

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 21 September 2004

Session 2

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CONTENTS

Tuesday 21 September 2004

	Col.
DELEGATED POWERS SCRUTINY	565
Fire (Scotland) Bill: Stage 1	565
EXECUTIVE RESPONSES	571
Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (draft)	571
Fishing Vessels (Satellite-tracking Devices) (Scotland) Scheme 2004 (SSI 2004/379)	571
Oil and Fibre Plant Seed (Scotland) Regulations 2004 (SSI 2004/317)	571
Register of Sasines (Application Procedure) Rules 2004 (SSI 2004/318)	572
International Criminal Court (Enforcement of Fines, Forfeiture and Reparation Orders) (Scotland) Regulations 2004 (SSI 2004/360)	572
Freedom of Information (Fees for Disclosure under Section 13) (Scotland) Regulations 2004 (SSI 2004/376)	572
Fodder Plant Seeds Amendment (Scotland) Regulations 2004 (SSI 2004/380)	573
Aberdeen City Council (Bobby Calder Park) Compulsory Purchase Order (No 3) 2001 (SE 2004/159)	573
DRAFT INSTRUMENTS SUBJECT TO APPROVAL	574
Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order 2004 (draft)	574
Scotland Act 1998 (Modifications of Schedule 5) Order 2004 (draft)	574
Maximum Number of Judges (Scotland) Order 2004 (draft)	574
INSTRUMENTS SUBJECT TO ANNULMENT	575
Solicitors (Scotland) Act 1980 (Foreign Lawyers and Multi-national Practices) Regulations 2004 (SSI 2004/383)	575
Agricultural Wages (Permits to Infirm and Incapacitated Persons) (Repeals) (Scotland) Regulations 2004 (SSI 2004/384)	575
Firemen's Pension Scheme Amendment (Scotland) Order 2004 (SSI 2004/385)	575
Community Health Partnerships (Scotland) Regulations 2004 (SSI 2004/386)	575
Mental Health (Advance Statements) (Prescribed Class of Persons) (Scotland) Regulations 2004 (SSI 2004/387)	575
Mental Health (Patient Representation) (Prescribed Persons) (Scotland) Regulations 2004 (SSI 2004/388)	576
National Assistance (Assessment of Resources) Amendment (No 2) (Scotland) Regulations 2004 (SSI 2004/389)	576
Teachers (Medical Requirements for Admission to Training and Registration) (Scotland) Amendment Regulations 2004 (SSI 2004/390)	576
Sea Fishing (Enforcement of Community Satellite Monitoring Measures) (Scotland) Revocation Regulations 2004 (SSI 2004/391)	576
Sea Fishing (Enforcement of Community Satellite Monitoring Measures) (Scotland) Order 2004 (SSI 2004/392)	576
Fireworks (Scotland) Regulations 2004 (SSI 2004/393)	576
Food Safety (General Food Hygiene) Amendment (Scotland) Regulations 2004 (SSI 2004/394)	577
Food Safety (Act of Accession concerning the Czech Republic and other States) (Consequential Amendments) (Scotland) Regulations 2004 (SSI 2004/395)	577
Scottish Network 1 Tourist Board Scheme Order 2004 (SSI 2004/396)	577
Scottish Network 2 Tourist Board Scheme Order 2004 (SSI 2004/397)	577
Common Agricultural Policy Support Schemes (Modulation) (Scotland) Amendment Regulations 2004 (SSI 2004/398)	577
Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (Scotland) Amendment (No 3) Regulations 2004 (SSI 2004/399)	577
Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2004 (SSI 2004/ 400)	577
INSTRUMENT NOT LAID BEFORE THE PARLIAMENT	578
Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (Commencement No 15) Order 2004 (SSI 2004/382)	578

SUBORDINATE LEGISLATION COMMITTEE

25th 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

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 2

Scottish Parliament

Subordinate Legislation Committee

Tuesday 21 September 2004

[THE DEPUTY CONVENER *opened the meeting at 10:31*]

Delegated Powers Scrutiny

Fire (Scotland) Bill: Stage 1

The Deputy Convener (Gordon Jackson): Good morning and welcome to the 25th meeting in 2004 of the Subordinate Legislation Committee. Apologies have been received from Sylvia Jackson and Alasdair Morgan, who are in Stranraer with the Local Government and Transport Committee—they obviously get all the good trips away. Mike Pringle is somewhere else and Mr Tosh is coming through the door as I speak.

The first item is to consider the delegated powers in the Fire (Scotland) Bill at stage 1. There is a full report from our legal adviser. I intend simply to talk about the sections that have been flagged up as needing action. If members of the committee see something in other sections that should be mentioned, they should say so. I will concentrate only on the sections in which something has been flagged up.

Section 10, which is referred to on page 2 of the legal brief, gives the Scottish ministers a power, exercisable by order subject to negative procedure, to confer functions relating to emergencies on relevant authorities, which are defined as fire and rescue authorities and joint fire boards. The types of emergency in relation to which functions may be conferred are to be specified by order and will not include fire and road traffic accidents, which are dealt with elsewhere. The scope of the power is limited by the definition of “emergency”.

The Executive’s memorandum advises that the power is intended to allow a flexible response to the changing environment in which fire authorities operate and notes that a degree of flexibility is best provided by subordinate legislation.

Section 10 would allow an order to provide that an additional function is to be carried out by an authority outwith its own area. In that case the function would, by definition, be discharged in the area of another authority. We might wish to consider—I come at last to the point—whether it

might be appropriate in those circumstances for the Scottish ministers to consult the fire and rescue authority in whose area the function is to be discharged. [*Interruption.*] The noise that the committee can hear is coming from my phone; it is on silent but still makes a lot of noise. I apologise to the committee.

To come back to the somewhat long-winded point that I was making, should we ask the Executive for its comments on whether it should consult in the way that we have outlined?

Christine May (Central Fife) (Lab): It is appropriate that the authority into whose area someone else is going should be consulted. That is common courtesy and it would allow folk to know where other people are and so forth. We should phrase our comments slightly more strongly and say that we consider it appropriate that authorities be consulted.

The Deputy Convener: Rather than just asking the Executive why it is not doing that, we should say that we think that it should be doing it.

Christine May: Yes.

Mr Stewart Maxwell (West of Scotland) (SNP): I disagree. A degree of flexibility is required. I have a great deal of sympathy for the way that the Executive has drafted the provision. Authorities need to be able to respond quickly to a changing environment or changing circumstances. The borders between authorities, particularly fire authorities, are in effect artificial boundaries drawn on maps. It does not seem entirely inappropriate that things should be done in the way that the Executive proposes. In an ideal world we should always consult and come to negotiated agreements, but it is not unreasonable that authorities have the flexibility to act quickly. It would be to the detriment rather than to the advantage of the fire service if we enforced consultation that slowed things down.

Murray Tosh (West of Scotland) (Con): When I read the brief, which was considerably more concise than the convener’s introduction, I put a double tick next to paragraph 17. I agree with Christine May. I do not think that it is being suggested that there would have to be consultation before specific action was taken to assist another fire authority; directions cover those points. Section 10 relates more to where functions are planned. If functions are planned, it is appropriate that they should be the subject of consultation beforehand. Somebody doing something in an emergency would not consult.

Mr Maxwell: Clearly emergency circumstances are covered. It is not a major point.

The Deputy Convener: It is the broad view of the committee that we should ask the Executive

about the provision and suggest that it should consider providing for consultation with authorities. Unless Stewart Maxwell feels strongly otherwise, that is what we will do.

Mr Maxwell: That is fine.

The Deputy Convener: The next section in which points arise—I will try to be a little more concise about this—is section 20, which deals with fire hydrants. Section 20 gives the Scottish ministers a power, exercisable by regulations subject to negative resolution, to provide for uniformity in fire hydrants provided by Scottish Water and in accompanying marks and so on. Should there be an express requirement for the Executive to consult Scottish Water before exercising the power, or do we not care?

Christine May: As the legal brief points out, the section is not likely to apply to anyone else.

The Deputy Convener: I cannot help feeling that it would not be the end of civilisation as we know it one way or the other.

Christine May: I do not have strong feelings one way or the other about what we do.

The Deputy Convener: Will we just let the point go?

Christine May: I think so.

The Deputy Convener: Section 36 requires the Scottish ministers to prepare a framework document setting out priorities and objectives and what not, which they have to review and revise as appropriate from time to time.

The only question that arises is whether section 36 makes it sufficiently clear that the framework document is to be published. We might also consider how the Scottish ministers will decide whether a revision to the framework document is significant and how the attention of interested persons will be drawn to revisions that the Scottish ministers do not feel are significant.

That is a reasonable question to ask people in the Executive, just to ensure that they have thought of it. They might come back and say, “We hadn’t thought of that, thank you very much,” or they might have an answer for us. We should ask the question.

Section 41 gives the Scottish ministers a power to make a “property and facilities order” when they consider it necessary to do so for public safety purposes. The order would give directions to the relevant authority about the use or disposal of property and facilities.

It is pointed out in paragraph 53 of the brief that occasions on which the directions are given could be somewhat politically sensitive. I take the point that this is not quite the same as the uniformity of

fire hydrants; the provision has a more serious aspect from a public policy point of view. Do we think that negative resolution is really adequate in such circumstances?

Mr Maxwell: I do not think that negative resolution is sufficient in this case. This is a highly contentious point about the use of appliances, property and other material that is currently used by the fire services. We only have to think back to the not too distant past and the firefighters’ strike, when that was a contentious issue. It is reasonable for the Executive to go down the route that it has chosen, but it is also reasonable for the affirmative procedure to be used.

The Deputy Convener: We have often made the same point. To be fair, when the committee has asked the Executive not to use the negative procedure for a power, it has by and large tended to comply. When the committee has had the feeling that the negative procedure is too weak, the Executive has, generally speaking, come back to us and said okay. If the committee thinks that we should make such a suggestion in this case, I would be up for that.

Christine May: I think that we should do that.

Murray Tosh: I agree.

The Deputy Convener: Section 42 gives Scottish Ministers a power, exercisable by order subject to negative resolution, to require a relevant authority to use and maintain specified equipment and services. That partly re-enacts an old statutory provision, which required consultation with a body that is now being abolished under the bill. Now there is to be no consultation requirement. It might be appropriate to ask the Executive whether it thinks that any relevant authority affected should be consulted before an order is made. That seems a reasonable suggestion to make, so I think that we should ask that question.

Members indicated agreement.

The Deputy Convener: I have the impression that everyone agrees with me on that.

Section 54 gives the Scottish ministers a power, exercisable by regulations subject to negative resolution, to make provisions about fire safety in “relevant premises”, which are defined elsewhere in the bill. I am not sure that I can put this as concisely as Murray Tosh would wish.

Murray Tosh: You have been doing well.

The Deputy Convener: The legal advisers have some concern over section 54(2)(l), which creates criminal offences and specifies rules as to the burden of proof. The Executive tells us that that power is included so that the fire safety requirements contained in regulations will be backed up by an offence provision. Another

section already provides that, if a person fails to comply with a requirement under certain other sections, that makes that person guilty of an offence.

According to one view, failure to comply with section 54 regulations is already a criminal offence in certain circumstances. The power under subsection (2)(l) is presumably meant to target situations in which the other regulations do not kick in because non-compliance does not go so far as to put a person at risk of death or serious injury in the event of fire. It is not clear from the drafting of subsection (2) how the offence provisions elsewhere in the bill would interact with the offence provisions that are contained in regulations made under subsection (2)(l).

It might be appropriate to ask the Executive about how that subsection has been drafted, in particular with regard to how the two offence provisions contained in regulations made under section 54 are meant to tie in with the other offence provisions. I hope that that explains the point. It seems a legitimate one to ask the Executive about. The Executive might have a sensible way of viewing the matter, but I think that we should ask about it.

Christine May: I assume that the powers are in support of the transfer of responsibility from the fire service to ensure that firefighters can attend anywhere to the owner or occupier of the building to ensure that conditions in that building are such as to minimise the risk from fire. If risk assessments are being done all over the country, then it seems reasonable, if somebody refuses to comply, to be able to oblige them to do so.

The Deputy Convener: It may well be that the Executive does not see any problem with the offence provisions under section 54 being doubled up. There is no harm in asking a question about that. If we are satisfied with the Executive's answer, so be it.

Section 72 defines "relevant premises" as those premises that are subject to the fire safety regime under part 3 of the bill. Various premises are excluded. We have no argument about the power, but any regulations would modify primary legislation, and we might at least wish to consider whether the affirmative resolution procedure ought to be used. I do not feel as strongly about the powers under section 72 as I did about some of the other powers, but we should suggest to the Executive that the affirmative procedure might be appropriate.

Section 75 is about inquiries. It gives Scottish ministers a power to make regulations, subject to the affirmative resolution procedure, in connection with inquiries to be held under the bill. We could ask the Executive whether it intends for inquiries

under the bill to come under the scope of the Tribunals and Inquiries Act 1992. If so, the Scottish ministers might require to consult the Council on Tribunals before making regulations under section 75. There is a knock-on effect here. This seems a rather technical question, but it is the sort of thing that could turn out to be important. I think that we should ask about that.

Members indicated agreement.

10:45

The Deputy Convener: Section 83 concerns commencement. Commencement orders made under this section are not subject to any parliamentary procedure. It is suggested that we should at least secure clarification about whether there is to be single-day commencement or a series of commencements. There can be no harm in asking about that.

I am sorry—I have missed out a point concerning section 54, on fire safety provisions. I covered the double offence provision, but I missed out another point. We might consider whether there should be a consultation requirement and a regulatory impact assessment. I am happy for us to ask about that too.

Members indicated agreement.

The Deputy Convener: I am sorry that I missed that earlier; I had not realised that there was a further problem under that section.

Murray Tosh: We just assumed that that was read into our decision.

Executive Responses

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (draft)

10:47

The Deputy Convener: It is recommended that we draw the lead committee's attention to matters that we raised with the Executive on the draft regulations. I propose that we do so.

Members indicated agreement.

Fishing Vessels (Satellite-tracking Devices) (Scotland) Scheme 2004 (SSI 2004/379)

The Deputy Convener: Similarly, we asked for certain information and we have received it. We should draw that to the attention of the lead committee—subject to any points that members might wish to add.

Murray Tosh: Which point does the committee wish to make under point 3 of the legal brief:

“unexpected use of the power or defective drafting”?

The Deputy Convener: Och, you pick.

Murray Tosh: I was interested in that point, because the power was specifically justified by the Executive with reference to a comparable power in the Fishing Vessels (Decommissioning) (Scotland) Scheme 2003 (SSI 2003/87). I assume that it was the Executive that drew that to our attention. I wondered if we had more examples of that circuitous use of the power and whether we should raise the general issue with the Executive. However, I see the legal adviser looking sceptical, suggesting that this is just a wee stray that has got through the net, in which case we perhaps do not need to make a big fuss about it.

Christine May: We could raise it as a defective drafting matter.

The Deputy Convener: From what I am being told through gestures and facial expression, you have got it right, Murray. We will just leave it at that.

Oil and Fibre Plant Seed (Scotland) Regulations 2004 (SSI 2004/317)

The Deputy Convener: The regulations are extremely complicated, and there is perhaps something to be said about them.

Christine May: The regulations are indeed complex. The Executive has acknowledged the drafting defects that the committee identified, and we are grateful for that. It said that it will correct

them at the earliest possible opportunity. However, the Executive has not said when it anticipates that that opportunity might arise. It is reasonable to press the Executive just a little, so that the matter is corrected as quickly as possible. Could we ask the Executive for guidance on a date by which it would intend to correct the defects?

The Deputy Convener: That would not form part of the committee's report, but we could ask the Executive in a letter.

Register of Sasines (Application Procedure) Rules 2004 (SSI 2004/318)

The Deputy Convener: We will draw the lead committee's attention to the information that we asked for and received.

International Criminal Court (Enforcement of Fines, Forfeiture and Reparation Orders) (Scotland) Regulations 2004 (SSI 2004/360)

The Deputy Convener: These regulations raise a much more difficult issue, because we doubt whether they are *intra vires* and are not sure whether they could raise serious legal problems in future. I always feel that when the committee takes such a view on a matter, but the Executive is satisfied that things are okay, there is nothing much that we can do other than say “Well, if that's what the Executive thinks, so be it”. No doubt someone in another building will challenge its decision and other people will have to sort the matter out.

However, we should draw the lead committee's attention to our view that these regulations could lead to very serious problems. I believe that the lead committee should think long and hard about the matter and not simply rubber-stamp the regulations. That said, I do not know how we flag it up that we are drawing the lead committee's attention not to a trivial matter, but to a serious issue that it needs to be clear about, as it involves real responsibility. That is all that we can do, but there is a way of expressing that view to make it clear that we are not simply drawing some routine point to the lead committee's attention.

Freedom of Information (Fees for Disclosure under Section 13) (Scotland) Regulations 2004 (SSI 2004/376)

The Deputy Convener: I believe that Christine May has some thoughts on these regulations.

Christine May: Regulation 4 states:

“Where an authority proposes to communicate information ... the fee which it may charge shall be such fee as it shall notify to and agree with the person who requests the information”.

That implies that an authority could agree with someone to charge no fee whatever; however, the regulation does not actually state that. After all, the provision is that a fee shall be charged.

We have not really received an answer to that question. As we do not have the time to go back to the Executive on this matter, we will just have to highlight it in our report on the ground that it might not be *intra vires*.

The Deputy Convener: Again, we will ensure that our concerns are expressed to the lead committee.

Fodder Plant Seeds Amendment (Scotland) Regulations 2004 (SSI 2004/380)

The Deputy Convener: As far as these regulations are concerned, I propose that we simply report the current position on consolidation to the lead committee of the Parliament.

Aberdeen City Council (Bobby Calder Park) Compulsory Purchase Order (No 3) 2001 (SE 2004/159)

The Deputy Convener: The next instrument is this Bobby Calder park thingy. We will simply draw the information that we have received to the lead committee's attention.

Draft Instruments Subject to Approval

Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order 2004 (draft)

10:52

The Deputy Convener: The next item on the agenda is consideration of draft instruments subject to approval. I must say that, as far as the following instruments are concerned, my instinct at this stage is simply to ask the questions that the legal adviser has suggested, unless members have any strong views that they wish to express. That said, I will go through each instrument in turn.

On this order, the legal advisers have raised questions about what happens to existing provisions and the order's intended commencement date. We should simply ask the questions that have been suggested.

Scotland Act 1998 (Modifications of Schedule 5) Order 2004 (draft)

The Deputy Convener: In this order, there is an absence of footnotes to relevant amendments. I think that, in the spirit of non-confrontation, we should deal with this matter in just an informal letter.

Maximum Number of Judges (Scotland) Order 2004 (draft)

The Deputy Convener: No points have been identified on the order.

Instruments Subject to Annulment

Solicitors (Scotland) Act 1980 (Foreign Lawyers and Multi-national Practices) Regulations 2004 (SSI 2004/383)

10:53

The Deputy Convener: The next item on the agenda is consideration of instruments subject to annulment. A couple of what seem at a glance to be pretty technical questions have been raised on the regulations. At this stage, I think that, instead of agonising over them, we should simply allow the questions to be asked and worry about the matter when we receive a response.

Agricultural Wages (Permits to Infirm and Incapacitated Persons) (Repeals) (Scotland) Regulations 2004 (SSI 2004/384)

Firemen's Pension Scheme Amendment (Scotland) Order 2004 (SSI 2004/385)

The Deputy Convener: No points arise on the instruments.

Community Health Partnerships (Scotland) Regulations 2004 (SSI 2004/386)

The Deputy Convener: Again, legal advisers have suggested a whole list of questions that need to be asked about these regulations and, again, I suggest that at this stage we should simply ask them, unless any member holds a different view.

Christine May: I do not hold a different view, convener. However, I have to say that my local health board has already raised with me a number of the points that have been identified. It was clear even from the initial consultation that there was confusion, and that confusion has come through in the regulations.

The Deputy Convener: We should emphasise that point because it gives us all the more reason to ask these questions. After all, it is not just the anoraks around this committee table who are raising them; they are already being asked in the outside world.

Mental Health (Advance Statements) (Prescribed Class of Persons) (Scotland) Regulations 2004 (SSI 2004/387)

The Deputy Convener: It is suggested that we ask the Executive why the regulations come into force three days before the section to which they relate comes into force. We should ask such questions, because it is simply carelessness. If

such things happen, we should at least not pretend that we have not noticed.

Murray Tosh: Maybe that is why the phrase "Advance Statements" is used in the regulations' title.

The Deputy Convener: Indeed.

Mental Health (Patient Representation) (Prescribed Persons) (Scotland) Regulations 2004 (SSI 2004/388)

The Deputy Convener: The same point that we raised with regard to the previous regulations applies to these regulations. We should not simply ignore these matters.

National Assistance (Assessment of Resources) Amendment (No 2) (Scotland) Regulations 2004 (SSI 2004/389)

The Deputy Convener: On these regulations, we should at least ask the Executive about its plans to consolidate the principal regulations. It is always good to flag up the question of consolidation from time to time to ensure that it is being properly considered.

Teachers (Medical Requirements for Admission to Training and Registration) (Scotland) Amendment Regulations 2004 (SSI 2004/390)

The Deputy Convener: I propose that we ask the very specific question that has been raised on these regulations.

Sea Fishing (Enforcement of Community Satellite Monitoring Measures) (Scotland) Revocation Regulations 2004 (SSI 2004/391)

Sea Fishing (Enforcement of Community Satellite Monitoring Measures) (Scotland) Order 2004 (SSI 2004/392)

The Deputy Convener: No points arise on the instruments.

Fireworks (Scotland) Regulations 2004 (SSI 2004/393)

The Deputy Convener: I am very keen that we seek clarification on questions that have been raised about the meaning of "permitted fireworks night" and the various dispensations. Although some of the regulations that we consider involve matters of very little interest to constituents, there is certainly a lot of constituency interest in these regulations. I do not know about the rest of the committee, but the use of fireworks is one of the

major issues that I have to deal with. As a result, it is important to clarify those points that require it.

**Food Safety (General Food Hygiene)
Amendment (Scotland) Regulations 2004
(SSI 2004/394)**

The Deputy Convener: No points of substance arise on the regulations.

Murray Tosh: Do you propose to raise the minor points that have been identified through an informal letter or are we simply making an observation about them?

The Deputy Convener: It was not proposed that we raise them. I think that the briefing paper should have said that no points of substance arise on the regulations, but the line has been missed out.

**Food Safety (Act of Accession concerning
the Czech Republic and other States)
(Consequential Amendments) (Scotland)
Regulations 2004 (SSI 2004/395)**

**Scottish Network 1 Tourist Board Scheme
Order 2004 (SSI 2004/396)**

**Scottish Network 2 Tourist Board Scheme
Order 2004 (SSI 2004/397)**

The Deputy Convener: No points arise on the instruments.

**Common Agricultural Policy Support
Schemes (Modulation) (Scotland)
Amendment Regulations 2004
(SSI 2004/398)**

The Deputy Convener: With regard to the regulations, we shall certainly ask the Executive to explain a reference that does not appear to be correct.

**Pesticides (Maximum Residue Levels in
Crops, Food and Feeding Stuff)
(Scotland) Amendment (No 3) Regulations
2004 (SSI 2004/399)**

The Deputy Convener: On these regulations, we will ask the Executive two questions about certain issues that we usually pick up on.

**Title Conditions (Scotland) Act 2003
(Conservation Bodies) Amendment Order
2004 (SSI 2004/400)**

The Deputy Convener: No points arise on the order.

**Instrument Not Laid Before
the Parliament**

**Law Reform (Miscellaneous Provisions)
(Scotland) Act 1990 (Commencement No
15) Order 2004 (SSI 2004/382)**

10:57

The Deputy Convener: The fifth item on the agenda is consideration of an instrument not laid before the Parliament. No points arise on the order.

So endeth our deliberations.

Meeting closed at 10:57.

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