# SUBORDINATE LEGISLATION COMMITTEE

Tuesday 8 June 2004
(*Morning*)

Session 2

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## Tuesday 8 June 2004

# SUBORDINATE LEGISLATION COMMITTEE
## 20th Meeting 2004, 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)
Alasdair Morgan (South of Scotland) (SNP)
Mike Pringle (Edinburgh South) (LD)
*Murray Tosh (West of Scotland) (Con)

**COMMITTEE SUBSTITUTES**

Bruce Crawford (Mid Scotland and Fife) (SNP)
Alex Johnstone (North East Scotland) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)

*attended

**THE FOLLOWING GAVE EVIDENCE:**

David Doris (Scottish Executive Development Department)
Barry McCaffrey (Scottish Executive Legal and Parliamentary Services)
Gillian Russell (Scottish Executive Legal and Parliamentary Services)

**CLERK TO THE COMMITTEE**

Alasdair Rankin

**ASSISTANT CLERKS**

Bruce Adamson
Joanne Clinton

**LOCATION**

Committee Room 3

# Scottish Parliament

## Subordinate Legislation Committee

*Tuesday 8 June 2004*

(*Morning*)

[THE CONVENER *opened the meeting at 10:47*]

## Delegated Powers Scrutiny

### Antisocial Behaviour etc (Scotland) Bill: as amended at Stage 2

**The Convener (Dr Sylvia Jackson):** I welcome colleagues to the 20th meeting in 2004 of the Subordinate Legislation Committee. We have apologies from Alasdair Morgan and Mike Pringle.

The first item on the agenda is delegated powers scrutiny. We are considering the Antisocial Behaviour etc (Scotland) Bill, as amended at stage 2. To help us with our questions today, I warmly welcome from the Scottish Executive David Doris, Gillian Russell, Barry McCaffrey and Isobel Findlay. I hope that we will not delay you too long with our questions.

Our first questions concern part 1, which deals with antisocial behaviour strategies. Section 3A provides for a regulation-making power to apply sections 1 and 3 to registered social landlords. We take on board that what was previously a direction-making power subject to no parliamentary scrutiny has been replaced by a power that will be exercised by statutory instrument and will be subject to parliamentary procedure.

We would like some reassurance and perhaps a little more justification, because we have concerns about the choice of the annulment procedure rather than the affirmative procedure in this important part of the bill. A second concern is about consultation—because it is so important, should it be on the face of the bill?

I invite your comments on those two points. After that I will open up the discussion to the committee, for members to follow through with any questions.

**Gillian Russell (Scottish Executive Legal and Parliamentary Services):** Obviously we thought carefully about whether there should be a negative or affirmative resolution procedure in this part of the bill. Given the nature of the power that we would take and the purposes for which we thought we would use that power, we thought that the negative resolution procedure was appropriate.

I refer the committee back to what we originally said about the involvement of registered social landlords in the antisocial behaviour strategy. When we discussed the matter, we thought that we could use a direction-making power, and the reason that we gave for that is set out in the Communities Committee's first report of 2004, "Stage 1 Report on Antisocial Behaviour etc. Scotland (Bill)". Would it be helpful if I read that for the committee?

**The Convener:** Yes.

**Gillian Russell:** I do not think that our policy has changed. We said that we expected that the directions would be localised in nature and that we would use the power to involve RSLs in the preparation of the strategy. Because of the varied nature of RSLs, we said that use of the power would depend on our thinking that it was appropriate to involve the RSLs at a local level. We said:

> "Some RSLs are very large such as Glasgow Housing Association ("GHA") and Dumfries and Galloway Housing Partnership which have received local authority stock - whereas others especially in rural areas are very small and some have stock spread across a number of authorities. That being the case, it would not have made sense to impose a blanket duty on RSLs in relation to their involvement in preparation of strategies. All local authorities have a mixture of RSLs in their areas."

Really, we are considering local authority areas on a case-by-case basis and are deciding for each individual local authority area whether it would be appropriate to involve the RSL in the preparation of the strategy. That is why we did not think that the directions merited an affirmative resolution procedure; they are really not sufficiently important to merit affirmative resolution procedure and we thought that the negative procedure would be sufficient.

On the second point, about consultation, there would certainly be continuing dialogue with RSLs, and the Executive intends to consult any RSLs that it is considering adding on the duties that are contained in part 1 of the bill. Because we intend to do that, we did not think that it was necessary to make express provision in the bill to that effect, but we will listen to the committee's views.

**Christine May (Central Fife) (Lab):** I apologise, because I did not follow that. Can we go back to what are the key points for me? If this part of the bill is to work, it will require co-operation, so the drafting has to ensure that such co-operation can be achieved at all stages. That was the point that was made in the paragraph that you read from the Communities Committee report.

I am not clear about your following remarks about the fact that the decision would be made on a case-by-case basis. Technically, that concerns me, because it implies that there is considerable discretion over whether a landlord should be in or out of the consultation procedure. I do not like that; it allows a level of flexibility that might lead to a subjective rather than an objective decision, which would defeat the purpose of the reassurances that the bill seeks to give—or, at least, that I feel that the bill should give—on the fact that consultation will happen, will be on-going and will be guaranteed by ministers as a right. Given the importance of that, the procedure should be affirmative.

**Gillian Russell:** I could come back on those points, but perhaps David Doris wants to respond.

**David Doris (Scottish Executive Development Department):** From the Executive's point of view, the emphasis is on ensuring that there is a flexible approach to suit local circumstances and on the fact that the main partners will always be the police and the local authority. Depending on an area's circumstances, it might well be appropriate to include certain RSLs. As Gillian Russell said, through dialogue with RSLs and other partners in the area, the Executive would make a case-by-case assessment of whether it was appropriate for an RSL to be required to participate. However, in view of the local element and the fact that consultation will be on-going, we believe that a flexible approach without affirmative resolution is most appropriate.

**Gillian Russell:** Just to be clear, we are not talking about the involvement of RSLs in the consultation process, because that is guaranteed by the bill.

**The Convener:** Could you possibly show us where that is guaranteed?

**Gillian Russell:** Section 1(6) places the local authority under a duty

"In preparing, reviewing and revising the strategy"

to consult

"registered social landlords which provide or manage property in the authority's area".

So the consultation requirement is already enshrined in the bill.

Section 3A goes on to say that, under certain circumstances, it might also be appropriate for the registered social landlord to participate in the

"preparation, review or revision of a strategy",

taking a key role along with the police and the local authority in the antisocial behaviour strategy. That would not be appropriate in all areas and, even if some RSLs that should have a key role in devising the strategy are identified within an area, it might not be appropriate for all of the RSLs in an area; there might be hundreds of RSLs in any given area. The regulation-making power is about putting the RSLs in the same position as the police and the local authority.

**Christine May:** I am still not happy, and having heard Mr Doris's explanation, I am even more worried.

**The Convener:** Will you explain why you are still worried now that section 1(6) has been explained? It seems to get over the issues to a certain extent.

**Christine May:** Section 1(6) begins:

"In preparing, reviewing and revising the strategy".

Can I listen to the rest of the debate and come back to the point once I have thought about it? Mr Doris said something that I did not like, but I cannot remember what it was.

**The Convener:** It might be what was said about flexibility, which conjured up in my mind the idea that decisions about which RSLs would be involved could be subjective—that was the word that Christine May used. The word that Mr Doris means to use is "appropriate", because of the varied nature of RSLs, but the language that he used might have been confusing.

**David Doris:** Because of the varied nature of RSLs, the intention is to be flexible in a way that is appropriate rather than arbitrary. The likelihood is that RSLs that have been involved in a stock transfer would require to be involved in the preparation of a strategy. There is more of a debate to be had about whether it would be appropriate for smaller RSLs to be involved. That debate is best had with the local partners, and that is the approach that we have taken.

**The Convener:** I would be a bit wary if you were saying that the size of the RSLs is a determining factor.

**Murray Tosh (West of Scotland) (Con):** Is it really the size of the RSL that is being used as the criterion? I did not take that from what Mr Doris said. It is clear that when there has been a large-scale stock transfer, the local authority stock has become the RSL and so it must be involved. Beyond that, there will be a range of other operators in each local authority area, some of whom might be significant to the development of the strategy and some of whom will not be. Some of them will have a substantial policy-generating capacity and a capability for strategic thought, and some will be operating 20 houses from an office in another local authority area. There has to be a degree of flexibility before saying that every RSL is either in or out.

I would have thought that there has to be some kind of yardstick according to which the significant players in an area can be identified, and that we cannot expect them to manage the strategy unless they are involved in its evolution. I do not know whether those decisions can be made in Edinburgh or by affirmative resolution. They strike me as intensely local decisions, which should surely be taken on the merits of the circumstances in each local authority area.

11:00

**The Convener:** As I understand the situation, the alternative view is that the range of structures that might come into play in different local authorities with the transfer of housing stock is by no means worked out yet. Smaller housing associations might co-operate with a main housing association that is taking charge of housing stock, and there could be some concern about that. If Mr Doris did not mean size, he should please say so and give us some reassurance about that.

**David Doris:** Size is one factor, but it is not the only factor. The question is more about who would be expected to take a strategic role in the preparation of the strategies. All RSLs will be involved, at least at the level of consultation. The distinction is drawn around those RSLs that should be involved in the preparation and review of the strategies. Size is not the only factor in that. Some RSLs operate across different local authorities, and that needs to be taken into account, too.

**The Convener:** You are saying that some RSLs might not be involved in the consultation—in preparing, reviewing and revising the strategy.

**David Doris:** No—that is not the case. All RSLs will be involved in the consultation on the strategy. There is a requirement for them to be consulted when the strategy is reviewed, and they would all be consulted on the preparation of the strategies. It is more a question of whether or not RSLs are required to participate in actually preparing the strategies. Any additional consultation would depend on whether the Executive is required to consult RSLs formally about whether they should be required to participate in the strategies, rather than just be consulted on them. In our view, that is more a matter for local dialogue between the agencies concerned and the Executive, and for negative resolution.

**Christine May:** I am still concerned about this. I am struggling to understand the distinction that has been drawn. If an RSL is involved in the consultation process that prepares and reviews the strategy, then it has a right to be involved. I am thinking about some small RSLs that deal with particularly difficult client groups. By their very nature, they are small in each local authority area, but their client groups are frequently the subject of antisocial behaviour issues. It is essential that those RSLs have the right to be involved, because of the nature of their client groups. If you can assure me that nothing will exclude the likes of those RSLs, not just from being consulted but from being involved in drawing up, reviewing, monitoring and participating in the strategies, and if you can reassure me that the wording of section 1(6) says that—which is not what you seem to have said in your explanation—I will be content; otherwise, I will not be content.

**David Doris:** There is a distinction between authorities that become involved in the preparation of a strategy in a formal sense, on whom a requirement to be involved has been placed, and smaller local authorities. We would encourage smaller local authorities that wish to be involved to get involved. If there were a need to make regulations to state categorically that such authorities are to be involved in preparing strategies, that would be done. The intention is to be flexible. Where there is a need to require involvement, it will be required, but participation and preparation can happen without regulations anyway.

**Gillian Russell:** The

"preparation, review or revision of a strategy"

under part 1 has a particular set of meanings. We would expect the authority whose duty it is to prepare the strategy to do the necessary assessments, to specify the range of services required and to sort out the availability of services. Those with that duty would have to do all those big, strategic things. Many smaller RSLs—smaller in size or in target area—would not have the capacity to do that bigger job. However, they would be consulted, and their views would feed into and inform the bigger strategy.

I do not think that there is any doubt that all RSLs in a local area will be involved. I am sure that the guidance that the Executive will produce will cover that. Indeed, that is the kind of thing that the guidance will cover, to ensure that all the relevant parties in a local authority area are properly involved in the preparation and review of the strategy. However, they will not all be responsible for preparing or reviewing the strategy. That is the distinction that needs to be made.

**Mr Stewart Maxwell (West of Scotland) (SNP):** I think that I am now fairly clear about what is happening. However, for clarity, will everybody, in effect, be consulted?

**Gillian Russell:** Yes.

**Mr Maxwell:** But only some RSLs, whether because of their size, their relevance or something

else, will be involved in the actual preparation of the strategies.

**Gillian Russell:** Yes.

**Mr Maxwell:** So that is the difference. For the reasons that you have given, which concern organisations' relevance and resources, it is the Executive's view that, if everybody was, in effect, forced to be involved in the preparation of the strategies, the preparation would be so unwieldy as to be almost unworkable.

**David Doris:** Exactly.

**Christine May:** In that case, could we say that all the organisations concerned have the right to be involved? They might not wish to be involved, they might not feel it to be relevant for them and they might not have the resources, but I do not like the distinction, which means that, although everybody will be consulted, some parties might be excluded from preparing the strategies, either arbitrarily or for reasons of flexibility. That still worries me.

**Gillian Russell:** There will be no exclusion of anybody from the process, but there will be main players, who will be responsible for preparing the strategies. It would not be appropriate to place such a duty on everybody, because not all RSLs would be able to carry out the preparation of strategies, and the process would be made completely unwieldy. That does not mean that the smaller RSLs will be overlooked in the process at all. What we are saying is that only certain big, key players in an area will be given the responsibility of preparing, reviewing or revising the strategy. Those key players will be responsible for ensuring that everybody else gets together and works together to produce the strategy for the area concerned.

**David Doris:** I can assure members that, if a particular RSL wanted to ensure that the requirement to prepare a strategy was placed on them, and if there was agreement among the RSL, the police, the local authority and the Executive, there is no reason at all for excluding an RSL that wanted to engage as a strategic partner in the preparation of the local antisocial behaviour strategy. Although that is not in the bill, there is no reason why ministers would want to stop RSLs that wanted that requirement placed on them having it placed on them.

**Christine May:** Equally, there is nothing in the bill that says that ministers could not do that if they so chose. We have got to give a guarantee one way or the other; otherwise, I think that the provisions are technically flawed.

**Mr Maxwell:** Surely, if all RSLs were allowed to take up and took up that right, the system could not operate. I understand why they should all be consulted and I understand why the Executive is saying that there is a practical implication for the preparation of the documents. However, it would be strange and slightly concerning if many or all of the organisations in an area took up that right. It seems to me that the process would grind to a halt.

**Gillian Russell:** Yes.

**Christine May:** Nevertheless, it seems to me that the bill is denying those whom I would wish to have the right explicitly—

**David Doris:** It is not denying them—

**Christine May:** Implicitly—I beg your pardon. What I suggest is possible unless the right is guaranteed.

**The Convener:** You have made the distinction between consultation and participation. Section 3A(1) states:

"The Scottish Ministers may make regulations for the purpose of securing the participation of a registered social landlord".

It says "may". Following Christine May's arguments, does not that make the situation even worse? There is no real obligation for the regulations to be made.

**Gillian Russell:** The point that you make about the distinction between participation and consultation might be slightly confused. In section 3A, we are talking about participation

"in the preparation, review or revision of a strategy".

**The Convener:** I am clear about that.

**Gillian Russell:** It is not a question of participation instead of consultation. The provision is an enabling power that will allow ministers to make regulations to involve RSLs. We cannot say any more on why we think that it is appropriate for ministers to be able to consider each individual area, take soundings and take a view on whether, in addition to the local authority and the police in a particular area, a particular RSL should be given a strategic role by taking on the fairly onerous duties of preparing a strategy and following all the consequent procedure that will then have to be followed. I do not think that there is much that we can add to what we have said already.

**The Convener:** Perhaps I have got it wrong, but I understand that RSLs may have a considerable role to play in housing stock in the future, yet you seem to be saying that they might not have a strategic role in the preparation of antisocial behaviour strategies.

**Gillian Russell:** We are saying that RSLs will have that strategic role if, in a certain local authority area, it is felt that, in addition to the local authority and the police, they should be given it. I

do not think that there is any doubt that ministers will consider each local authority area and reach a view on whether there are RSLs in the area that need to be given that role.

**The Convener:** You will agree that we are dependent on the reassurances that you are giving, and that a different Scottish Executive might have a completely different interpretation.

**Gillian Russell:** I accept the fact that the power to make regulations is not a power that ministers have to exercise. However, ministers have said that they will consider, on a case-by-case basis, whether there are RSLs in any local authority area that merit inclusion in the process. If they are satisfied that there are, regulations will be produced that the Parliament can consider in due course.

**Mr Maxwell:** We are going round in circles. I seek some clarification, given the convener's concern over the use of the word "may". I understand where she is coming from.

You seem to suggest that there may be areas in which ministers will decide not to involve any RSLs in the preparation of a strategy to deal with antisocial behaviour. At first, I thought that you were saying that all RSLs in every area would be consulted, with some being involved in the preparation of the strategy. However, you now seem to be saying that, although all RSLs in an area will be consulted, ministers will decide whether any will be involved in the preparation of the strategy.

I agree that it seems a bit daft to involve everyone in preparing the strategy; however, I think that some RSLs in every area should be involved. You do not seem to be saying that now. Surely replacing the word "may" with "must" in section 3A(1) would ensure that some organisations in every area were involved in preparing the strategy.

**Gillian Russell:** But this is about preparing the strategy. As I have said, such a duty will be fairly onerous for the people who have to carry it out. For example, they will have to take responsibility in their area for assessing the extent of antisocial behaviour, specifying the range and availability of services and co-ordinating their functions for exchanging information. It might well be that, in a particular area, an RSL would not be in a position to take on such a role.

**David Doris:** It is also important to point out that this matter was widely consulted on when the bill was being prepared. Our flexible approach ensures that, where appropriate, RSLs can become fully involved in a strategic role, but avoids placing a blanket duty on them to carry out such an onerous responsibility. The Scottish Federation of Housing Associations and other partners have welcomed the balance that we have struck.

11:15

**Murray Tosh:** This discussion illustrates why we have primary and secondary legislation. It would be impossible to specify such matters satisfactorily. After all, RSLs can vary from Glasgow Housing Association, which is preponderantly the supplier of social housing in that city, to a body such as Bield Housing Association, which in any local authority area might have one house containing eight elderly ladies who would not remotely come under the bill's provisions. Members might know of some elderly ladies who might be considered to be relevant in that respect, but by and large I do not think that that segment of the market is characterised by antisocial behaviour. Indeed, I imagine that such housing associations would find being involved in the procedure burdensome and irrelevant to their mainstream activities.

In response to Stewart Maxwell, I do not think that the word "must" is better than "may" in this context. The word "may" is necessary, because we are still in the very early stages of local authority stock transfers and in some areas it might not be appropriate to include any organisations in preparing the strategy. That said, in many local authority areas, stock transfer landlords with perhaps 2,000 or 3,000 houses should be involved, because they are key players. There are other organisations whose operation in individual local authority areas is so slight that they will not want to be involved and we should not place such a level of responsibility on them.

**The Convener:** If there are no further points, we can probably end the discussion here and continue it later.

We now move on to guidance provisions. I want to raise three questions about section 14A, the first of which is whether the bill should seek to impose a duty as opposed to a discretion on ministers to issue guidance. The second question is whether ministers should be placed under a statutory duty to consult on the preparation of guidance, and the third is whether any such guidance should be laid before the Parliament or be subject to any parliamentary procedure.

Similar points have been raised about section 20, which concerns guidance on the dispersal of groups; section 46A, which concerns guidance in relation to part 5; and section 51E, which concerns guidance to local authorities on graffiti removal. We might as well cover section 85, which is to do with parenting orders, at the same time as section 88A(5), which is to do with further criminal

measures, as we have the same three points about both of them.

**Gillian Russell:** I will approach the matter from the legal perspective; David Doris will want to comment generally on the Executive's approach to guidance.

In all cases, there is no duty on ministers to produce guidance. In effect, it is unnecessary for the bill to provide even that ministers have the power to issue guidance because they have that power in any event. The bill deals with the legal effect of any guidance that ministers issue. Persons who exercise functions under the various parts of the bill that have been discussed will have to have regard to the guidance when they carry out their functions. That is the effect of the guidance provisions.

We have taken on board the committee's comments on whether the guidance should be laid before the Parliament. In part 3, which introduces the power to disperse groups, we have provided in section 20 that guidance shall be laid before the Parliament. The guidance will not be subject to any parliamentary procedure and will be laid before the Parliament for information after it has been made. We do not think that there is any need to do the same for guidance on other provisions.

David Doris will speak more generally about our approach to guidance and what we intend to do aside from what the bill expressly states.

**The Convener:** Before he does so, I point out that we are most concerned about the dispersal of groups. I ask him to home in on that as an example.

**David Doris:** The main point about the dispersal of groups is that, as Gillian Russell said, under the bill the guidance will be laid before the Parliament. The Communities Committee raised the issue in its meeting of 26 May and ministers have agreed to write to that committee to set out the proposed timetable for the publication of guidance on each part of the bill. We will do that in the next few days, which will allow the Communities Committee to timetable its scrutiny of the guidance. We will consult on the guidance, but a statutory requirement to consult is not considered necessary; the issue is one of good practice.

**The Convener:** To clarify, you are saying that the Communities Committee will examine the guidance, particularly the guidance on the power to disperse groups, and that changes will be made before the final stage of the bill.

**David Doris:** The Communities Committee wanted early sight of parts of the guidance that we have begun to draft, in order to inform its consideration of stage 3 amendments. During stage 2, the minister said that various amendments were not necessary because the matters would be covered in guidance. We intend to give the Communities Committee sight of the guidance as soon as possible. More generally, the Communities Committee will timetable scrutiny of the guidance in the lead up to implementation of the legislation.

**The Convener:** When the guidance is ready and comes to Parliament, what will be the process by which MSPs interrogate it?

**David Doris:** I do not know what procedure draft guidance falls under, but it will be sent to the most relevant committee, which will consider it as it sees fit.

**Christine May:** That last answer was quite revealing, because although the committee might have the opportunity to consider the draft guidance—I am not sure about procedures in respect of guidance and committees—the Parliament will not, and it will not have the opportunity to amend the draft guidance. Given that we are discussing some of the most contentious parts of the bill, it is important that the technicalities and parliamentary procedures are correct.

I will go through what I think that you are saying. First, ministers may issue guidance or they may not—they do not have a duty to do so. Secondly, guidance does not have to be laid before the Parliament, nor is it subject to any procedure. Thirdly, there is no statutory duty to consult on the guidance. Taking all three points together, an awful lot of discretion is allowed for. As I recall from the discussions on the bill, there was a wish from the Parliament for clear direction from ministers on what the powers would be and how they would be exercised. I would be grateful if you would tell us again why you think that the provisions are sufficient.

**David Doris:** I was referring in particular to our discussions with the Communities Committee because it is the lead committee on the Antisocial Behaviour etc (Scotland) Bill and it takes the biggest interest in the bill as a result. That said, there is nothing to prevent any other member from having sight of the draft guidance. We could consider how that could best be done—whether by ensuring that copies of the draft guidance go to the Scottish Parliament information centre or by another mechanism. We have treated the guidance as all other types of guidance from the Executive tend to be dealt with, in that it is not subject to parliamentary procedure. In many respects, the planned level of engagement has been much higher than for most other Executive guidance.

**Christine May:** I do not suggest that the information is being kept from individual MSPs; I

am much more concerned that the mechanisms by which the guidance is consulted on, developed and then subjected to parliamentary scrutiny, are technically correct and appropriate for such legislation. I accept that we are entitled to ask for information at all stages.

**David Doris:** Where there is a formal consultation and guidance is issued—and that might not always be appropriate—the intention is that such information would be issued within the three-month consultation period as standard.

**The Convener:** We move on to a quick question about part 5, which deals with noise nuisance. Section 46 concerns fixed-penalty notices. As the proposed power is a wide one, what is your justification for the stance that you have taken?

**Barry McCaffrey (Scottish Executive Legal and Parliamentary Services):** The committee raised the same points in relation to sections 49 and 50, so it might be easier to deal with them together.

At stage 1, this committee was clearly concerned that an open-ended power might be exercised in a significant way and it naturally questioned the procedure for making an order to increase the fixed penalties. In response to the concerns of the committee at stage 1, we took on board the serious issue about increasing a fixed penalty. We lodged stage 2 amendments to bring the provisions into line with section 97(2), which makes level 2 on the standard scale the upper limit on the exercise of the power to increase the fixed penalty. That makes it clear that the exercise of the power is limited.

11:30

However, one must bear it in mind that the power is to increase the penalty in a fixed-penalty notice, which is meant to be an alternative to prosecution on proceedings for a substantive offence. A power is needed to amend the penalty, to take account of changes in the value of money, for example. That is the primary reason for having the power to increase the fixed penalty.

If the level 2 limit did not apply and the Executive suddenly decided to increase a fixed penalty to £1,000 or £2,000, it is likely that that would defeat the purpose that the fixed-penalty procedure is meant to serve—that of being an alternative to prosecution. In appropriate circumstances, the procedure gives people the chance to pay a fixed penalty, which would obviate the need for criminal proceedings on the substantive offence.

The Executive does not intend to use the power to increase the penalty to the extent that people would be perilled on paying a significant penalty. However, we recognise that as the power is to be used primarily to reflect changes in the value of money and to change the fixed penalty over a period, it should be limited. That is why we responded to the concerns that the committee expressed at stage 1 by lodging stage 2 amendments to set limits.

**Gordon Jackson (Glasgow Govan) (Lab):** The only point that I did not understand was that you said twice that the power was to be used to reflect changes in the value of money. The fixed-penalty system does that automatically. A fixed penalty can be set permanently at level 3, but the values of the fixed-penalty scales change from time to time under subordinate legislation. The Executive does not need to move a penalty from level 2 to level 3 because the value of money has changed, since the amount at which level 3 is set changes from time to time. I did not understand the point about reflecting the value of money, because that is dealt with under subordinate legislation to change fixed-penalty rates from year to year.

**Barry McCaffrey:** That is true. I just focused on a potential reason for exercising the power. Section 50 of the bill, which was amended at stage 2, will amend section 88 of the Environmental Protection Act 1990, which concerns fixed penalties for a littering offence. The 1990 act already contained a power to increase the fixed penalty, which has been exercised twice in the past 10 years. That happened most recently last summer. The fixed penalty was originally £50 and it has now been increased to £100. Such provisions are not unusual.

Over a period, it would be appropriate to reflect on whether the level of a fixed penalty was suitable. The value of money is one reason for that, but over a period, an increase in the penalty might be appropriate. However, it is borne in mind that any increase should be limited. If the Executive suddenly decided to increase the fixed penalty for a littering offence tenfold, so that it was £500, people who faced such a significant penalty would be likely to say, “I’d rather take my chances on defending my case and going to court.” As I said, that would defeat the purpose of the fixed-penalty procedure, which is to be an alternative to prosecution, in appropriate circumstances.

**Gordon Jackson:** I am not sure whether I agree. The general practice in fixing a statutory fine is to specify its level, rather than to give the Executive the power to fix the level as it goes along. Whether the subject is road traffic or whatever, an offence normally attracts a fine at a summary level, which reflects the value of money, because it changes from time to time.

To take one example at random, if someone does not abide by a parenting order they will

commit a criminal offence under section 83 of the bill, and they

"shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale."

The normal statutory provision is to fix a fine at not exceeding level 3, rather than give the Executive the ability to switch the level of fine on the standard scale. If I am wrong on that tell me, but I find that a rather unusual power.

**Barry McCaffrey:** The basic concern of the committee at stage 1 was that the power should not be open ended and that there should be an upper limit on it. At stage 2 we strove to produce that upper limit. We intended to be consistent with what is already in section 97(2), in part 11 on fixed penalties. Even if we had not done what we have done, the basic point is that there is still a littering offence that has a fixed penalty, to which the provision should apply.

**Gordon Jackson:** If I am honest, it is not the greatest deal in the world, because the penalties do not bear much resemblance to what the courts fix as fines. We constantly see people who, on a statutory offence, could be fined £1,000 but they are fined 3/9. The bottom line is that the court fixes the penalty at what it considers to be appropriate, so maximums almost do not exist in practice. It is an interesting way of doing it. I suspect that the sheriff fixes the fine as he thinks appropriate. If you gave him a limit of £3 million he still would not make the fine above 3/9 if he did not think that it was appropriate. It does not matter all that much.

**The Convener:** Section 46B, on the meaning of "relevant place" and "relevant property", seems to have fairly wide implications. Could you talk us through it?

**Barry McCaffrey:** It would probably be easier if I referred to what the Deputy Minister for Communities said to the Communities Committee at stage 2:

"As originally drafted, the definition of the places from where noise could be emitted was modelled on the definition of 'dwelling' in the Noise Act 1996, and aimed to tackle noise emitted from domestic dwellings. However, in response to consultation, the definition has been expanded to cover places other than dwellings."—[*Official Report*, *Communities Committee*, 12 May 2004; c 982.]

The definition at section 46B covers things like accommodation. There is a further definition of accommodation in section 46B(2), which essentially covers buildings, whether permanent accommodation, temporary accommodation such as a bed and breakfast or a hotel or guest room, and other types of property, such as land that belongs to or is enjoyed with the accommodation, such as a garden ground. Section 46B(1)(c) refers to land in which people have rights in common, such as Queen Street gardens and common passages within tenement buildings. It is clear that in light of consultation the definition of "relevant property"—which is the place where the noise offence can be committed—has been expanded beyond simple dwelling houses, which was welcomed by the Communities Committee at stage 2.

Conversely, the definition of "relevant place", which is the place from which noise can be measured, was amended at stage 2 to reflect the fact that, because of technical difficulties in measuring noise, the place from which a noise can be measured has to be within a building. That followed advice from research consultants that the Executive engaged before stage 2.

The minister told the Communities Committee that

"research commissioned by the Executive concluded recently that at present it is not technically possible to measure noise from outside, so the definition of 'relevant place' has been restricted to require measurement to take place from within a building. In practice, that will allow local authority officers to measure noise levels from a building that is in close proximity to the place from which the noise is being emitted."

She went on to say that the amendment that she was discussing sought

"to insert provisions to enable the definition of 'relevant property' and 'relevant place' to be amended in future if technical developments in the measurement of noise make that possible."—[*Official Report*, *Communities Committee*, 12 May 2004; c 982.]

In light of the importance of those future possible changes, another amendment sought to insert in section 108 a reference that would require any such order to be subject to the affirmative procedure.

Although we recognise that the power is wide, our starting point is that, at stage 2, the scope of the provisions moved significantly beyond the normal domestic-dwelling scenario. There is a technical issue about from where one can measure noise. Our initial focus was primarily on the definition of "relevant place". Our understanding is that, at some point in the future, it may become technically possible to measure noise from outwith a building. We have taken on board that possibility by giving ourselves the power to prescribe a further category of relevant place. We appreciate that, as that could be a wide power, the affirmative procedure would provide the appropriate degree of scrutiny.

The focus of the definition of "relevant property", in so far as it relates to buildings, is accommodation but, in future, more sophisticated devices for measuring noise may make it possible to measure the noise that is emitted from caravans, tents or other temporary structures. At this stage, it is difficult to foresee how the

technology will develop but, just as we have acknowledged that that could affect the definition of "relevant place" in the future, for consistency's sake we have also seen fit to examine the definition of "relevant property" and to give ourselves a power to amend it. Again, that power would be subject to the affirmative procedure.

**Mr Maxwell:** Can you name somewhere that would not be covered by the definitions? Am I right in suggesting that, in effect, everywhere would be covered by them?

**Barry McCaffrey:** If we take "relevant property", the focus—the strand that is mentioned in section 46B(1)(a)—is accommodation, but there are other things that are not accommodation specific. It is clear that the present definition of accommodation is focused on permanent buildings and other such structures. I mentioned the specific example of caravans. I accept that, if a caravan were situated on land that people had in common as a private garden and noise was being made outwith the caravan, the likelihood is that any such noise that was made in the vicinity of the caravan could be caught. However, there would be an issue about whether noise that was emitted from a caravan—which is not accommodation; it is just a type of vehicle—would be covered. The difficulty would be that, if noise was being emitted from a caravan and there was not another building in proximity to that caravan, it would be very difficult to find a relevant place from which to measure the noise, given the present constraints.

**Mr Maxwell:** In relation to "relevant place", section 46B(1)(b) says:

"such other place as may be prescribed."

In relation to "relevant property", section 46B(1)(e) also says:

"such other place as may be prescribed."

In other words, do those provisions not mean anywhere?

**Barry McCaffrey:** They could do. The main issue is the ability of the current technology to measure noise.

**Mr Maxwell:** You would agree that, in effect, ministers are being given the power to measure noise anywhere they please.

**Gillian Russell** *indicated agreement.*

**Gordon Jackson:** I have a bias—I would give ministers all the power that they want. I am up for anything that cuts down noise pollution. This is the one occasion on which I do not mind how much power they have.

**The Convener:** I ask for further clarification of the definition of accommodation. In section 46B(2), you use the word "accommodation" within the definition of accommodation, which is perhaps less than helpful. The bill states that

"'accommodation' means a building or other structure … used or intended to be used as a separate unit of accommodation".

Does that include pubs, clubs and so on?

11:45

**Barry McCaffrey:** It could. The example that was put to the Executive in the run-up to stage 2 was of a stag weekend at a chalet up in Aviemore. That would not be a domestic dwelling in the normal sense, but there might still be a noise nuisance caused to those who lived in the vicinity of such an establishment. A conscious decision was made that any type of accommodation, either temporary or permanent, could fall within the ambit of the bill's provisions.

**The Convener:** Let us be clear about this. The definition covers temporary as well as permanent accommodation. Clubs and pubs are definitely included in the definition.

**Barry McCaffrey:** There will clearly be issues as far as clubs are concerned, because powers exist under licensing legislation that would be brought to bear on operators of clubs who were not appropriately managing antisocial behaviour on their premises. Nevertheless, it was still felt that there might be circumstances in which the bill's provisions might be brought to bear on smaller hostelries, bed and breakfasts and guest chalets—in Aviemore or elsewhere—if no other enforcement regime might more appropriately be brought to bear.

**The Convener:** I appreciate that. What I am talking about is the clarity of the definition. When you talk about accommodation, do you mean where people are physically living?

**Barry McCaffrey:** I mean where they are living for a time.

**The Convener:** You see what I mean: the definition of accommodation is not terribly clear because the word "accommodation" is used within it.

**Barry McCaffrey:** The definition tries to clarify what we mean by accommodation. The words in brackets at the end of that definition of accommodation are:

"whether on a permanent basis or otherwise".

That represents a clear intention that any temporary accommodation—however temporary—could fall within the definition of "relevant property". That would mean, in turn, that the noise nuisance offence could apply.

**The Convener:** Okay. Stewart Maxwell mentioned section 46B(1)(e), which defines "relevant property" as being

"such other place as may be prescribed."

That is what led me to ask you about the definition of "accommodation". Would there be consultation if ministers planned to include a range of other places? I think, judging by what Stewart Maxwell said, that the definition is fairly all-encompassing.

**Barry McCaffrey:** It is clear to us that it is a significant power and that the end result—the use of the affirmative procedure—is entirely appropriate. However, in the run-up to producing an order for Parliament's consideration through the affirmative procedure, the Executive will consult in the normal way, especially for a change of that nature.

There would be other issues because the guidance that would be associated with the operation of part 5 of the bill would have to be changed to reflect significant changes. There would be a process—the Executive would not just suddenly decide one day that other places should be brought within the ambit of the bill, and thereafter produce an order without consultation. I would not expect that to happen.

**The Convener:** You would not expect that to happen, but you will accept that the bill does not state that there must be consultation.

**Barry McCaffrey:** I accept that, but I suspect that the matter at issue is not the only enabling power of that nature in the bill. I do not think that it is specified anywhere in the bill that there will be a requirement to consult. However, given the significance of the powers, it would be highly unlikely that there would not be any form of consultation before we got to the stage of laying an order before Parliament for consideration under the affirmative procedure.

**The Convener:** That brings us to section 51B and the power to modify the meaning of "relevant surface". The affirmative procedure is proposed for that power. Could you talk us through this section as well, to justify that?

**Gillian Russell:** It might be helpful to start by explaining what "relevant surface" means for the purposes of this part of the bill. On 13 May, the Deputy Minister for Communities said to the Communities Committee that local authorities would be given

"the power to serve graffiti removal notices on persons responsible for relevant surfaces having been defaced by graffiti that is offensive or otherwise detrimental to the amenity of the surrounding area"

and that such surfaces

"might be the surface of a public road, buildings, street furniture, telephone kiosks or litter bins."

She went on to say that

"The surface of land that is owned, managed or controlled 'by a relevant body', or the surface of 'any building, structure, apparatus, plant or other object on such land' would also be included. For the purposes of the amendment, a 'relevant body' is a statutory undertaker, as defined in section 98(6) of the Environmental Protection Act 1990 or an 'educational institution', as defined in section 98(3) of the 1990 act."

I can explain that later. The minister continued:

"The surface in question must be on public land, visible from public land or otherwise visible to those who use the services and facilities of the relevant body or those of any other relevant body. The provision empowers a local authority to serve a graffiti removal notice where there is graffiti on a school or college building that, while not visible from a street, is visible to those who attend the school or college."—[*Official Report*, *Communities Committee*, 13 May 2004; c 1015.]

She then went on to talk about what happens once the graffiti removal notice has been served.

The minister was asked to explain a little more about the relevant surface. She responded:

"Other places that we would be looking at under the proposed new section include telephone boxes, electricity sub-stations and benches along the street. Those are places that are not looked after by any one person and graffiti can remain there for some time. There is a need to impress that point on those responsible."

Later, the minister was asked specifically about the use of the power to modify the meaning of "relevant surfaces". She said:

"I reassure members that any regulation to do that would be introduced under the affirmative resolution procedure. I reassure members that the issue would not simply be looked at by me—or whomever the minister happened to be—and that it would be open to the committee to consider whether ministers had correctly used those powers."—[*Official Report*, *Communities Committee*, 13 May 2004; c 1021-22.]

Although the initial definition of "relevant surfaces" is quite complicated, the power applies only to a limited number of surfaces, including the examples that were given, such as telephone boxes, electricity substations and educational establishments.

The current definition was arrived at after consultation of local authorities. There was consensus that the power to issue graffiti removal notices and to deal with graffiti should at present be limited to the particular surfaces that were listed. However, it was also felt that we might in time want to extend the provisions beyond the fairly limited list in order to take in other types of surface, which is why we took the power that will enable us to do that. Obviously, we propose to keep the use of the powers under review and to monitor how they are working in practice. If necessary, we would like the opportunity—if it were thought appropriate—to expand the definition of "relevant surface".

The members of the Communities Committee mentioned a number of examples of graffiti in their local authority areas that they thought the powers might be used to deal with. However, we have limited the use of the powers at present for the reasons that I have given.

**Gordon Jackson:** Just for my own purposes, I ask the witnesses to give me an idea of the sort of surface that is not relevant under the bill as drafted, but might become so.

**Gillian Russell:** I suppose that surfaces that are not relevant at the moment would include, for example, shop fronts. However, that is merely an example of something that we did not feel it to be appropriate for us to legislate on. We could possibly open the matter up for discussion in the future. At present, we are limited to surfaces in the public domain, such as telephone boxes and electricity substations.

**Christine May:** Does the term "relevant surface" include trees? I assume that the "plant" that is mentioned in the first paragraph of the minister's response refers to industrial plant rather than to greenery.

**Gordon Jackson:** You are just worried about all those trees in Fife that you carved "Christine Loves So-and-so" on in your teens.

**Christine May:** I am thankful that all those trees are in Dublin.

**Gillian Russell:** The list in section 51A(3)(b)(ii) refers to

"any building, structure, apparatus, plant or other object".

I do not think, in that context, that a tree would ever be considered as an "object". I suppose that we could extend the provision to trees if that became a problem.

**Christine May:** Good.

**The Convener:** We move on to part 8 of the bill, which concerns registration areas for housing. I think we have already asked the question that has been raised in relation to section 64B, on application for registration. Does the provision make it possible for the local authority to decide that no fee would be payable on applying for registration?

**Gillian Russell:** Yes.

**The Convener:** Similarly, does the provision in section 64F, which concerns the duty of a registered person to provide information to the local authority, make it possible that no fee would be payable?

**Gillian Russell:** Yes. However, I should point out that if regulations that provided for fees were introduced, fees would have to be paid. In the absence of any such regulations, a local authority would have the discretion to charge no fee.

**The Convener:** Part 11 concerns fixed-penalty offences. Sections 95(2) and 95(3) refer to the table of offences that is set out in section 95(1). For example, section 95(2) states:

"The Scottish Ministers may by order … amend an entry in the table … add an entry to the table"

or

"remove an entry from the table."

Would the Executive ever consider going outwith the offences that are specified in the table?

**David Doris:** We could add to the offences in the table. However, they would then be in the table.

**The Convener:** Let me just confer on that matter for a moment.

I am sorry. Could we please leave that question? I think that we have been reassured on the matter.

We move on to part 13, which concerns miscellaneous provisions.

Page 16 of the committee's legal briefing deals with section 106(3), which was amended for clarity. As we are running a bit short of time, would it be easier for us to liaise with the Executive about part 13? It is no problem to read out the points that we would like to raise if the witnesses would like to deal with the matters now.

12:00

**Gillian Russell:** Could we hear the question then tell you whether we can deal with it? If we cannot answer now, we will respond this afternoon.

**The Convener:** Excellent—I will go through our points.

"Legal advisers have some reservations about the Executive's view of the interpretation of this provision as set out in its Memorandum. The Executive claims that the expression 'by virtue of' includes 'by' and 'under' citing as its authority article 6(3) of the Interpretation Order (SI 1999/1379). However article 6(3) provides only that '…words and expressions used in an Act of the Scottish Parliament which are also listed in section 127 of the Scotland Act 1998 shall, unless the contrary intention appears, have the same meaning as they have in that Act'.

The expression 'by virtue of' is indeed defined in the Scotland Act as described by the Executive but in section 126(11) not 127. This subsection is not one of the sections cross-referred to in section 127 nor is there any other provision either in the Scotland Act or in the Interpretation Order that in the opinion of legal advisers would have the effect of attracting the definition."

Would you like to take that issue away with you?

**Gillian Russell:** We will take that away with us. That point is helpful and we thank the committee for it.

**The Convener:** That is fine. We picked that up when we went through all our legal advice—I am sorry that you did not have notice of that point. I thank the witnesses for attending the meeting. We will consider your responses later and we will compile a report.

For us, today's agenda is mammoth, but the committee will be glad to hear that the rest of the agenda will be quite quick.

# Executive Responses

## Town and Country Planning (Electronic Communications) (Scotland) Order 2004 (draft)

12:02

**The Convener:** Agenda item 2 is Executive responses. Following the Executive's responses to our questions on the order, the legal brief recommends that we draw the instrument to the attention of the lead committee and the Parliament on the following grounds:

"(a) defective drafting on point 1 acknowledged and now corrected …

(b) failure to follow proper legislative practice on points 2 and 4, again acknowledged by the Executive and now corrected;

(c) defective drafting on point 3";

the footnote references, which have been corrected in the new draft order; and

"(d) that information was requested on progress on consolidation".

Members will see from the Executive's reply that consolidation will be completed when time and resources are available. Do members agree to draw those points to the attention of the lead committee and Parliament?

**Members** *indicated agreement*.

## Crofting Community Body Form of Application for Consent to Buy Croft Land etc and Notice of Minister's Decision (Scotland) Regulations 2004 (SSI 2004/224)

**The Convener:** Members will remember that the regulations had a huge number of problems. Following the Executive's response, it is suggested that we might want to draw the attention of the lead committee and the Parliament to the following points:

"(a) that there is a doubt as to whether"

the regulations

"are intra vires on points 1, and 9;

(b) failure to follow proper legislative practice on points 2, 4, 5, and 7;

(c) defective drafting on points 3, 10 and 11;"

and

"(d) that the meaning could be clearer on points 6 and 8".

Question 12 is whether the matter is sufficiently intra vires and covers what it should under the parent act. The Executive has replied that it is constructing guidance that will assist crofting

community bodies and others to exercise their rights. Does the committee think that the Executive has given a sufficient explanation? Should we flag it up to the lead committee and Parliament that we are still a wee bit concerned that the regulations could be clearer?

**Gordon Jackson:** Yes, and we should just agree to the rest of the recommendations.

**The Convener:** Are we agreed?

**Members** *indicated agreement*.

## Crofting Community Right to Buy (Grant Towards Compensation Liability) (Scotland) Regulations 2004 (SSI 2004/225)

**The Convener:** The recommendation is to draw to the attention of the lead committee and the Parliament

"(a) that there appears to be doubt as to whether"

the instrument

"is intra vires on point 3;"

and that there is

"(b) defective drafting on point 2 acknowledged by the Executive"

and

"(c) defective drafting of the Explanatory Note acknowledged by the Executive."

Most of our points have been acknowledged by the Executive. Do we agree with that recommendation?

**Members** *indicated agreement*.

## Crofting Community Right to Buy (Compensation) (Scotland) Order 2004 (SSI 2004/226)

**The Convener:** Again, the recommendation is to draw to the attention of the lead committee and the Parliament that there is:

"(a) defective drafting or possibly unexpectedly limited use of the power (or both) on point 1;

(b) defective drafting on point 2;

(c) that its meaning could be clearer and/or defective drafting on point 3;

(d) that there appears to be a doubt as to whether it is intra vires on point 4;"

and that there is

(e) defective drafting of the Explanatory Note on point 5."

Are we agreed?

**Members** *indicated agreement*.

## Crofting Community Right to Buy (Ballot) (Scotland) Regulations 2004 (SSI 2004/227)

## Community Right to Buy (Ballot) (Scotland) Regulations 2004 (SSI 2004/228)

**The Convener:** Again, the legal briefing recommends that the committee might want to draw the attention of the lead committee and the Parliament to the following points:

"(a) failure to follow proper legislative practice acknowledged in part by the Executive on points 1 and 3;

(b) that there is a doubt as to whether they are intra vires on points 5 and 6;

(c) defective drafting on point 6;

(d) that their meaning required explanation (supplied by the Executive) on point 4."

Is that agreed?

**Members** *indicated agreement*.

## Community Right to Buy (Compensation) (Scotland) Regulations 2004 (SSI 2004/229)

**The Convener:** The legal brief recommends that the committee draw the attention of the lead committee and the Parliament to the regulations on the grounds

"(a) that there is a doubt as to whether regulation 3(2) is intra vires",

and that there has been

(b) Failure to follow proper legislative practice on point 1, acknowledged by the Executive."

Is that agreed?

**Members** *indicated agreement*.

**The Convener:** I have to say that our legal advisers have done a good job on all the instruments because so many of our points were accepted by the Executive.

## Community Right to Buy (Register of Community Interests in Land Charges) (Scotland) Regulations 2004 (SSI 2004/230)

**The Convener:** The committee may wish to consider drawing the regulations to the attention of the lead committee and the Parliament on the ground that they required explanation, which we asked for and which has been supplied by the Executive. Is that agreed?

**Members** *indicated agreement*.

### Community Right to Buy (Specification of Plans) (Scotland) Regulations 2004 (SSI 2004/231)

**The Convener:** The legal brief recommends that the committee might consider drawing the attention of the lead committee and the Parliament to the regulations on the grounds that there is a doubt as to whether regulation 3 is intra vires; and that there is defective drafting as outlined in the legal brief. Is that agreed?

**Members** *indicated agreement*.

### Community Right to Buy (Forms) (Scotland) Regulations 2004 (SSI 2004/233)

**The Convener:** The committee might consider drawing the attention of the lead committee and the Parliament to the instrument on the ground that its form could be clearer. Is that agreed?

**Members** *indicated agreement*.

### Victim Statements (Prescribed Offences) (Scotland) Amendment Order 2004 (SSI 2004/246)

**The Convener:** The recommendation is that the committee considers drawing the attention of the lead committee and the Parliament to the order on the ground of defective drafting that has been acknowledged by the Executive, which the Executive has moved to correct. Is that agreed?

**Members** *indicated agreement*.

## Draft Instrument Subject to Approval

### Town and Country Planning (Electronic Communications) (Scotland) Order 2004 (draft)

12:09

**The Convener:** The recommendation is that the committee should return to the Executive on the drafting of articles 7(2) and 8(2) because we do not seem to have an explanation for them. We have time to do that. We can pass the order to the lead committee at a later date.

**Christine May:** The Executive might just have overlooked it.

**Mr Maxwell:** If we have the time, we should chase it.

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

**Members** *indicated agreement*.

## Proposed Code Subject to Approval

### Scottish Outdoor Access Code: Proposed Code (SE/2004/101)

12:10

**The Convener:** I was delighted to see the proposed Scottish outdoor access code on the agenda. No points arise, however.

**Christine May:** I was delighted to note that the proposed code

"does not contain any legal infelicities."

**The Convener:** The legal advisers like those words.

## Instruments Subject to Annulment

### Plant Health (Export Certification) (Scotland) Order 2004 (SSI 2004/248)

### Plant Health Fees (Scotland) Amendment Regulations 2004 (SSI 2004/249)

### Seed Potatoes (Fees) (Scotland) Regulations 2004 (SSI 2004/250)

### Potatoes Originating in Poland (Notification) (Scotland) Order 2004 (SSI 2004/255)

### Education (Student Loans) Amendment (Scotland) Regulations 2004 (SSI 2004/256)

12:10

**The Convener:** No points have been identified on the instruments.

# Instrument Not Laid Before the Parliament

## Land Reform (Scotland) Act (Commencement No 2) Order 2004 (SSI 2004/247)

12:11

**The Convener:** Although the legal advisers have not noted any points of substance on the order, a few minor points have been identified. It is suggested that we might wish to take them up with the Executive when we have an appropriate opportunity. Should we treat our forthcoming meeting as such an opportunity? Shall we raise the points informally?

**Members** *indicated agreement.*

# Delegated Powers Scrutiny

## Antisocial Behaviour etc (Scotland) Bill: as amended at Stage 2

12:12

**The Convener:** I have now finished with everything that is on the agenda, but I would like to return to the points about which we asked the Executive. I had thought that we might leave the clerk to give us some pointers for us to go over next week, but we should quickly go through the main points that we need to consider with respect to the Antisocial Behaviour etc (Scotland) Bill. We are short of time, so we need to get a steer.

The first point was about section 3A, on registered social landlords.

**Christine May:** Although I pushed the Executive witnesses quite hard on the matter, I was, in the end, content with the explanation that they gave. I think that there is probably enough of a safeguard to ensure that those who really wish to be involved in antisocial behaviour strategies can be involved in them. I therefore think that the wording is appropriate. I still have some concern, however, that the affirmative procedure, rather than the annulment procedure, should be used.

**The Convener:** I would agree with that. I seek other members' views. Murray Tosh seemed to think that the wording was okay.

**Murray Tosh:** I have no strong views on the matter. However, there are thousands of RSLs and there will be many more, so do we really want to include them all in regulations made by affirmative resolution? An alternative approach might be to amend the bill to specify that nobody is excluded from participation in antisocial behaviour strategies. The Executive would probably say that that would be a bit declaratory but, on the other hand, it came out of our discussion that the Executive could conceive of situations in which people or RSLs could participate fully without being included in regulations made under section 3A. That might be a preferable way of doing things, rather than cluttering up the system with a whole series of affirmative resolutions, which, on the basis of what the Executive witnesses said, might be unnecessary.

**The Convener:** Could you elaborate on what you are suggesting?

**Murray Tosh:** The Executive's case was that any RSL could participate in drawing up an antisocial behaviour strategy. The purpose of section 3A is more to require the key players to become involved if, for whatever reason, they did not wish to become involved. If the objective is to

include those who wish to be involved, an alternative might be to allow RSLs to volunteer to be involved by agreement locally. Use of the regulations could then be retained only in relation to those RSLs that the police and the local authority felt obliged to include within the scope of regulations. It might be appropriate for regulations to be made under the affirmative procedure in such cases, but do we really want to involve the thousands of RSLs and the 32 local authorities by making regulations under the affirmative procedure for each of them? That seems an oppressively bureaucratic approach.

12:15

**The Convener:** Do you think that the spirit of the reassurance that was given should somehow be included in the bill?

**Murray Tosh:** The bill is silent on the issue, so perhaps we can accept that nothing will preclude, for example, Bield Housing Association from being involved in 32 local authority partnerships if it so wishes. The Executive might resist including in the bill a declaratory statement that would simply state something that would not have been prevented anyway and which was, in fact, implied by the bill. Perhaps the legal advisers could reflect on whether an amendment is necessary. If it is felt to be unnecessary, we need not proceed with the idea.

**The Convener:** That sounds sensible.

**Mr Maxwell:** I shared the concerns that Christine May outlined, but I accept the Executive's explanation about the unwieldy nature of trying to involve everybody in consultation and participation. That was an entirely reasonable point, so I am quite happy with the reassurance that was given.

**The Convener:** Do you think that an amendment is needed?

**Mr Maxwell:** It is perhaps unnecessary. I accept the Executive's explanation. An amendment might help, but I have no strong feelings on the issue.

**The Convener:** My only concern is whether the assurances that we were given will be effective in reality.

It strikes me that it might be safer to have a final look at the issue next week. Will we be able to consider the bill again next week?

**Alasdair Rankin (Clerk):** Time constraints require us to report by the end of this week. Stage 3 is next Thursday.

**The Convener:** We will ask our legal advisers to have a think about the issue and, before the end of the week, we will consider what they have drafted.

**Alasdair Rankin:** I will circulate any drafts to members.

**Christine May:** As with other committees, a form of words could be circulated by e-mail.

**The Convener:** We could then give our views on the suggestion that has been drafted.

The guidance provisions have also been the cause of much debate, especially on sensitive issues such as the dispersal of groups. Are we happy with what we were told by the Executive or do we want a stronger position on the three areas that were highlighted in our legal advice?

**Murray Tosh:** It was quite revealing to hear that, in effect, ministers can issue guidance on anything. Therefore, the significant issue is not the guidance itself but the imposition of an obligation on people to have regard to that guidance. The Executive witness said that section 20(3) was unusual because its provision on guidance goes further than normal, but I would have thought that section 20(3) should be the minimum position that ought to apply to any piece of guidance. That should apply not just to all the guidance sections in the bill but to such sections in all legislation. Without wishing to make a political point, I simply observe that, given the political sensitivities around the issue, I would have thought that section 20 ought to contain some form of parliamentary procedure simply because of the concerns that have been highlighted by many parliamentarians and by others who were involved in the debate. It would be fine if all the other guidance sections were worded like section 20(3), but section 20 needs something stronger.

**The Convener:** What about consultation?

**Murray Tosh:** You may want to make a more general point about consultation. However, given the sensitivities of the matter, I would have thought that consultation on guidance to be introduced under section 20 was necessary. I had jumped on to section 20 rather than section 14B.

**The Convener:** That is fine.

**Christine May:** With specific regard to section 20, I think that ministers should, in the first instance, have a duty to issue the guidance and a duty to consult on the preparation of that guidance, which should then be subject to parliamentary procedure. That section is the one about which there has been the greatest conjecture that there might be interference with the operational responsibilities of chief constables, for example. I know that section 21 has been deleted; nonetheless, section 20 is still contentious, so I think that guidance should be subject to the affirmative procedure.

**The Convener:** Are members agreed on that point with regard to section 20?

**Members** *indicated agreement*.

**The Convener:** On the point about guidance under the other sections, do members agree with what Murray Tosh has said about the need for that guidance to go through some sort of parliamentary procedure?

**Members** *indicated agreement*.

**The Convener:** I do not think that Murray was saying more than that.

**Murray Tosh:** No, but what I was saying does not rule out the possibility that other members might feel that some other specific piece of guidance requires more scrutiny than it would get if it were simply laid before Parliament.

**The Convener:** Section 20 is an obvious example, but I am asking whether, from the guidance that we went through, there are any other examples of guidance that should be scrutinised more closely than simply by the Executive reporting it to Parliament. Should all the guidance be subjected to parliamentary procedure?

**Christine May:** All the guidance covers areas in which there is likely to be confusion over precisely what is included and what is excluded. In all those cases, there should be a duty on ministers to issue guidance. If Murray Tosh is suggesting that such guidance should be subject to the affirmative procedure, we should be content with that, although I do not think that we would want to go quite as far as we did with section 20. The other sections will not necessarily be so contentious.

**The Convener:** The only issue that might be so contentious is parenting orders.

**Mr Maxwell:** Was Murray Tosh suggesting that guidance should be subject to affirmative procedure?

**Murray Tosh:** No, I was suggesting that, at the very minimum, guidance should be subject to some form of procedure.

**Mr Maxwell:** That is what I thought.

**Murray Tosh:** Much of the guidance that is issued at the moment is not subject to anything, so being subject to some form of procedure ought to be the baseline. Beyond that, we could start to consider whether the negative or the affirmative procedure would be more appropriate. I do not have any view as to whether guidance under the other sections should be subject to anything further than that, but some form of procedure must be the minimum that is required.

**The Convener:** Do members want to go further, as Christine May was suggesting, or should we stay where we are? Is it generally agreed that we should do the latter?

**Members** *indicated agreement*.

**The Convener:** We now move on to the fixed-penalty notices. This is where Gordon Jackson came in.

**Gordon Jackson:** I do not feel particularly strongly about it, but I was picking up the point about having to reflect changes in the value of money. I feel that that is a slightly false point, because the value changes automatically; that is the whole point of having scales. I did not think that it was a valid point to make but, for the reasons that I gave during the debate, I do not think that it matters hugely.

**The Convener:** Do members agree that there are no further points on that issue?

**Members** *indicated agreement*.

**The Convener:** What about consultation on "relevant place" and "relevant property", which is covered in section 46B?

**Mr Maxwell:** I have two opinions on that. I understand the wish to deal effectively with noise nuisance no matter where it comes from. From a personal point of view, I would welcome such a provision, but what is proposed is an extremely wide power. Effectively, it means that anywhere could be a relevant place or property, which seems exceptionally wide. At the very least, we should draw to members' attention the fact that the provision could apply anywhere, because people should be aware of how wide that power is.

**Gordon Jackson:** Yes, I think that we should highlight how wide a power it is. That said, I quite like the idea of more effective noise control, but that is another matter.

**The Convener:** We shall make the point about its being a wide power. That is fair enough.

Let us go on to section 51B and the meaning of "relevant surface". Apart from Christine May's trees, is there anything else that we need to note?

**Christine May:** They are everybody's trees.

**The Convener:** Do members have any points to raise?

**Christine May:** Again, I think that it might be worth drawing folk's attention to the fact that it is a wide power.

**Gordon Jackson:** It is a wide power, but the odd thing about it is that the Executive does not want a wide power right now. Usually, such provisions are there in case we have missed something that arises in future and a surface that we have not thought about crops up. In this case, the situation is unusual, in that there are surfaces that we have thought about but, for a whole lot of reasons, we do not want to take the power right

now, although we might take it in the future. It is a wide power, but this is an unusual and very tentative way of making it. It is as if we are saying, "We see lots of surfaces, but let's take a softly-softly approach at this stage and let's not cover too much." Apparently, the provision arose out of consultation with local authorities, which perhaps did not want to be overburdened. It is unusual to take in case you need it later a power for which you have identified a need now.

**Mr Maxwell:** I certainly think that we should point out the fact that the power is wide, just as we will do with regard to the previous point that we discussed. However, I have slightly more concern about this point, because it would allow people to define any property at all, as our legal briefing tells us. The back of my garage is in my garden and nobody else but me—not even my neighbours—can see it. However, the idea that the Executive could say that it is a surface on which I cannot spray paint if I so wish—not that I would—seems a bit strange to me. I am not suggesting that the Executive would do that, but—

**Gordon Jackson:** If nobody else can see it, how would anyone know?

**Mr Maxwell:** Maybe the gardener would notice it.

**Murray Tosh:** Parliament would never agree to something so extreme.

**Mr Maxwell:** I know that, but I am just illustrating the point that the power is extremely wide and that, effectively, any property or any surface could be defined as relevant. I have concerns about that power being agreed to, as it is very wide indeed.

**The Convener:** Do members agree that we should point that out?

**Members** *indicated agreement*.

**The Convener:** Part 8 concerns registration areas, and we have raised the issue of there being no fee until there is a regulation. There is nothing to say on that, other than to point it out. Is that agreed?

**Members** *indicated agreement*.

**The Convener:** Part 11 concerns fixed penalties, and that was okay. The Executive is going to come back to us about part 13, on miscellaneous provisions. That is the point that we added on from the legal briefing.

Thank you, colleagues, for a very long meeting. We have never had such a long meeting before.

*Meeting closed at 12:27.*

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