note gives no indication of the content of the provisions that are not to be commenced as a result of the order. That is another issue concerning explanatory notes.

**Christine May:** Moreover, the order does not have an Executive note.

**The Convener:** We will raise both those points with the Executive.

**Act of Sederunt (Fees in the National Archive of Scotland) 2003 (SSI 2003/234)**

**The Convener:** No points arise on the instrument.

**Agricultural Holdings (Scotland) Act 2003 (Commencement No 1) Order 2003 (SSI 2003/248)**

**The Convener:** We will want clarification from the Executive on the effect of the words "for those purposes" in article 2.

**Adults with Incapacity (Scotland) Act 2000 (Commencement No 4) Order 2003 (SSI 2003/267)**

**The Convener:** It is recommended that the Executive should be asked to provide further background to the order, but the committee may be happy to let the matter stand.

**Murray Tosh:** The comment in the briefing makes the fairly substantive criticism that there is no Executive note to explain why the provisions are now to come into force. As the order does not refer to previous orders, there is no context. It would be appropriate for us to seek further information on those matters.

**The Convener:** Yes. We shall ask that further background be provided.

**Criminal Justice (Scotland) Act 2003 (Commencement No 1) Order 2003 (SSI 2003/288)**

**Agricultural Holdings (Scotland) Act 2003 (Commencement No 2) Order 2003 (SSI 2003/305)**

**The Convener:** No points arise on the orders.

**National Health Service (Functions of the Common Services Agency) (Scotland) Amendment (No 2) Order 2003 (SSI 2003/306)**

**The Convener:** We could again ask the Executive whether it plans any consolidation of the relevant orders.

## **Instruments Laid Before the Establishment of the Committee**

**Water Industry (Scotland) Act 2002 (Consequential Provisions) Order 2003 (SSI 2003/draft)**

**National Health Service (Optical Charges and Payments) (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/218)**

**Police (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/220)**

**Pollution Prevention and Control (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/221)**

**Scottish Public Services Ombudsman Act 2002 (Consequential Modification of Instruments) Order 2003 (SSI 2003/242)**

**Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2003 (SSI 2003/246)**

**Criminal Legal Aid (Youth Courts) (Scotland) Regulations 2003 (SSI 2003/249)**

**Tobacco Advertising and Promotion (Sponsorship Transitional Provisions) (Scotland) Amendment Regulations 2003 (SSI 2003/265)**

**Adults with Incapacity (Management of Residents' Finances) (No 2) (Scotland) Regulations 2003 (SSI 2003/266)**

**Regulation of Care (Scotland) Act 2001 (Commencement No 3 and Transitional Provisions) Order 2003 (SSI 2003/205)**

**Environment Act 1995 (Commencement No 21) (Scotland) Order 2003 (SSI 2003/206)**

**Proceeds of Crime Act 2002 (Commencement No 6, Transitional Provisions and Savings) (Scotland) Order 2003 (SSI 2003/210)**

**Public Appointments and Public Bodies etc (Scotland) Act 2003 (Commencement No 1) Order 2003 (SSI 2003/219)**

**Act of Sederunt (Rules of the Court of Session Amendment No 2) (Proceeds of Crime Act 2002) Order 2003 (SSI 2003/222)**

**Act of Sederunt (Rules of the Court of Session Amendment No 3) (Applications under the Nationality, Immigration and Asylum Act 2002) 2003 (SSI 2003/223)**

**Disease Control (Interim Measures) (Scotland) Amendment Order 2003 (SSI 2003/228)**

**Kyle of Sutherland Salmon Fishery District (Baits and Lures) Regulations 2003 (SSI 2003/230)**

**Act of Sederunt (Rules of the Court of Session Amendment No 4) (Fees of Shorthand Writers) 2003 (SSI 2003/247)**

**Lanarkshire Primary Care National Health Service Trust (Establishment) Amendment Order 2003 (SSI 2003/259)**

**Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (Immigration and Asylum) 2003 (SSI 2003/261)**

**The Convener:** No points arise on the instruments, unless anyone has anything to add.

**Murray Tosh:** Minor textual points arise on one or two of the instruments. Can we delegate authority to the clerk to raise those points with the Executive?

**The Convener:** Yes. I think that Murray Tosh is going to keep an eye on these matters.

## Legal Adviser's Briefing

**The Convener:** Agenda item 9 is in response to a point that Murray Tosh raised at last week's meeting. We are to consider which parts of our meetings should be in public and which parts should be in private. We want some guidance on the issue.

I consulted the clerk on how the previous committee worked and on how it understood the matter. It appears that legal briefings were not seen as part of the committee's proceedings—although perhaps Gordon Jackson will tell me that I am wrong.

**Gordon Jackson:** No, no.

**The Convener:** As the legal briefings were not considered part of the committee's proceedings, all the committee's proceedings essentially took place in public. Members may want to debate that point.

Like quite a few other members, I am fairly new to subordinate legislation, so I would welcome our continuing—at least for some while—with the legal briefings in their current format, as they allow us to ask questions that might appear silly to somebody with the background legal knowledge. We could perhaps reassess the matter after a while.

**Mr Maxwell:** I fully support the convener's comments. New members especially find it helpful to receive the legal briefing—which is not part of the meeting as such—in private, so any questions can be raised before the formal meeting starts.

**Christine May:** I, too, support the continuation of the current format. Nobody wants to look like a fool in public by asking questions that have a very simple explanation. However, I would be concerned if there were any suggestion that material that was available only to the committee in private might have a material effect on decisions that were taken in the public meeting. If there were any such suggestion, I would like us to consider further whether the discussions should be part of the public session. I am conscious that we want to avoid any suggestion that the decisions that we take are made before the meeting on the basis of information that is available only to us in private.

**The Convener:** That is a good point, with which I am sure we would all agree.

**Gordon Jackson:** It is worth noting that that criticism was never made during the past four years. There is a reason for that. It is partly because, in a sense, what the committee does is not at all political. We do not take decisions on policy matters. It does not matter what the policy is on the issue to which an instrument relates. We might find a policy abhorrent, but that is none of our business. Margo MacDonald was a great fan

of mentioning policy, but she did so just for fun. Policy is not our business. If we thought that a policy to which an instrument related was abhorrent, we could refer the matter to the lead committee. We deal only with the technical format of a policy, not the policy itself. We consider whether that technical format is legally right. The potential criticism that Christine May mentioned has never actually been made; it is more theoretical than real.

There is nothing to prevent a member from putting anything from the legal briefing into the public domain during the public session. Members do that all the time. We often have discussions in which it emerges that a member is unhappy about an issue that was mentioned in the private session. There is no rule that prevents members from taking the opportunity to put an issue that was dealt with in the pre-meeting into the public domain. The briefing session is not a method of hiding things from people; it works very well. Members can say what they want during the public session.

Frankly, I do not know anyone who could handle such material without private legal briefing. I have often said to the legal adviser Margaret Macdonald that how she manages to deal with the material is a mystery to me. The Subordinate Legislation Committee is a unique committee in that it deals with material that is purely technical. Members could not handle such matters without some kind of advance briefing. We should not kid ourselves that we could work out these things on our own. None of us could do that; it is a full-time job.

**The Convener:** I am reassured by what Gordon Jackson has said.

**Mike Pringle:** I agree. The hour during which we managed to hide our stupidity was the hour that gave me most explanation. It was essential to help me to understand what was going on. I would ask whether any member of the public is interested in that anyway. The legal briefing gives us the chance to get our heads round the legal position. If even Gordon Jackson does not understand it, other members will struggle.

**Gordon Jackson:** It is not even a matter of understanding. I understand the legal briefing; everyone can understand it. The point is that it involves a huge amount of work. Members would not be able to do it by themselves. I suppose that I could do what Margaret Macdonald does, but I would have to be employed full time. No one could get through the material unless they were working full time on it. The issue is about work load, not about understanding.

**The Convener:** Do you want to say anything, Murray?



10:45

**Murray Tosh:** I want to refer to the clerk's briefing note on the weekly legal briefing. I received my copy only this morning—I was late to the meeting because I stopped to read it—so some members may not have seen it.

I realise that the guidance on public and private sessions that is quoted is not the responsibility of the clerk to the Subordinate Legislation Committee; it is produced by the clerking directorate. I was surprised not to find in paragraphs 7.7 to 7.15 of the guidance any reference to the absolute requirement in standing orders that matters of legislation be dealt with in public. In my view, that extremely important principle goes to the heart of what the Parliament is about as a transparent institution.

I want to comment on the arguments that are put forward in paragraphs 5, 7, 8 and 9 of the clerk's note. Several members have referred to the argument in paragraph 5, which is that, because we do not know what the material is about, having part of the business in private protects us in some way. That is not a remotely allowable reason for any committee to decide to go into private session. As Gordon Jackson has pointed out, no matter how expert any of us becomes, there will always be matters that we do not understand and need to seek guidance on. No one should be embarrassed about asking a technical or legal question or finding out what an unknown or unfamiliar acronym means. In such circumstances, members should just ask their question, rather than have the committee go into private session.

Paragraph 7 makes a point about unanimity. We have had only one hack at things, but we have not had any difficulty in arriving at unanimous positions on matters that are technical and procedural, rather than matters of policy.

Paragraph 8 suggests that, if we had the legal briefing in public, Executive party members might not wish to pursue matters with the Executive. During this morning's public session, Executive party members have agreed happily to write to the Executive. My experience of other committees tells me that that is simply not an issue. As Gordon Jackson pointed out, the Subordinate Legislation Committee is not a policy committee. In my view, we will not have such political difficulties.

Paragraph 9 argues that we might lose our authority if we were portrayed as simply approving legal advice. We have not done that—we have discussed many issues surrounding the legal advice. In any case, if we were solely reliant on legal advice, it would be necessary to make that known, for the sake of transparency. We should have no reason to feel embarrassed to take legal advice or to rely on the legal briefing. The matters

that it was suggested we should take up with the Executive, which were in the paragraphs from the legal briefing that the convener carefully read out, were recommended by our legal adviser. That strikes me as being prudent, sensible and normal practice. Those of us who have previous local authority experience know that officials can write recommendations. Members discuss them and decide whether to agree to them; sometimes they add to them or subtract from them. That is nothing to be ashamed of or worried about.

Having said all that, I do not think that there is necessarily any particular reason why the briefing meeting should be part of the public record—although I might change my mind on that in the future.

As we went through the meeting, I was struck by the frequency with which we required to refer to the legal briefing. It is a principle of the Parliament that our proceedings are recorded and are accessible. Although, as Mike Pringle said, it might be the case that few people are interested in our deliberations, that is not the point. The point is that anyone who is interested in our deliberations must be able to understand them. I referred to the legal briefing a number of times, the convener read from it a number of times and other members referred to it. It strikes me that, in certain circumstances, it would be difficult for someone to track our discussions and decisions without referring to the legal briefing. Therefore, I must ask our legal adviser whether the briefing would suffer from being a public document and whether it could be issued with the other committee papers.

**The Convener:** My thoughts were running along the same lines during Murray Tosh's explanation. I gather that the legal briefing is not available as a public document at present. Could we give Margaret Macdonald and the clerks time to think about the matter? Gordon Jackson, who has past experience on the committee, could also make an input. Rather than rushing to a quick decision on whether to make the legal briefing a public document, we could discuss the matter next week.

**Murray Tosh:** I do not want to push anyone into making quick decisions. I accept the argument in the final paragraph of the clerk's note that members would wish to be confident about what they were doing before they made any changes.

**The Convener:** Absolutely. You seemed to say that you did not think that there should be an *Official Report* of the legal briefing part of the meeting, but I got the impression that what you said earlier contradicted that. You seemed to imply that the legal briefing discussions should be in public. I am a bit confused about that.

**Murray Tosh:** I said that I would make my mind up about that in the light of experience. If the

briefing note was part of the record that the public could refer to along with the instruments on the agenda, any reference to it in the committee meeting would make sense and could be followed by the reader, whether they were a lay person, a specialist or someone who was affected by the instrument. Without cross-referral to the legal briefing note, some of our discussions are rather opaque.

**The Convener:** We are dealing with two different points, but I take them both on board.

**Mike Pringle:** I agree with Murray Tosh. Why could not the legal briefing note be a public document? Has that not been the case in the past?

**The Convener:** No. Let us take that idea away and consider the pros and cons of it before bringing it back to the committee.

Murray Tosh says that he has no great feeling that we should rush to take the legal briefing in public. Because most of the rest of us quite like the way in which it is taken at the moment, according to the format that has been used in the past, I suggest that we stick with the format that we have. We could return to the issue later and decide whether we want to change that format.

**Murray Tosh:** I would like us to discuss the matter again in the fullness of time, when I have settled my mind on some of the issues. It would be appropriate for our adviser to take a little time to think through the implications of what I have said and to return with a considered response.

**The Convener:** Okay. Is that agreed?

**Members** *indicated agreement.*

**The Convener:** This has been a rather steep learning curve, but that is not to say that we have not begun to master the subject. If we gather as much information next week, we will be well on the way to understanding a lot more about subordinate legislation. Thank you very much.

*Meeting closed at 10:52.*

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