

# **SUBORDINATE LEGISLATION COMMITTEE**

Tuesday 24 June 2003  
*(Morning)*

Session 2

£5.00

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## **SUBORDINATE LEGISLATION COMMITTEE**

### **3<sup>rd</sup> Meeting 2003, Session 2**

#### **CONVENER**

\*Dr Sylvia Jackson (Stirling) (Lab)

#### **DEPUTY CONVENER**

\*Gordon Jackson (Glasgow Govan) (Lab)

#### **COMMITTEE MEMBERS**

Mr Stewart Maxwell (West of Scotland) (SNP)

\*Christine May (Central Fife) (Lab)

\*Mike Pringle (Edinburgh South) (LD)

\*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 24 June 2003*

*(Morning)*

[THE CONVENER *opened the meeting at 10:25*]

**The Convener (Dr Sylvia Jackson):** Welcome to the third meeting of the Subordinate Legislation Committee in this session of the Parliament.

### Executive Responses

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

**The Convener:** Members will recall that this instrument breached the 21-day rule and failed to take account of the fact that the chamber office would be shut on 9 May. Any views?

**Christine May (Central Fife) (Lab):** The response indicates that the informal procedure that the Executive has relied on in the past failed on this occasion and that steps are being taken to ensure that that does not happen again. However, we should make the point at this stage that, in relation to something that is so important that it might be relied on in a court of law, all possible steps must be taken to ensure that the rules are complied with. We will talk about that principle again later on in this meeting.

An informal procedure is not good enough. We should make a recommendation—and possibly follow it up with a letter to the individuals concerned—that there should be a formal procedure and that, when it is ready, they should let people know about it.

**The Convener:** We have a recommendation that we not only ring the need—with the lead committee and the Parliament—to change an informal agreement into a formal arrangement, but that we send a letter directly to the unit concerned. Is that agreed?

**Murray Tosh (West of Scotland) (Con):** I agree with that. There is an unfortunate tone in the Executive response. We are told that

“The SSI Team do not trawl the Business Bulletin on a day to day basis”,

but it is not a question of trawling. Keeping on top of such things is not burdensome, as all the relevant information is public. Ultimately, the Executive has a responsibility to find out such

information. If it finds that the current arrangements are not working satisfactorily, it should set in motion internal processes to ensure that more effective procedures are in place.

**Mike Pringle (Edinburgh South) (LD):** I agree. The excuse is feeble.

**The Convener:** We are all agreed, I gather.

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

**The Convener:** We found the use of the word “may” somewhat confusing in the regulations. The Executive has given us an explanation of the matter. What are our views?

**Murray Tosh:** I think that we should provide the explanation to the lead committee.

**The Convener:** Is that agreed?

**Members** *indicated agreement.*

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

**The Convener:** We asked several questions about the regulations, one of which concerned the full out in regulation 1(3). Although the Executive has answered all the questions that we asked, we might want to send our letter and the response to the lead committee and point out the failure to comply with the proper legislative practice and the need for clarification of the meaning of the areas that we highlighted in points 3 and 4 of our letter.

Are there any other points?

**Murray Tosh:** Just a procedural one. Are all the Executive responses part of the public record of the committee?

**The Convener:** Yes.

**Murray Tosh:** That means that the points in our letter that you refer to can be cross-referenced correctly. That is fine.

**The Convener:** Yes, everything will appear in the committee’s report, so there is no problem.

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

10:30

**The Convener:** The regulations raised an issue that comes up in many of the instruments that we will discuss later. I want to ask members whether they want to be firm about the need for a transposition note in relation to the regulations.

**Mike Pringle:** We must be firm on this matter. Although the Food Standards Agency says that it “does not rule out” the possibility of providing transposition notes, we should insist on—and indeed expect—such notes at every available opportunity and wherever appropriate. It is unfortunate that we did not get one the last time. In that respect, the explanation is not very good.

**Christine May:** Moreover, the agency does not refer to the consultation requirements that are set out in article 9 of EC regulation 178/2002. Such a reference is established good practice in Westminster and across other European Union states. It is not acceptable for the agency to say that it takes a different view and that, although such references should be made, it does not do so. I am not keen on the tone in which that comment is made; in fact, the same tone is used at various points throughout all these particular responses. If it is good practice, the reference should be included in the regulations. It is for the benefit not simply of members of the Subordinate Legislation Committee or those who draft the instruments, but of the people outside who have to implement regulations and to stand by their decisions.

**The Convener:** I take your point.

**Murray Tosh:** If we examine all the FSA's responses at the end of the meeting, we will find that it does not appear to be taking the committee, the Parliament or the process all that seriously. Indeed, it seems to regard the need to fulfil our requirements as optional. We cannot really accept that to be an appropriate way of proceeding.

**The Convener:** In its response, the agency says that it

“does not consider that it is necessary to refer in the preamble to the consultation requirement contained in article 9 of Regulation (EC) No. 178/2002”.

Are committee members definitely saying that the agency should refer in the preamble to that consultation requirement?

**Murray Tosh:** Yes, because the agency's approach should not be minimalist. Instead, it should inform, clarify, explain, be explicit and make the comprehension of the documents as straightforward as possible for anyone who requires or wishes to read them.

**The Convener:** I ask the clerk to clarify whether we can write directly to the FSA on this matter.

**Alasdair Rankin (Clerk):** Yes, we can do that.

**The Convener:** Are members agreed that we do so?

**Members indicated agreement.**

**Mike Pringle:** I agree with Murray Tosh's earlier comments. When I read the FSA's responses, I

felt throughout that it was not taking the matter seriously. That is bad news.

**The Convener:** I know that the issue will come up again in instruments that we will discuss later.

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

**The Convener:** We asked the Executive about the defective drafting of the explanatory note, and will bring its response to the attention of the lead committee and the Parliament.

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

**The Convener:** Members will recall that we asked the Executive why the regulations do not mention the duty to consult imposed by the Local Government in Scotland Act 2003. The point of including a citation of the statutory provisions that require consultation is to make it clear that such consultation is mandatory. As a result, we felt that the regulations should refer to the duty to consult.

Do members have any other comments that we should pass on to the lead committee and to the Parliament?

**Murray Tosh:** Not really, except that the Executive's statement at the end of its response that it

“will ensure that this preferred practice is followed in future instruments”

is positive. That said, I am not sure what the abbreviation “FCSD” at the very end of the response means in this context. Will we get the same thing on all responses right across the Executive or merely from an individual section or department?

**The Convener:** We will seek clarification on that point. We will also draw the regulations to the attention of the lead committee and the Parliament on the ground of the failure to comply with legislative practice and, in particular, the failure to mention the duty to consult.

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

**The Convener:** We raised again the need for a transposition note in relation to the regulations, although we should also note that the Executive has provided some useful additional background. We should draw to the attention of the lead committee and the Parliament those points and the various changes of substance.

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

**The Convener:** We raised once more with the Executive the need for a transposition note, the fact that the regulations do not refer to article 9 of EC regulation 178/2002 and various changes of substance. We will bring the points and the FSA's response to the attention of the lead committee and the Parliament.

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

**The Convener:** The committee asked the Executive about the use of the term "police area". Are we happy with its explanation on that point?

**Christine May:** I do not think so, convener. This goes back to my previous point that instruments should be drafted in a way that helps people. As Murray Tosh, I think, said earlier, helpful is good. Exactly what the regulations mean should be clear to those who implement them and to those who will be bound by them. People should not be confused by terms that are not used elsewhere; the same terminology should be used. As a result, the regulations raise certain issues.

**The Convener:** The point is that the term "police area" was not helpful and should not have been used. It was not good practice. We will refer that to the lead committee and the Parliament.

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

**The Convener:** The FSA's response to our questions on these regulations highlights points that we have already made and that we will draw to the attention of the lead committee and the Parliament.

**Mike Pringle:** These points have come up again and again and again.

### **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 asked the Executive to explain why the regulations did not contain a footnote about where copies of the drugs tariff might be obtained, nor was there any such indication in the explanatory note. Thankfully, the Executive agrees that it would have been helpful to have inserted such references. I assume that

that information will be inserted into the web version of the regulations.

**Murray Tosh:** The only problem is that, when the matter was raised in relation to an earlier item in the agenda, the Executive said that it would insert the information into the web version. However, it has not said the same about these regulations. After all, if we are telling others that it is not a good thing to infer something, we should not infer anything. Perhaps we should just ask the Executive whether it will insert the information into the web version.

**The Convener:** Good.

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

**The Convener:** We questioned whether the word Scotland should be included in brackets in the title of the order. That is a wider issue that came up in relation to bills in another committee of which I used to be a member. It might be useful to have clarification on when the word Scotland, in brackets, should be included in a title. Are there any other views on that?

**Murray Tosh:** At the pre-meeting briefing, Stewart Maxwell indicated a desire to refer the matter to the Procedures Committee. I do not believe that he was suggesting that the Procedures Committee should rush off and start an investigation, but that we should draw the matter to that committee's attention as something that it might like to consider at an appropriate point in its work programme.

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

**The Convener:** It was noted again that the regulations were defectively drafted in relation to the requirement for records to be kept for a period of time. That requirement is not fully explained in the regulations.

**Christine May:** Again, we are required to infer something from the text and one person might infer something different from another. The regulations are not clear; they are defectively drafted and we should report that.

**Murray Tosh:** The very fact that the committee questioned the regulations indicates that it is possible to infer more than one meaning, or at least to be unclear about the meaning. That we had to ask the question disproved the validity of the FSA's response. In general, the Executive should not be inviting anyone to infer meanings from its documentation; it should be so clear that inference is immaterial and irrelevant.

**The Convener:** Do we agree to pass that point on to the lead committee and the Parliament?

*Members indicated agreement.*

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

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

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

**The Convener:** We asked that instruments should be consolidated on their fifth substantive amendment. In its response, the Executive has explained the position for these instruments. The Executive says that what the committee has recommended might prove difficult, but it is trying to take that on board.

**Mike Pringle:** Why would it be difficult?

**The Convener:** I assume that it would be because of time constraints. I cannot think of any other reason.

**Mike Pringle:** Once there are three or four instruments to be consolidated it might be a big job, but if it is not done, it starts to get more confusing and therefore makes more work for other people.

**Christine May:** To be fair, we would not want to hold up necessary change or amendment on the ground that everyone was tied up doing a consolidation exercise. If there is a glaring anomaly, or circumstances change, it is important to get legislation through quickly.

**The Convener:** Are we agreed that we will pass this on to the lead committees and the Parliament?

*Members indicated agreement.*

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

**The Convener:** We asked the Executive about making the regulations available free of charge to those who could show that they had purchased SSI 2003/177 because it looked as if SSI 2003/303 had been drawn up because of an Executive error. The Executive has agreed that it will provide that free copy. It is, however, a worry that that has not been written in to the regulations. We should be saying that to the Executive. Is that agreed?

*Members indicated agreement.*

**Gordon Jackson (Glasgow Govan) (Lab):** I am imagining all those people with their old copy, queuing down Lothian Road, past the Usher Hall. I cannot see it somehow.

**Mike Pringle:** Me neither.

**Murray Tosh:** If it is about rural stewardship and it is free, there will be farmers coming from everywhere.

**Gordon Jackson:** All the way from Lockerbie to save a pound.

**Christine May:** The drafter will be as rich as JK Rowling.

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

**The Convener:** The committee believed that the order was rather ambiguous at certain points. I welcome the explanation about who is referred to in the order, but I do not know whether it is now acceptable.

10:45

**Christine May:** Again, I must comment about the Executive being helpful. It is important that amendments should make it clear who and what is being referred to. People should not have to go backwards and forwards through previous documents to try to find out. It is useful if people know where changes have been made so that they are not hunting for them; not everyone has that much time. If the committee has a doubt about who is covered by the order, we can be sure that someone is going to try and drive a coach and horses through it in order to get round it. Again, helpful is good, so let us have the drafting as clear as possible.

**The Convener:** We will pass the order on to the lead committee and the Parliament and say how the committee has had to ask for an explanation on those points. Obviously, we have received an explanation from the Executive, but we are keen that instruments should be as clear as possible in the first instance.

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

**The Convener:** We asked whether directives made using the codecision procedure, involving the European Parliament and the European Council, are technically the same as European Council directives. We also had doubts as to whether the order was *intra vires*. How do



members feel about the order and the Executive responses?

**Murray Tosh:** All three questions that the committee raised with the Executive—the failure to follow legislative practice, defective drafting and whether the order is *intra vires*—should be referred to the lead committee.

**Christine May:** The question of whether the order is *intra vires* is probably the most important. If the committee is in doubt, and those who advise the committee have raised that doubt, I am sure that there are others who will raise the same doubt. It would good to be clear that the order achieves what is intended and that the full reference should be included in all similar instruments in future.

**The Convener:** When you say the “full reference” do you mean a reference to whether the directive was made through a codecision?

**Christine May:** Yes; it should say “Directive of the European Parliament and the Council” rather than “Council directive” because they are two different things.

**The Convener:** Are we agreed on the suggested course of action?

*Members indicated agreement.*

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

**The Convener:** It is suggested that we draw the attention of the Parliament and the lead committee to the defective drafting and the response that we received to our two questions. No further points arise.

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

**The Convener:** Members will recall that, although we had some background earlier, the explanatory note could have been clearer. The Executive has accepted that point. Are there any further points?

**Christine May:** I do not think so.

**The Convener:** The Executive note was also missing from the order. The Executive's response says that Executive notes are not prepared to accompany commencement orders because they are usually self-explanatory. However, the Executive accepts that, on this occasion, it might have been of assistance to provide one, given the history of the commencement order. The Executive seems to accept that it could have given

more background information. We must pass that on to the lead committee and the Parliament.

**Christine May:** Is the Executive going to do that?

**The Convener:** Yes.

**Christine May:** Has it said so?

**The Convener:** Sorry—it is a commencement order, so it is therefore a matter for the Parliament, not a lead committee.

The committee has been referred to the further explanation contained in the Executive response to our letter on the Adults with Incapacity (Scotland) Act 2000 (Commencement No 4) Order 2003 (SSI 2003/267). Is that sufficient?

**Christine May:** It might be, but it would be helpful to have confirmation that such information will be provided.

**The Convener:** No further points arise.

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

**The Convener:** We turn now to a further commencement order. The issues that arise in relation to this order are very similar to those that pertained to the previous one. Is it therefore agreed that we raise the same points with the Executive?

*Members indicated agreement.*

## **Draft Code**

### **Draft Code of Recommendations for the Welfare of Livestock: Pigs (SE 2003/173)**

**The Convener:** We move on to item 2, on a draft code. No obvious points come to mind.

**Christine May:** I am lost in my papers.

**The Convener:** We will give you a minute.

**Christine May:** This is not the one to do with the length of the pigs, is it?

**The Convener:** No, that is the draft Welfare of Farmed Animals (Scotland) Amendment Regulations 2003, which comes later.

**Christine May:** We will do the length of pigs later, then.

**The Convener:** We are all agreed: no points arise on the draft code.

## Draft Instruments Subject to Approval

### Housing Grants (Assessment of Contributions) (Scotland) Regulations 2003 (draft)

**The Convener:** There are quite a few points to make on the regulations, on which we might wish to seek clarification from the Executive, so bear with me as I go through them.

First, we might ask why the draft regulations appear to define a number of terms with reference to legislation that has now been repealed. For example, the regulations use the terms “disabled persons tax credit”, “employed earner” and “severe disablement allowance”. In the case of the definition of “employed earner”, the footnote makes no reference to the relevant amendment made by schedule 6 to the Income Tax (Earnings and Pensions) Act 2003. The point relates to the new tax credit legislation. Have the changes all been taken into account, and how? We seek a full explanation of how the regulations relate to the new legislation.

The second point is allied to that. Why does regulation 14(1) refer to sections 257(6) and (7) of the Income and Corporation Taxes Act 1988—the ICTA—which no longer appear to exist, by virtue of section 33 of the Finance Act 1988? Furthermore, section 259 of the ICTA, which is also referred to in regulation 14, was repealed under schedule 20 of the Finance Act 1999. It is a matter of the Executive checking out those two matters.

The third point relates to drafting. Regulations 18 to 21 and regulation 23 include the phrase “and this regulation” after “regulation 6”. The purpose of that phrase is not clear—except perhaps in relation to regulation 23. We seek a bit more clarity on that. It is noted that that phrase does not appear in regulation 22(1). The Executive could be asked to explain the effect of those words; to state whether they are considered necessary in the other regulations; and to give the reason for their omission in regulation 22(1). Is that agreed?

**Members indicated agreement.**

**The Convener:** The fourth point is that the regulations exclude certain payments from named charitable trusts, such as the Macfarlane trusts, from computations of income and capital under the regulations. There is no specific mention of the Eileen trusts or of any of the new trusts that were set up earlier this year to make payments in respect of sufferers of new variant CJD, for example. Other regulations that provide for the calculation of income for the purposes of means-

tested benefits mention such funds specifically, so we need to know why there are such omissions. Is that agreed?

**Members indicated agreement.**

**Christine May:** That is important. The inclusion or exclusion of such funds will determine the amount of grant that is payable and that could make an enormous difference to someone.

**The Convener:** The next point concerns the fact that regulation 23(b) does not seem to fit in context. It seems in part to be a free-standing provision and some clarification of that would be welcome.

The final point concerns regulation 28. In the definition of “refurbishment scheme”, we think that the reference to regulation 33(d) should be to regulation 33(2)(d). Again, clarification seems to be required.

**Murray Tosh:** I agree.

On a practical point, that information was quite complex and we followed it only because we have the briefing paper that is available only to the committee. Might we give a copy of that to the *Official Report* to help the reporters with the brackets, inverted commas and so on? That would render the published version of our discussion much more intelligible.

**The Convener:** That is done as a matter of course.

**Murray Tosh:** Fine.

**The Convener:** Are we agreed that we will make those points to the Executive?

**Members indicated agreement.**

### Housing Grants (Minimum Percentage Grant) (Scotland) Regulations 2003 (draft)

**The Convener:** We might want to ask the Executive why, in items 1 and 2 of the schedule to the regulations, it was considered necessary to include definitions of the terms “improvement grant” and “repairs grant”, when those definitions simply reproduce the definitions of the terms in section 338 of the Housing (Scotland) Act 1987. Do we agree to do that?

**Members indicated agreement.**

### Civic Government (Scotland) Act 1982 (Licensing of Houses in Multiple Occupation) Amendment Order 2003 (draft)

**The Convener:** Are there any points in relation to this order?

**Christine May:** There was a question whether it was competent to introduce new criminal offences and penalties relating to houses in multiple occupation by modification or whether it should be done by a free-standing instrument. I understand that, if it is done by a free-standing instrument, the maximum penalty that can be imposed is a scale 4 penalty, whereas it is proposed that it should be a scale 5 penalty, which could be imposed only if the new penalties were introduced by modification.

Given the seriousness of the need to control the regulations regarding houses in multiple occupation and to ensure that people do not get around those regulations, it is important that the new penalties are introduced. However, we need to be absolutely sure that the order is drafted so as to ensure that the correct powers will be in place and that it is acceptable to impose the penalties by modification. Again, we are talking about something that might appear in a criminal court. In that case, and most similar cases, someone will be examining the provisions carefully and challenging their validity, legality and appropriateness. We should ask the questions that will enable us to be sure that the system will work correctly.

**The Convener:** We will ask about the power of modification. We could also ask about the vires of the offence provisions in article 6(a), which is linked to that. Is that agreed?

**Members** *indicated agreement.*

### **Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2003 (draft)**

### **Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) (No 2) Order 2003 (draft)**

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

### **Welfare of Farmed Animals (Scotland) Amendment Regulations 2003 (draft)**

**The Convener:** We come to the regulations that Christine May mentioned earlier. Do you want to raise some points, Christine?

11:00

**Christine May:** I will start with the issue that is probably the most striking. There is a provision in the draft regulations that specifies the size of a stall for a pig. However, the European directive in question says simply that the animal should be able to turn round, not that the length of the stall should be 75 per cent of the length of the pig squared or whatever. That is because it might be

possible for a stall to be constructed to the specified dimensions, but for the animal not to be able to turn round because of the way in which the space had been constructed. That part of the draft regulations is probably poor drafting and should not be there.

There are a number of other points, including the issue of tethers, for example, and the references in the draft document to directives that have been repealed. Again, that is evidence of poor drafting. We need to ensure that the correct and current references are included in regulations, as we said earlier.

Finally, the directives that are implemented by the regulations should have been brought into force on 1 January. As they are late, are they competent? Are we entitled to implement them late without having specific permission to do so? If we are not entitled to implement them late, are they likely to be subject to challenge?

Those are important points and we should bring them to the attention of the relevant committee and the Scottish Executive.

**The Convener:** Are we agreed to raise the reason for the delay and the issue of the Executive's reassurance that the provisions of the regulations accurately reflect the requirements of the directive, particularly in relation to the stall and the tethers, which links to paragraphs 4 and 5 of the new schedule 3A?

**Members** *indicated agreement.*

**Gordon Jackson:** This is utterly beyond me.

**The Convener:** I am pleased about that. That gives me hope.

**Gordon Jackson:** It is the geometry that is difficult—I am trying to do it in my head. I would have thought that the provisions in the regulation were better than those in the directive. Our legal briefing paper tells us that schedule 6 of the regulation says:

"The internal area of such pens must not be less than the square of the length of the pig and no internal side can be less than 75% of the length of the pig."

**Christine May:** Can a pig turn round in a space that is less than 75 per cent of its length?

**Gordon Jackson:** That is not right. If one side is less than 75 per cent, the other one must be much longer, to make the square. For example, if the pig is 3ft long, the area would have to be 9ft<sup>2</sup>, as nine is the square of three. If one side is only 75 per cent of the length of the pig, the other must be much longer.

**Murray Tosh:** This would be a lot easier if it were a 4ft pig.

**Gordon Jackson:** If you make one side less than the length of the pig, the other side has to be very much longer.

**Christine May:** Surely it is simpler and clearer in the directive, which says only that the pig must be able to turn round.

**Gordon Jackson:** I am not so sure, because in that case one could argue about what constitutes easy. For example, one could ask the pig "How easy are you finding things?" whereas if measurements were stipulated we could guarantee that the pig could turn round easily. Otherwise, the pens could be much shorter, which would open the debate about whether the pig can turn around. Indeed, including measurements would ensure that the directive is implemented. That is my theory about pigpens—I only hope that no one I know reads this.

**Christine May:** I would love to be there when the pig answers you.

**The Convener:** As long as the *Official Report* is able to reflect your comments, Gordon, we will ask the Executive for clarification on that matter.

**Murray Tosh:** I do not believe that Gordon Jackson has high hopes that no one he knows will read this. He will have it all around Babbity Bowster later in the week.

**The Convener:** The main point is that, if I have picked up Gordon Jackson correctly, his suggestion could well be an improvement on the European directive.

**Gordon Jackson:** It will guarantee that the pig can turn easily in its pen.

**The Convener:** We will ask the Executive about that matter.

That brings us nicely to the end of agenda item 3, which will probably be our one bit of excitement for this morning.

## Instruments Subject to Annulment

### National Health Service (General Medical Services) (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/310)

**The Convener:** Although the regulations breach the 21-day rule, a letter has been attached that explains the breach. The explanation seems reasonable.

### Condensed Milk and Dried Milk (Scotland) Regulations 2003 (SSI 2003/311)

**The Convener:** Again, the regulations breach the 21-day rule.

**Murray Tosh:** In this case, we have received not an explanation, but an expression of regret that the regulations were not made earlier. I do not think that we can be entirely satisfied with that, particularly given that the Food Standards Agency is involved yet again. As a result, we should press for an explanation.

Furthermore, it might be useful to ask the agency for an assurance that, when it draws up regulations that parallel regulations in other parts of the UK, it pays proper attention to Scottish parliamentary terms that are different from terms that are used in Whitehall and Westminster, in order to ensure that misplaced modifiers are not inserted. It would be gratifying to know that the FSA was fully aware of all the Scottish Parliament's processes and procedures that would affect the timing of any instruments that it introduces.

**Gordon Jackson:** In principle, we should always ask for an explanation for a breach of the 21-day rule. That does not mean that we will not accept such an explanation or that we will not be charitable about it.

**The Convener:** The regulations contain some typographical errors. We might also want to ask whether, in schedule 1 to the regulations on page 6 of the instrument, a word is missing between "7.5 per cent" and "and" in column 2 relating to item 1(c). We should clarify whether the food additives that are listed in footnote 2 on the same page are to be added to the list of designated products or to the designated products themselves.

### Feeding Stuffs (Scotland) Amendment (No 2) Regulations 2003 (SSI 2003/312)

**The Convener:** The regulations breach the 21-day rule without any explanation.

**Murray Tosh:** We have received the same dismissive letter that simply expresses regret that the regulations could not have been introduced earlier. We cannot indicate whether we accept the FSA's reasons for the breach if it does not state any such reasons. We should make it clear to the agency in strong terms that we cannot accept such a letter.

**The Convener:** Will the clerk confirm that we cannot write to the Food Standards Agency directly about this, and that we must do that through the Executive?

**Alasdair Rankin:** Yes. All the letters go to a central point at the Executive; they are then distributed to the addressees that are implied within them.

**The Convener:** As long as the FSA is getting the message—that is the main thing.

**Mike Pringle:** There is clearly an issue around the Food Standards Agency. Did such an issue arise during the first session? Has there been a change in personnel somewhere, perhaps?

**The Convener:** It does not seem to have arisen.

**Mike Pringle:** So this is a new issue, which has suddenly arisen at the beginning of this session. Is that the way it is?

**The Convener:** Possibly.

**Mike Pringle:** I think that that is unacceptable.

**Christine May:** A new group of people might be involved, and they might take a different view from—

**Mike Pringle:** That is why I was asking. Do we know whether there has been a change of staff?

**Christine May:** We have changed.

**The Convener:** I recommend that we ask why there appears to have been a change in relation to breach of the 21-day rule and so on.

**Mike Pringle:** Yes—there is a general question. The FSA does not seem to care, somehow.

**Murray Tosh:** The other issue is about transposition notes not being provided. That has cropped up about four times already. There was also the decision not to provide information because of there not being an applicable statutory condition. I presume that those points are not new, and that they must reflect previous practice. In general, the points that we are raising are not new. The 21-day rule issue might be the major point, but it would appear that there are longer-term difficulties around the level of information and the degree of co-operation that we appear to be getting from the FSA.

**Christine May:** The clerk to the committee said that all letters that we ask to be written go to a central point, and are then sent on. Do we automatically get a copy of any response?

**Alasdair Rankin:** Yes, always.

**Christine May:** That is fine.

### **Improvement and Repairs Grant (Prescribed Valuation Band) (Scotland) Order 2003 (SSI 2003/314)**

**The Convener:** There is an error in footnote (c): the proper citation of the order concerned is SI 1996/741, not SI 1996/74. We could mention that to the Executive in an informal letter.

**Murray Tosh:** Is that the kind of thing that the Executive can amend by an erratum note? If so, then that is what to do.

**The Convener:** Is that agreed?

**Members** *indicated agreement.*

### **Instrument Not Subject to Parliamentary Control**

#### **Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (West Coast) (Scotland) Partial Revocation Order 2003 (SSI 2003/315)**

**The Convener:** Item 5 covers an instrument that is not subject to parliamentary control. No points arise on the order.

## Instruments Not Laid Before the Parliament

### Mental Health (Care and Treatment) (Scotland) Act 2003 (Commencement No 1) Order 2003 (SSI 2003/316)

**The Convener:** Item 6 refers to a commencement order not laid before the Parliament. No points arise on the instrument.

**Christine May:** I wish to make a general point. While acknowledging the fact that we are mostly new on the committee, I am extremely concerned about the quality of the drafting of what we receive. There are some points that are picked up consistently, and the responses that we get back appear to be more dismissive of the committee's views than I would like. Those who advise us are, in some cases, more expert than those who are doing the drafting. This is a very complex area, and training is required to help the staff who do the drafting to get up to speed with it. I wonder how much training is available.

Later in the meeting we will discuss the schedule for our away day. I wonder whether it would be possible for committee members to meet some of the more junior staff who do the drafting, so that we can get an indication of what the issues are for them. I have no wish to knock staff who work very hard, but the regulations, orders and other instruments that we deal with implement law, and they may be relied on in courts of law. Therefore, they must be right. The more often that they can be right in the first place, the more helpful it is and if the views of those who are expert in the area can be taken on board and implemented, we will surely get better quality drafting.

**The Convener:** I agree. What do other members think?

11:15

**Gordon Jackson:** This is nothing new. I was on the committee during the previous parliamentary session and the unreasonable level of mistakes has always been a problem. Statutory instruments are very technical and some error is unavoidable.

The Executive is aware of the matter. Last week I had a conversation with Patricia Ferguson on the subject, and I am not entirely clear why it does not get better. I am also not sure that it is worse here than it is anywhere else. I have been looking at statutory instruments all my life, but never in the way that the committee requires. Perhaps if someone such as the committee's legal adviser had been looking at Westminster statutory instruments in the past, they would have found the same level of mistakes. Of course, I do not have a

yardstick against which I can measure the current level.

It should be possible to improve the quality of drafting, but I have no idea how to achieve that. During the past four years, the previous Subordinate Legislation Committee was constantly expressing its concern about the levels of mistake and inaccuracy. It is different when we have to discuss, for example, whether an instrument is *ultra vires*; that is a straightforward argument that the committee can have with the Executive.

**The Convener:** I understand that the House of Commons set up the Joint Committee on Statutory Instruments to consider this very issue. We could make inquiries.

I am told that the JCSI was set up in 1972 with the aim of improving the quality of statutory instruments. We could write and ask for some information on whether the quality of statutory instruments has improved.

**Gordon Jackson:** Did you say 1972? That is only 31 years ago.

**Mike Pringle:** And they are still trying to improve.

**Christine May:** In legal terms, that is a minute period of time.

**The Convener:** We could make inquiries and find out how much progress the JCSI believes has been made during those years.

**Mike Pringle:** I agree with Gordon Jackson, and that was the point I made earlier. We want the quality of drafting to improve, but how do we achieve that? I do not want to imply that we are criticising the staff who are working very hard. That should certainly be the message that we send to the Executive.

It is all very well saying that we want the quality of drafting to improve, but we have to address the problem of how to do that.

**Christine May:** We might be able to use the JCSI's website to find out whether it has come up with any initiatives and, if so, whether they have been implemented. Let us ask the question.

**The Convener:** Are we agreed that we should try and find out a bit more information about what has been happening at Westminster?

**Members indicated agreement.**

**The Convener:** I am reliably informed that the situation has improved. If we can find out how Westminster has managed to achieve that, we might be able to take some steps forward.

**Mike Pringle:** If the situation has improved, it must have been pretty bad before.

## Committee Projects

**The Convener:** Members will recall the legacy paper produced by the previous committee, under Margo MacDonald. It makes various suggestions about how the committee should proceed. Members have also been given a timeline of how the committee might progress the various suggestions.

Three different areas of work are proposed in the note from the clerk. The first is to do with changes to chapter 10 of standing orders. The second is an inquiry into the regulatory framework in Scotland. The clerk has suggested that the inquiry might be modest or extensive. It could fit into the other inquiry—the third area of work—which is the statutory instruments bill.

In addition, we will want to consider when we could have a conference involving other committees in different parts of the world that are grappling with similar issues. We have to consider where that conference would fit into the timeline in the note from the clerk.

**Murray Tosh:** I am not clear what our role would be in the inquiry into the regulatory framework. It would seem to be a research project that we would commission, so I am not clear why it would take as long as is indicated in the note.

I was under the impression that we could not control the timetabling of the conference. Would that not be done by some other body? Would there be a series of running meetings?

**The Convener:** The clerk will give us more detail, but there is a continuing process with other committees in other parts of the world, and such conferences are held regularly. We might fit into that.

**Murray Tosh:** Therefore, if we want to have the conference here, we might have to move when we detect the momentum for such a conference, or risk losing the opportunity.

**The Convener:** Possibly.

**Alasdair Rankin:** The inquiry into the regulatory framework could be conducted as has been suggested—the committee could simply commission a paper—or the committee could be more active and invite witnesses from various jurisdictions that have adopted frameworks that are different from ours, considered innovative ideas and introduced them to their regulatory systems. The question is how much the committee wants to get involved.

**Murray Tosh:** At the moment, I would not know what to ask or where to probe. I might get a better idea were research available first. If we are to

undertake the inquiry, we will have to do quite a bit of research anyway.

**Alasdair Rankin:** I agree. We are at an early stage and one thing that the committee could do now would be to ask for a scoping paper that would set out the issues with which other Commonwealth countries, for example, are grappling and what they have done with their regulatory systems. That might give us an idea of how to proceed.

**Murray Tosh:** Could we have such a scoping paper in time for the away day at the end of the summer?

**Alasdair Rankin:** That might be a bit too soon, but a paper could certainly be made available before the Christmas recess.

**The Convener:** Would we ask the Scottish Parliament information centre to produce a paper or would we employ someone?

**Alasdair Rankin:** Those are possibilities. We could suggest various people, but SPICe would certainly be an option.

**The Convener:** SPICe will be working through the summer, so could we at least get an early starter paper from it? That would be useful. Apart from Gordon Jackson, we are all fairly new to this.

**Alasdair Rankin:** I can certainly take up the issue with SPICe.

**Christine May:** Most of my experience of the regulatory framework has been at the other end—having to implement regulations and then consider where they are defective, overprescriptive or whatever. It is high time that consideration was given to the framework. I would hate our consideration to be sketchy because of constraints of time or work pressure, so it is worth considering whether we want to undertake the inquiry as a full committee, whether we want to commission a separate project altogether, perhaps overseen by two members of the committee, or whether we want a combination of the two. If we are going to do it, let us do it properly. Such an inquiry is long overdue, so let us not skimp on it. The alternative would be to do something very short and sharp and acknowledge that it only skimmed the surface—perhaps by simply considering good practice from elsewhere—before moving on to other work. I accept that the statutory instruments bill inquiry is probably the more important piece of work for this session.

**The Convener:** Does Gordon Jackson have any ideas?

**Gordon Jackson:** I am not sure. I went to the conference in Toronto and what came across in particular is that the reform of regulatory systems is a big topic, especially in the English-speaking

world and in Europe. The issue is reforming such systems so that they have a clear logic that ensures that only necessary regulations are drafted and that people are not overburdened with regulations. I found the conference quite technical and struggled sometimes to follow what was happening.

It was suggested that Scotland might host the next conference. That was suggested partly because people liked the idea of coming to Scotland. David Mundell attended the previous conference, which was in Australia. I am not sure whether there is an organising committee for another conference. There was a kind of looseness about that matter. Perhaps the clerk can help.

**Alasdair Rankin:** I agree that that matter was left rather open at the end of the Toronto conference.

**Gordon Jackson:** It was left hanging.

**Alasdair Rankin:** Yes. However, I think that it was suggested that the Scottish Parliament might want to host the next conference.

**Gordon Jackson:** Absolutely. The conferences are not organised like most international conferences, which tend to have a body—for example, the International Bar Association—that organises a conference every two years or so. The conferences on government regulatory systems are slightly more ad hoc. However, some conference delegates wanted regulatory agencies to get together every two years or so to assess their progress.

The conference was extremely useful. I think that the Executive should have sent somebody, but it felt that it did not need to attend the conference. In fact, the Executive could have learned a lot and should have had people there. The conference would have been more useful to the Executive than it was to me because it would have informed the Executive about how best to draft regulations, whereas it informed me only of how to criticise the job that the Executive does in that area.

It would certainly be useful to have a conference on regulatory systems in Scotland. Such a conference would be good for the Scottish Parliament. I am a great fan of the idea of the Parliament taking its place on the world stage and telling people not only that we are here, but what we do. I am sure that we could organise the next conference. The question is what we do in the meantime. I like the idea of having an inquiry into the regulatory framework, although I take Murray Tosh's point about that being an area for experts. Westminster seems further ahead of the game than we are. Is that a fair comment?

**Alasdair Rankin:** I am not entirely sure. The Cabinet Office has a regulatory impact unit that examines the stock of regulations for internal consistency and to see whether it is growing and how far the various regulatory regimes can be combined. Something is definitely going on in that unit. The Scottish Executive has an equivalent unit but, because I have insufficient information, I am unsure about what it does. I am not sure whether the Executive unit analogues what happens in the Cabinet Office unit.

**Gordon Jackson:** Canada has what I think is a sophisticated system, in which every regulation must go through a particular unit, which vets each regulation and asks whether it is necessary or merely adds a regulatory burden. The unit strikes a balance between overregulation and necessary regulation.

I am just going round in circles; I do not know where I am heading. An inquiry into how we deal with regulations would be useful and could be linked into the international scene, where there is a lot to learn.

The trouble is that we work as a committee and stand apart from the Executive, which is right in a sense, because we are the Parliament, rather than the Executive. However, the Executive needs to come on board. We can talk all day about regulations, but what we say is never translated into practice, even when the Executive links into what we are doing. The Executive will always draft the instruments.

11:30

**Christine May:** Is there a precedent for a joint inquiry by the Executive and a committee of the Parliament?

**Alasdair Rankin:** I am not aware of any precedent.

**Christine May:** Is it competent for us to consider that? Can we ask? I take Gordon Jackson's point, which partly goes back to what I said about the quality of the drafting. There is a Chinese wall between the Executive and us, or perhaps even between the Executive and the advisers to the committee. To get the sort of improvement that we are looking for, we need better dialogue and discussion of the issues. On reducing the burden of legislation, there is no point in saying that we passed only X number of bills, if the number of regulations and statutory instruments flowing from the bills increases exponentially. The burden is de facto greater than it was before. That is where we need to consider the impact of the regulatory framework.

**The Convener:** There are two points: there is Gordon Jackson's point about how we could learn



from what is happening at Westminster and there is Christine May's point about how we perhaps need to liaise more with the Executive. Does Mike Pringle have other points to raise?

**Mike Pringle:** No. I agree with the points that have been made.

**The Convener:** I suggest that we get a starter paper from the Scottish Parliament information centre to get as much information as we can about regulatory frameworks. We can consider what is happening in the UK and in the Commonwealth. I do not know whether members think that we should consider the European dimension; obviously there are examples there of devolved Parliaments. We could perhaps ask Alasdair Rankin to take on board some of the points that have been made this morning and we will discuss them at the first meeting after the recess. We can all have a think about the area as well. Is that agreed?

*Members indicated agreement.*

**Murray Tosh:** Do we require to meet during the recess? Does the Executive stop issuing instruments for a while?

**The Convener:** Yes. Apparently everything stops—the process stops at least.

**Alasdair Rankin:** The Executive can continue to draft instruments in the recess, but it cannot lay them before Parliament. The 40-day scrutiny period will start on the first day back after the recess for any instruments drafted during the recess.

**Christine May:** If the convener wants us to have a meeting during the recess, we are all absolutely at your service.

**The Convener:** Is that at any time?

## Committee Reports (Approval)

**The Convener:** The last item on the agenda concerns the approval of committee reports and how we will proceed to ensure that we have the necessary reports ready, given the 20-day limit and the need to turn around quickly reports on bills that are amended at stage 2. I suggest that members delegate to me powers to liaise with Alasdair Rankin and the legal team to ensure that what we agree, and only what we agree—for example, what we agreed on today's Executive responses, some of which had to be turned around today—is included in reports. Is that agreed?

*Members indicated agreement.*

**Christine May:** In your absence, will that delegation of power fall to the deputy convener?

**Gordon Jackson:** Absolutely not.

**Christine May:** If it does, we should say so. I would move that it does.

**The Convener:** We could either sub-delegate power to the clerk, or we could act through the deputy convener. Which would members prefer?

**Gordon Jackson:** Sub-delegating power to the clerk will be fine. There is no point in my getting involved; I would just say okay anyway.

**The Convener:** You are hoping that I do not throw myself under a bus.

**Murray Tosh:** Is it not the case that anything that is delegated to the convener is delegated automatically to the deputy convener in the convener's absence?

**The Convener:** That is how we worked in the Local Government Committee last session. That is how it should be, so there you have it, Gordon.

Apart from Gordon Jackson, we are all new to the committee, so I thank members very much for being so patient during the first three meetings. I will see you all after the recess.

*Meeting closed at 11:35.*



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