SUBORDINATE LEGISLATION COMMITTEE

Tuesday 9 November 2004

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

30th Meeting 2004, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Mr Adam Ingram (South of Scotland) (SNP)
*Mr Stewart Maxwell (West of Scotland) (SNP)
*Christine May (Central Fife) (Lab)
*Mike Pringle (Edinburgh South) (LD)
*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Alex Johnstone (North East Scotland) (Con)
Maureen Macmillan (Highlands and Islands) (Lab)
Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Margaret Macdonald (Legal Adviser)

THE FOLLOWING GAVE EVIDENCE:

Paul Allen (Scottish Executive Legal and Parliamentary Services)
Patrick Layden (Scottish Executive Legal and Parliamentary Services)
Murray Sinclair (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Alasdair Rankin

ASSISTANT CLERK

Bruce Adamson

LOCATION

Committee Room 3

Scottish Parliament

Subordinate Legislation Committee

Tuesday 9 November 2004

[THE CONVENER *opened the meeting at 10:36*]

Scottish Executive (Correspondence)

The Convener (Dr Sylvia Jackson): Good morning. I welcome colleagues to the 30th meeting of the Subordinate Legislation Committee in 2004. I have received late apologies from Gordon Jackson, who will not be with us this morning.

For the first item on the agenda, I am pleased to welcome Patrick Layden from the office of the solicitor to the Scottish Executive, and Murray Sinclair, Paul Allen and Catherine Hodgson from Scottish Executive Legal and Parliamentary Services. In welcoming you, I also thank you for your letter, which covered several items about which the committee has been concerned. We have been trying to keep a note of various examples of the issues that we raised and which you are here to discuss with us.

Do any of you have anything to say before we go through the letter and ask questions?

Patrick Layden (Scottish Executive Legal and Parliamentary Services): I do not think so. The letter is a recent expression of the minister's views and we are happy to explore with the committee any issues that it might have. There are one or two matters on which we can add some detail, but the letter shows where we are.

The Convener: Members will see that the first page of the minister's letter sets some context. We appreciate the volume of work that you deal with and that the number of Scottish statutory instruments rose from 337 in 1998 to 623 in 2003. We are very aware of that and of the background to the issues. On the ways in which we are going to move forward, the letter contains a list of bullet points about the network of advisers who have been brought on stream, the administrative unit and its management and electronic tagging. We would like to start with those issues.

Could you tell us a bit about the advisers? How many people are coming into post and what will they do in respect of quality control?

Patrick Layden: The primary responsibility for the content and vires of a subordinate instrument rests with the appropriate division; if the instrument is about health, the health division of OSSE will be responsible for it. Once the instrument has been prepared, it is referred to one of the advisers, who are C1 lawyers—the equivalent of grade 7 in Whitehall—and who have been on a little course that covers points to look for in subordinate instruments. That is not their whole function; it is what they do in addition to other things.

We are increasing the number of advisers so that we can do more advising because more SSIs are being processed; we aim to have six trained advisers in place. The advisers are supervised part-time by a C2 lawyer—grade 6—and we have put in place measures to free up some of the time of one of our C2 lawyers so that she can supervise the advisers.

The advisers check the instruments for questions of vires, style and layout and then discuss those with the solicitor who drafted the instrument. Once both are content that the instrument is in proper shape, it goes into the administrative process and to the minister for final approval.

The Convener: Is there a timescale for when the six advisers will be in post?

Patrick Layden: There are four advisers in place at the moment. As it happens, we are also in a recruitment process for C1 lawyers; changes in the senior civil service have moved some C2 lawyers up, which means that some C1 lawyers have been able move up to C2 level, leaving room at the bottom for C1 lawyers. I will not say that we are in a constant state of flux, but there is a fair amount of movement in the population at the moment.

Christine May (Central Fife) (Lab): You said that only part of the advisers' duties is to examine SSIs. What proportion of their time do you anticipate being spent on SSI work?

Patrick Layden: The theory says 25 per cent.

Christine May: In practice?

Patrick Layden: They would spend less time than that some of the time and more some of the time—it depends on when the SSIs come in.

Christine May: Fair enough. Thank you.

The Convener: The second issue is about SSIs coming in clumps, so to speak. That might be to do with the 21-day rule or the date on which instruments come into force. How can that be staggered? You mentioned electronic tracking. Does any member want to pick up that point?

Christine May: I noted that the convener referred to it as "electronic tagging", which raised the interesting vision of SSIs galloping out of the door and going, "Beep."

Patrick Layden: That happens in a different part of the office.

The Convener: That would be antisocial behaviour legislation gone mad.

Christine May: I also noted that you were careful to say that arrangements were progressing. How far have those arrangements progressed?

Paul Allen (Scottish Executive Legal and Parliamentary Services): There has been discussion with Solicitec Ltd, which is the firm that we have contracted to work on the system for us for the past couple of years. It has taken some time to work through because it is part of a wider system that is being put into the office. We are getting to the stage at which we will be able to pilot the system at the turn of the year; we hope that there will be output from that early next year.

The system is new, but it is based on a previous system for parliamentary questions and ministerial responses, in respect of which our performance has not been particularly good. An electronic system that clearly shows where we are and where we want to get to is a way of monitoring and encouraging better performance so that performance follows the general path that has been set previously on those issues.

Christine May: In your experience of introducing similar software, how long has it taken between evaluation of a pilot and full implementation? Are we talking about 12 months, or less than that?

Paul Allen: I hope that we can do it in less than 12 months. I was not involved in the previous two instances, but the main part will be to get the system up and running, then we will have to see what teething problems there are. We hope that there will not be too many because the system has been in gestation for quite a while, which should mean that we have ironed out a good number of the problems before we introduce the pilot.

Murray Sinclair (Scottish Executive Legal and Parliamentary Services): In parallel with and to some extent in anticipation of the new electronic monitoring system, we are taking steps to ensure greater appreciation by instructing departments and drafting solicitors that there should be more planning by reference to obvious fixed dates, such as the beginning of the financial year or the end of the year. We are seeking to ensure that clumps are avoided. We fully understand the committee's difficulties with clumps and the difficulties that they cause us.

As Patrick Layden said, the percentage of an SSI adviser's time that is spent on SSI advisory work depends on circumstances. If the advisers face a clump of SSIs, their role is much more difficult. There is a wider picture; there are other ways in which we can try to ensure that management of such clumps is handled more effectively than it has been.

10:45

Murray Tosh (West of Scotland) (Con): Is it intended that our officials will have access to the electronic system? If they will not, will information from it be available to them, so that they can track the progress of instruments and their anticipated delivery into our work load?

Patrick Layden: In its final form, the electronic tracking system will be a tool for the whole Executive to identify centrally how it is progressing with actual and proposed subordinate legislation. To a certain extent, that is crystal-ball gazing, given that any actual subordinate legislation depends on ministerial decisions. In other words, because we think there will be legislation on such-and-such a subject in such-and-such a year, we think that we might have some SSIs, so we will put them on the tracking system. To answer your question, we would not necessarily want to share that information; at the top level, it is a matter of internal ministerial policy.

We hope, however, to have a system in which the policy people in particular areas will have a better idea of what they will be involved in over the year and that they will, as a matter of routine planning, be in touch with the officials of the Subordinate Legislation Committee and of the subject committees to say what they expect will come up in the following six to 12 months. That is a matter of ordinary business organisation and we hope that it will be better informed by an electronic tracking system.

The Convener: To a certain extent, that happens already.

Patrick Layden: It should be happening already, but the new system will improve the process.

The Convener: Do you have firm ideas about staffing and management of the SSI administrative unit? The issue is mostly about back-up.

Patrick Layden: The crudest description of the situation is that two people were primarily responsible for the unit. If one of them was on holiday or—as happened recently—was ill, that left one chap with too much work to do, so we put a third person in the unit permanently. We also have a back-up system that can help if it looks as if the unit will become overburdened.

The Convener: We will move on to deal with the issues that are covered in the letter, the first of which is ancillary provisions in bills, in particular

the use of the term "supplemental". I think that Adam Ingram had a question on that.

Mr Adam Ingram (South of Scotland) (SNP): My question is on the next issue.

The Convener: Right; I will ask the question.

In drafting a bill and considering the SSIs that might be necessary, how far can you predict whether you will need to use the word "supplemental"? Will you elaborate on the points that you have made in your letter?

Patrick Layden: As a draftsman, I would prefer not to have to have any kind of supplemental provision; I would prefer to be able to predict precisely what needs to go into a bill and to provide for that and nothing more, but legislation is not like that. Nowadays, there are so many outside agencies or outside considerations that may cause us to rethink minor aspects of legislation that it is prudent to leave room for extra bits and pieces to be fitted in.

I used to think of drafting legislation as being similar to the job of a cabinetmaker who had been instructed to build for a particular purpose a cabinet with a big drawer at the bottom for long things, two or three medium-sized drawers further up for other objects and a row of small drawers at the top for long thin chisels or what have you. As well as the cabinet looking good and being able to hold all the tools that we need, there should be spare space in case someone comes along with a useful extra tool that we have not thought of.

That is still a good way to legislate, but what sometimes happens nowadays—not necessarily uniquely with the Scottish Executive or the Scottish Parliament—is that ministers, departments or Parliament do not want a carefully designed cabinet as much as a portmanteau, into which all sorts of things can be put; they want a big floppy bag to carry about the place. Although they want to specify the colour, the lock and the handles, they do not want to say too much about the number of things that need to go into it. The use of a supplemental power enables one to put in the odd extra bits that one has not quite thought of yet, but which one anticipates might come up. If it turns out that such extra bits are necessary, one does not want to be caught without having somewhere to put them.

Murray Sinclair: It is worth saying that, although Patrick Layden used the word "extra", such provision must still be within the cabinet, to continue his analogy. It is supplemental in the sense that it is usually in consequence of, or for the purposes of, the act in question, so it supplements existing provision rather than allows important additional provision.

In our letter, we give a good example of why the power to make supplemental provision can be valuable. It relates to the Local Government in Scotland Act 2003, in which a drafting slip had the effect that a power to make subordinate legislation would not have been subject to parliamentary scrutiny. We did not discover that until the act had been passed. The power in the act could still have been used, but any regulations that were made under it would not have been subject to parliamentary scrutiny. We did not think that that was right, so we made supplemental provision to provide for such parliamentary scrutiny. In that way, we corrected what would otherwise have been an unfortunate consequence of a minor slip. That provision was very much supplemental; it did not relate to a big new policy initiative, but merely corrected an unforeseen glitch.

Murray Tosh: I have some questions on the section of the letter that is headed, "Ancillary Provisions in Bills". Is the expression "ancillary provision" ever used in the wording of legislation or is it a generic term that you use in a non-statutory way to mean incidental, supplemental, transitional, transitory or saving provisions?

Patrick Layden: It is just a description of the generality.

Murray Tosh: So the expression is never used in its own right.

Patrick Layden: It might be used.

Murray Tosh: If it were used in its own right, what additional meaning would that confer?

Patrick Layden: I do not know; I would have to look up the dictionary before I used the expression.

Murray Tosh: I admire your precision.

Murray Sinclair: I think that the expression "ancillary provision" gets used largely because that is the parenthetical description that usually introduces sections that empower ministers to make subordinate legislation, rather than because it is used in such powers themselves.

Murray Tosh: You give the example of using a similar right of appeal in an unanticipated circumstance. In what respect would incidental provision not cover that?

Patrick Layden: The new right of appeal would not be incidental to any existing right of appeal, because it would not relate to any of the specified cases. We would want to make extra or supplemental provision to cover a case that should have been mentioned, but was not. Incidental provision would relate to appeals that one knew to cover a number of specified cases; it might, for example, enable one to fix the number of people who should sit on a tribunal.

Murray Tosh: It would not allow one to extend the scope of any appeal mechanism in the context of a stated overarching approach.

Patrick Layden: One would want to have the ability to make supplemental provision because of a doubt about that.

Murray Tosh: I do not quite follow the argument, which you make in your letter, on section 58 of the Local Government in Scotland Act 2003. Did that act use the term "ancillary provision" or are you just using the term in a generic sense, as a short-hand expression that covers all the other kinds of provision?

Murray Sinclair: As I think I said, the phrase "ancillary provision" is not a quote from the relevant power. I am afraid that I do not have section 58 of the Local Government in Scotland Act 2003 in front of me, but I think that it was worded in a very similar way to the power in the National Health Service Reform (Scotland) Act 2004, which is quoted in the letter.

The key point of the example is that section 58 gave us the power to make supplemental provision. We relied on that power, because the provision that we sought to make was supplementary to the provision in section 41(2). We supplemented that provision in a very useful way.

Murray Tosh: You may have dazzled me with linguistic science in our discussion about the difference between incidental and supplemental, but we can come back to you on that if we think of other questions to put to you. You will be aware that the committee's concern has been that the use of the word "supplemental" in bills has the effect of giving you much more sweeping powers to make subordinate legislation than was intended in the original primary legislation.

Although the letter that you have sent us is significant in its own terms, it is only a letter. Is there a statement of definition in a protocol or anywhere else that defines the word "supplemental" in a way that would give the committee confidence that ministers' use of supplemental powers would not, in any conceivable context, exceed what was intended when Parliament accepted—either deliberately or implicitly—that the use of supplemental powers was a legitimate way to proceed?

Patrick Layden: There are a number of safeguards against that danger. The first is that ministers do not want to use the powers in an act in such a way as to go beyond what is properly within the terms of that act or supplemental to it. Murray Sinclair said that the extra bits that one might add through supplemental provision must be concerned with the subject matter of the legislation. If one has a cabinet for woodworking tools, one cannot suddenly decide to put something to do with scuba diving in there as well. The standard form of words is that supplemental provision must be necessary or expedient for the purposes of the act, so it must be linked to the primary purpose of the legislation.

Ministers are concerned about that, as are the Subordinate Legislation Committee and the relevant subject committees. If the Subordinate Legislation Committee thought that the use of a power went further than the sort of minor alterations that we have been discussing today, and which we have discussed on previous occasions, we would expect it to draw Parliament's attention to the fact that that was an unusual use of the power.

If the provision slipped through the net of ministerial concern, the Subordinate Legislation Committee's concern, the subject committee's concern and the Parliament's concern, it would still be open to anyone to go to court to argue that the statutory instrument in question went beyond the powers of the prevailing statute because it was too far removed from the subject matter of that statute. No piece of subordinate legislation that the Scottish Parliament has made has been challenged successfully on that basis and I cannot think offhand of a recent example of a piece of subordinate legislation that the United Kingdom Parliament has made that has been challenged successfully on that basis. I am not saying that there has never been such a case, but I am not aware of one. The possibility to make to such a legal challenge exists. There are safeguards in the system to prevent us from rushing off to use a supplemental power to do all sorts of things that Parliament had not intended.

Murray Tosh: That is a very helpful answer.

I have a further question for clarification. The final safeguard that you mentioned was the possibility that someone could seek judicial action in the event that they felt that the use of supplemental powers had been inappropriate. That goes back to the core of the question that I asked: Is there a definition of all the meanings of the word "supplemental" in all contexts that is sufficiently watertight that it could be pointed to by anyone who was taking such action, or would that person have to found their case on a review of how the word "supplemental" had been interpreted on all the occasions on which it had been used?

What I am trying to get at is that all that provides a definition is the accumulation of ministerial letters and statements by civil servants in the *Official Report*. Although they might be usable in a court as evidence of the Executive's intention, that strikes me as being a laborious and roundabout way of getting at what should be a fairly simple definition, which should—and could—be

presented in such a way that people will always know that supplemental means something as limited as what you have defined it to be and that it is as constrained in operation as you have explained it to be in reality.

11:00

Patrick Layden: The difficulty with attempting to produce a single definition is that different acts are for different purposes. What might be a sensible supplemental provision in the context of one act might not be sensible in the case of another act. I fear greatly that this is an area for which I cannot provide a ready reckoner against which provisions may be tested. It is not like saying, for example, that if the thickness of a tyre tread is less than however many millimetres, the tyre is illegal; there is no ready reckoner that may be applied to instruments, which would let us say that some of them were by definition outwith the proper scope. We must examine the relevant act, the purposes of that act and the nature of the provision itself, and then form a considered view based on the act and the subordinate legislation in question. There is no rule book that says much more than what I have tried to set out this morning—although I am sure that other people have done so better and more eloquently.

Murray Tosh: I love the folksy metaphors about tyre treads and toolboxes. There was enough in that answer to enable us to consider the matter and return to it if we feel that there are still issues that need to be addressed.

The Convener: It was a useful answer.

Christine May: I would like to go back almost to first principles. I hear what you say about making cabinets and there being scope for amending them, and about portmanteaux being floppy and so on. That almost suggests that Parliament should allow ministers to indulge in sloppy thinking in respect of drafting legislation, and that it is not necessary for ministers to refine their thoughts to the extent of the detail with which adequate SSIs are produced. Would it be reasonable for this committee and Parliament to take steps to ensure that ministers do not get into that way of thinking?

Patrick Layden: I am entirely with you on that. I am not suggesting that to use a big portmanteau, as it were, would be a good way to legislate. As I recollect, I started with the idea that a nicely defined cabinet illustrates the best way to legislate. It is sensible—however nicely one defines one's cabinet—to make provision for the odd little extra thing to be added. It is very much for Parliament to examine legislation, to test it and to ask ministers what is intended by it. I have no problem with that and the Executive has no problem with it—it is the whole point of the process. It is not the Executive's position that Parliament should simply give us a blank cheque and tell us that we can just go off and legislate.

Christine May: Rather than there being a definition of supplemental such as Murray Tosh was trying to elicit, there is recognition that supplemental, ancillary or other provisions of that nature would be used almost as a last resort in matters where it is impossible to identify the range of activities that might need to be covered under subordinate legislation.

Patrick Layden: The test for making a provision is that the provision should be necessary or expedient. "Necessary" means that the legislation will not work without the provision; "expedient" means that the provision is a sensible use of the legislative power, but not necessarily in the sense that the legislation will not work without it. We have given an example in which although legislation would have worked without the use of a supplemental power, Parliament would have been denied the power to scrutinise the subordinate legislation and to vote against it on a resolution. Although it was not necessary to use the power in that case, it was—in our view—expedient to do so. The question goes further than whether a provision is absolutely vital to keep legislation working; it involves an element of judgment.

Murray Sinclair: As Patrick Layden indicated in his last answer, our first resort in the example to which he referred would have lain in the bill. Had we spotted the glitch in the bill when it was still going through Parliament, a procedure would have been included in the bill. We did not spot it, but the power that was available enabled us to correct the glitch later.

Mr Stewart Maxwell (West of Scotland) (SNP): Much as I hate to continue with the cabinet analogy, it might be useful now that we have started with it. You are correct to say that it would be ideal to use a nice, well-defined cabinet—representing the legislative route to pursue. I can see that, if you tried to attach a compartment for subaqua equipment to that cabinet, that would easily be open to challenge because that would not have been in the original scope of the cabinet.

Attaching space for subaqua equipment to cabinets is not our concern, however. Our concern is more about, say, whether wheels should be fixed to the bottom of the cabinet. That is not as clear cut as the idea of the subaqua equipment. If the cabinet was made into a mobile cabinet, would that or would it not fall under the original thinking? Much as I hated saying all that, it does illustrate the problem. It is not about the stuff that is away out on the extremes; rather, it is about the supplemental stuff that was not anticipated. It could be argued later that certain supplemental provisions were within the scope of a bill, even if,

when the bill was being considered, nobody ever thought that it would cover that area. That is where the problem lies.

To return to what Murray Tosh was asking about, I am not entirely convinced that your answer about the differences between incidental, supplemental and other provisions was particularly strong. If a provision is incidental, transitional, transitory or saving to the act, I would have thought that that would cover some of the examples that you gave of additional matters that are forgotten when a bill is considered, although they might turn out to be obviously within the scope of the act. Could you discuss with us the idea that the problem lies not with the stuff on the extremes, but with the stuff on the margins? That is where the committee feels slightly uncomfortable.

Patrick Layden: I agree that the problem is always that it is easy to recognise the extremes, but the grey areas prove to be difficult. It must be a matter of judgment where a grey area turns black, rather than white. That judgment would include such factors as how important it is to everyone to make the power concerned. To take the example of the Local Government in Scotland Act 2003, if we came to the committee and said that although we would like parliamentary scrutiny to be applied to the use of subordinate legislation, it cannot be applied because the act will not allow it, that would be a matter of common disappointment. I could, if pushed, argue that the provisions were not within the competence of the order-making power because they were not incidental to anything already in the act—the act would work perfectly well without the provisions. If Parliament chose not to put a certain power in an act, that is what Parliament decided; Parliament would no doubt have had its reasons for that.

One can always make up arguments that Parliament could not have intended this or that, but that is the beginning of sloppy thinking, because it imputes to Parliament a policy intention that we would have liked it to have had. It is much safer to start from what Parliament said, to note that Parliament intended to do a certain thing and to assume that that is safe because of what was said in Parliament and anything different was outside Parliament's intention. In this case, the 2003 act reads perfectly well, although it does not provide for parliamentary scrutiny of a particular kind of subordinate legislation. It works, and we do not need anything else in that sense. We would not have been able to make the necessary change until we had time for another piece of primary legislation. That would not have been the end of the world, but it would not have been desirable.

Mr Maxwell: I accept what you are saying and I understand the example that you have given, which is a good one. I am probably speaking on behalf of the whole committee when I say that it is the width of the word "supplemental" that leaves us slightly uncomfortable.

Patrick Layden: That should be understood within the context of the piece of legislation concerned.

Mr Maxwell: Yet, during this discussion, we have been unable to define exactly what comes within that context. That is part of the problem. It is easy to spot the extremes, but we never know exactly what is just beyond our ken.

Patrick Layden: That is because each piece of legislation is different. The purposes of the National Health Service Reform (Scotland) Act 2004 were different from those of the Local Government in Scotland Act 2003. One must examine particular legislation to see what its purposes were and what would be reasonably considered to be supplemental to those purposes. I am really sorry that I cannot do so, but I would love to be able to provide the committee with a ready reckoner, against which we could hold up a proposal and say, "That won't do." The committee could then have a good look at it and say, "No—that won't do." However, there is no such ready reckoner. We just have to consider each provision case by case. We are certainly aware that we are subject to close scrutiny when producing provisions; we expect that.

Murray Tosh: We can obviously come back to this subject, but we should stress that we reserve the right to consider the question further, perhaps after we have looked at the dictionary meanings of "supplemental" and "ancillary". I understand ancillary provisions to be those that derive from an act, whereas supplemental provisions appear to be those that add to an act. It might be that "ancillary" would be a better word than "supplemental". What we are uncomfortable with are provisions in subordinate legislation that nobody ever considered in the primary legislation. It may be that we are arguing about the meaning of a word, in which case there might be a better way of expressing things. We should consider that as well as the procedural and subordinate legislation implications.

The Convener: I agree. Under our review, we can consider what other legislatures do in this area. We could find out how they tackle the question. Thank you for those answers—and we will say nothing about electronic tagging.

We now move on to the subject of illustrative lists. I think that Adam Ingram had a point to raise.

Mr Ingram: The committee had inquired about the possibility of introducing greater consistency in the drafting of bills when it comes to being specific with illustrative lists or outlining a more general

power. You have knocked that on the head and said that it is basically horses for courses. Would you like to give us a bit more on that? I can then follow that up with a suggestion.

Patrick Layden: As the Minister for Parliamentary Business has said, if we had a rigidly applied formula, under which there was always to be an illustrative list or never an illustrative list, or some sort of combination, I am not sure that that would help us. If somebody told us that we must always have an illustrative list in a bill, we could do that. However, I am not sure that that would always be of assistance to the reader of the legislation.

I can remember cases when I have been told to provide for a general power, so that, for example, a body may enter into such contracts as it sees fit. Somebody might then come along and say that they want to make sure that the body can buy and sell land and I might say okay and redraft the power so as to state that the body can buy and sell land and enter into other contracts as it sees fit. Somebody else might then come along and ask whether we are sure that the body can enter into contracts with particular kinds of other bodies. I will say, "Yes, I am sure," but they might say, "You'd better put that in anyway, because we are very concerned that we shouldn't have any gap in the powers."

Before we know where we are, we find ourselves producing a long list of particular contracts that a body can enter into. If the original formulation had just been left alone to wash its own face and be read in its ordinary dictionary sense, it would have done the job. However, we have ended up with a combination of things. We are saying that the body in question may enter into such contracts as it sees fit, but we then have some other subsection saying something like: "Without prejudice to the generality of the foregoing, the body may enter into the following kinds of contract". There follows a list of all the people concerned with particular kinds of contract. That pacifies the client, but it means producing a piece of legislation that is about one and a half times as long as it needs to be. What does that gain?

I approach things on a case-by-case basis. I would consider what powers are required to be conferred on the body concerned or what instances I am required to cover. I would consider whether those instances are so important that they need to be specified in a list or whether a general formulation would deal with the matter better. Sometimes, when the department or the policy maker and ministers are being particularly beastly, I find myself doing both.

11:15

Murray Sinclair: Again, I emphasise that the context is very important. As Patrick Layden suggested, the list will be there not because it is strictly necessary in legal terms. Sometimes an illustrative list develops as a response to a consultation or in consequence of what is said during the parliamentary passage of the legislation. In particular contexts, the potential users of the legislation will say things that suggest that it would be useful to have an illustrative list. In other contexts, the potential users of the legislation will see no need for an illustrative list. It would not necessarily be appropriate to have a single approach that would apply in every case.

The Convener: What you have just said dovetails well into this next point, which is on the section in the letter headed "More complete information on instruments". Sometimes it needs to be explained more fully why there is a list or extra information in one case and not in another.

Mr Ingram: I want to develop that point a little. We talked about improving parliamentary scrutiny. What difficulties would there be with introducing draft regulations at the same time as bills are introduced into the Parliament? When broad powers are being exercised, should we not be able to debate the regulations in parallel with the provisions of the bill? During the past two or three years, a number of bills have come through the Parliament that have left a lot to regulations. Could you develop that point?

Patrick Layden: I will do my best. A judgment has to be made about whether a particular provision is sufficiently important to be on the face of a bill or whether it would more appropriately be put into subordinate legislation. The principles of the legislation should certainly be explicit in the bill. Any provision that will not change without a considered decision by the Parliament ought to be in the bill, as should a whole range of other matters, such as financial arrangements and the setting up of commissions and committees. Such matters should be in the bill so that people can see what the structure of the legislation will be.

It is difficult to consider these issues in generic terms, but I am doing my best. When we move to a range of subordinate regulation, we are considering matters that will clearly fall within the principles that are set out in the bill but that might be subject to change from time to time. They might also be subject to further consultation, so a degree of flexibility might be sensible. If we are going to set up a system of licensing, for example, the principles of the licensing regime ought to be included in the bill, but the detail might be left until later, after further negotiation with the people involved in the process. Once the legislation is passed, those people might still want to say that

the regime should be run one way or another. There has to be room for negotiation on that.

It is not always appropriate to move to the level of subordinate regulation until one has established that the Parliament is content with the shape of the primary legislation. In purely technical terms, there is also sometimes a difficulty in that the policy behind the bill has to be developed and presented so that the Parliament can understand it all and it is not always possible to develop fully the detail of the regulation at the same time. That is not only for reasons of Executive resources; as I said, there might be a desire for further negotiation and consultation with interested bodies, but they, like everyone else, are concentrating on the structure of the legislation and do not have the time, energy and expertise at that point to examine how the regulation might work.

There is a logic to having the process of the primary legislation first, before a separate process for the subordinate legislation. I accept that in some cases Adam Ingram's point applies. In the case of the Primary Medical Services (Scotland) Bill, the primary legislation was very much an enabling mechanism for a new system of regulation of medical contracts and it made a lot of sense to have the medical contract available when the primary legislation was being considered. Equally, there are lots of cases in which it is not a sensible or logical way of doing business to produce the whole thing as a package. However, that is a matter for the Parliament. If the Parliament says, "No, we are not prepared to put up with this and we want all this material on the face of the legislation," the preparation of legislation will take longer, the legislation will look more complicated and it will take longer to get through. Nonetheless, the decision whether a provision goes into the bill or into regulations is a matter for the Parliament.

The Convener: Thank you. I was going to make the point about the Primary Medical Services (Scotland) Bill, because that was the big example.

Murray Tosh: On the point about illustrative lists and the merits of explanation, Mr Layden, clearly you do the thinking before you produce a list. From what I understood from your answer, you debate the merits of such a list and decide for good reasons in every circumstance whether to include one. Is there any reason why you could not flesh out your thinking and include a statement of a justification? That is a bit over-heavy, but could you define in the explanatory memorandum why you think an illustrative list is necessary? That would save us having to ask why you had included it.

Patrick Layden: In a large number of cases, you would be asking why we had not included an illustrative list. That is simply a subset of the question, "Why have you drafted the legislation in this way?" There are so many reasons for drafting legislation in different ways that I would hesitate to set out a rule book for it. You could discuss that with the office of the first Scottish parliamentary counsel.

Murray Tosh: The committee could always ask for an illustrative list if you had not included one and it thought that one would be helpful. Usually the committee says the opposite. Generally we do not like illustrative lists and we wonder why they are there. Including a positive statement with a reason for including an illustrative list would perhaps be a less burdensome procedure for you to adopt.

Patrick Layden: We can certainly consider that. I am not aware of any policy in the office of the first Scottish parliamentary counsel on whether there should be an illustrative list. I suspect that, like me and others in that line of business, it considers the merits of every case. It will have illustrative lists in some cases but not others.

Murray Sinclair: On your concern about an explanation of why there is an illustrative list, the best that we can do is to bear that in mind. I cannot say that there is no office policy or that no explanatory notes have been issued giving particular examples in a list, but we can certainly bear in mind what you have said.

The Convener: One of the issues that we remember was that, when we heard from Scottish Executive officials in successive weeks, the explanation that was given on the second week about why there was no list was completely contrary to what had been said the first week, when there had been a list. I am talking about the philosophy of why you use a list or do not use a list, because that obviously depends on what the bill or statutory instrument is about. However, there was inconsistency about the illustrative lists, which is why we raised the issue.

Are there any other points on that issue, or on the next section, which is about having more complete information on instruments?

Christine May: I would like to comment on that and on the consultation criteria. The comments in the paragraph about more complete information are very welcome. I am certainly grateful for them and I am sure that my fellow committee members are, too.

If you are going to be looking at the amount of information that comes with statutory instruments and trying, where possible, to achieve consistency, comments such as, "A list has been provided for the following reasons," "In this instance, the Executive does not intend to consult because," or, "The Executive does intend to consult because," would be helpful not only to the

committee, but to the Parliament and to users of SSIs. I realise that that is a statement, rather than a question, but I am inviting you to turn it into a question.

Patrick Layden: At the previous meeting, we discussed consultation on draft instruments. There are obviously areas in which we have consultation. Colleagues who draft legal aid regulations consult with players in the legal aid field almost continuously. Any set of legal aid regulations may not represent what the users out there would like, but it will certainly not take them by surprise, because they will have had a chance to comment on the regulations. The same is true in other areas of technical regulation—those who are directly involved will be aware of what is going on.

Whether there should be wider public consultation is a matter of judgment. A great deal of legislation, particularly subordinate legislation, is of a technical nature and is not of immense interest to the wider public. We run the risk, as I believe Mr Allen pointed out at the previous meeting, of consultation overload. If we continually send out lists of draft instruments to a wide range of organisations, they are likely to wind up going, like application forms for new credit cards, straight into the wastepaper basket. People would stop reading them, which would be undesirable.

I do not know whether that answer is helpful to you, but we are concerned that, if we undertook to consult on everything, we would have 600-odd consultation papers going out every year for all the sets of regulations that we were planning to make and people would switch off.

Christine May: That is not what I was suggesting.

Patrick Layden: I beg your pardon.

Christine May: I wanted to know whether you felt that you might be able in future to provide an explanation—in the explanatory memorandum or in an attached letter—particularly for regulations on legislation that is coming through. If, for example, there has been a significant amount of public consultation with concerned parties before the event—including on quite a lot of technical stuff—it might be argued that, in that case, it was not felt necessary to consult further. However, for a similar type of instrument on which prior consultation had not taken place, one might expect to have consultation with the interested parties. Something to explain why there is no consultation in a particular case would be helpful.

Patrick Layden: I see your point. That is something that we said that we would look at. It is a question of judgment and we will exercise that judgment.

Christine May: Thank you. The answer was helpful.

11:30

Murray Tosh: Although I do not want to overdo a textual deconstruction of the minister's letter, I am curious about the meaning of the final sentence of the section headed "More complete information on instruments". I am not sure whether what is stated is simply the blandly obvious or whether it is meant to signal that the Executive is looking for some kind of qualitative shift in the level or nature of the dialogue between its "respective officials". Can you give us an indication of the meaning that is intended? Are the Executive's respective officials going to use better processes to amend instruments or to get away from what the letter elegantly describes as

"the ping-pong of query and explanation".

Patrick Layden: We have done some work on that already. In consultation with the committee's legal adviser and clerk, we have produced a system in which greater advance notice of draft instruments is given so that some legal questions can be looked at and dealt with in advance. We also have a system in which the drafting solicitor in our office can pick up the telephone to one of the Parliament's legal staff and say, "An issue is coming up. Can we talk about it?" That system is working. Although the working party that looked into consolidations might appear not to relate directly to the issue, it could do so—

Murray Tosh: So the final sentence in the section is more a statement of the expected benefits that should result from the changes in procedure and not an indication that the issue is one on which additional work is required.

Patrick Layden: It is both. If there are other areas in which we can hold informal dialogue, we are happy to look at them. We are doing that already. The list is not closed.

Murray Sinclair: The letter is not calling for a new process but sending out a positive statement about the value that we place on continuing communications.

Murray Tosh: That is helpful in the context of what is, in general, a fairly positive letter.

The Convener: To be fair, I should say that, at recent meetings, we have seen instances of useful informal dialogue to pick up points early in the process.

I have a question that relates to the section on consultation. I think that it was Dennis Canavan who raised a question about consultation criteria on an instrument whose name I cannot remember but which related to fishing. He raised the issue of

someone who had made an objection as part of the initial consultation on the instrument but had not been informed of the changes that may have been made. Have you come across similar cases? Will such examples been taken on board in future consultations?

Patrick Layden: I would expect the department concerned to take those examples on board. It should be aware of the political and public information context of its own legislation. That is not an area that those of us who work on the legal or parliamentary side of the Executive control directly. However, the department concerned would be aware of what was required to smooth the passage of particular pieces of its work.

The Convener: I remember the incident because it ran over two or three weeks. If such situations can be avoided, the process will run a lot more smoothly.

We move on to the section headed "Guidance and the use of guidance in place of statutory provision". On occasion, Murray Tosh has said a few things on the subject. One issue is that we have always been keen for guidance to be laid in the Parliament so that as many people as possible can see it. Do you want to raise any other issues on that, Murray?

Murray Tosh: The convener has bowled me the proverbial googly. However, I have picked out something that I want to ask about. Close to the beginning of the second paragraph, the Executive says that it should proceed

"in whatever way appears to be most appropriate and effective in any given circumstances."

I am sure that all of us hope that that is the way in which everyone proceeds—the phrase is not very revelatory. I am not sure of the criteria that would be used in the definitions of the words "appropriate" and "effective". Could we not be given a more transparent explanation of the times at which the Executive would use guidance instead of regulations? How can we be sure that the Executive is being consistent in its approach to the subject matter of regulations and the level of parliamentary scrutiny that it invites when it lays documents as opposed to introducing subordinate legislation?

Patrick Layden: Behind this issue, there is the level of parliamentary scrutiny that is built into the consideration of primary legislation. Parliament makes decisions about the matters that it wants dealt with in a bill, those that it wants dealt with by way of subordinate legislation under the affirmative resolution procedure, those that it wants dealt with by way of subordinate legislation under the negative resolution procedure and those that can be left to ministers to carry out as a matter of departmental policy, directions or guidance. Under that structure of powers, in a descending or ascending order, depending on which way we sort them, ministers and their officials have to make decisions about the appropriate way in which to secure a policy as allowed for under the legislation.

It would be in accordance with a minimalist approach to regulation that, when it is possible to achieve a policy result by way of guidance, letters, directions and so on, rather than by subordinate legislation, with its built-in rules, sanctions and so on, we should use guidance if that will secure the desired result. As the minister's letter says,

"Any such guidance is published".

I see, and appreciate, the committee's clear wish to have a set of rules against which to judge any Executive action, whether that is administrative action, an item of subordinate legislation or whatever. However, from my perception, life is not like that. There are many different ways in which to approach a problem, and one tries to find the way that will work for the particular problem concerned, using the lightest touch possible. If you were to ask me why something was in the form of a piece of guidance and why something else was in the form of a set of regulations, I would answer you on the merits of those two questions. However, I could not say that we apply some rule that says where we have guidance and where we have regulations.

Murray Tosh: I do not think that I am asking for a rule. Your metaphor about cabinets with drawers of different sizes has sunk in sufficiently for me to understand your point. If an item of subordinate legislation comes to us telling us why the Executive is introducing some regulation, there will be an explanation for it, and we will know why the step is being taken. When the Executive issues guidance, perhaps there is an explanation somewhere of why guidance has been chosen rather than a set of regulations. I am not certain that I always see that explanation, or that it always comes before the committee. In a sense, the Executive explains one choice but does not necessarily explain the other choice.

Although this is in the framework of the explanation that is given in the minister's letter and in that of the explanation that you have just given, I am not sure that there is always a menu that says "guidance", "negative resolution" and "affirmative resolution", from which you pick the most appropriate tool from the drawers in your cabinet. There must be circumstances in which guidance is the only thing that is appropriate and other circumstances in which regulation is the only thing that is appropriate.

Patrick Layden: Yes.

Murray Tosh: I am not sure, however, that we always receive and clearly understand the Executive's reasons for proceeding down its chosen route. I am asking not for a rule-book approach, but for one that would allow us consistently to understand the choices that are made and why given routes are chosen.

Murray Sinclair: In the context of guidance that is issued under primary legislation, the explanation ought to be found in the bill or in the accompanying documents. If it is not there, it ought to be found in the discussions that take place around why the bill has been constructed in the way that it has been. If there is a statutory power to issue guidance, it must be indicated why that power has been taken. The Executive would explain that it is just a power to issue guidance, which does not carry any specific sanctions if people do not comply with that guidance. If the same bill had a power to make regulations to regulate people's activities, with specific sanctions—perhaps criminal ones—for breach of the regulations, the reasons why that power had been taken and the policy thinking behind it would be debated and explained in the context of the bill. The matter depends on the context.

Murray Tosh: Obviously, that is at the point of primary legislation. However, when you choose to use guidance rather than regulation, it is not necessarily clear to us in every case why you do so. I wonder whether, for cases in which guidance is used to achieve the same ends as regulation would be used—although without the same legal force—the level of scrutiny by the committee and therefore the Parliament should be similar. Underlying that is the concern that mechanisms are in place that create guidance that is, in effect, regulation, but which is not subject to the level of scrutiny that would be appropriate if it were regulation.

Patrick Layden: In the final analysis, that takes us back to the balance that the Parliament agrees to when it passes a bill. The Parliament sets the level of Executive involvement that it wants to scrutinise and requires the Executive to carry out the process by way of regulation of a particular type. The Parliament also identifies Executive involvement that it does not want to scrutinise at that level. At the end of the day, that is the decision that the Parliament makes when it passes the bill. Ministers simply exercise the discretion that the Parliament leaves to them.

Murray Tosh: I am not sure that the Parliament consciously makes that decision. In recommending that guidance be used, the Parliament recognises that guidance is more flexible and that it allows the Executive to use tools that regulation-making powers may not allow. The two are different mechanisms, but that does not therefore mean that the Parliament has decided that it does not want to consider the guidance. If we were subjecting the process to quality control, we would agree that a hammer was a different tool from a saw, but we might be concerned about the quality of the steel that had been used in the production of the tools and concerned that both tools had been fitted into the drawer appropriately and to an appropriate standard. You now see the danger of coming to the committee with folksy metaphors.

Patrick Layden: If the Parliament decides which tools are to go into the cabinet and states that ministers may issue guidance on the sharpening of tools and the appropriate use of chisels, that would be entirely understandable, but it does not require regulations. It would be sensible for whoever controls the tool cabinet to say how the chisels should be used, but we do not need to regulate that in great detail in the list that gets published on top of the chest.

Murray Tosh: We may be using a hammer to crack a nut, but we will obviously want to reflect on the discussion. I did not know that I had a lot to say about the use of guidance, but we may need to return to the issues.

The Convener: One issue that has often arisen when we discuss guidance is the consultation that is done on it. We want to ensure that guidance is as thorough as possible, just as with statutory instruments and with legislation in general, and that the Parliament and MSPs actually get to see the guidance, given that they have a lot of interest in it. Several bills that have come before the committee have involved the use of guidance. When we had a spate of such bills, we had elaborate discussions, along the lines that have been suggested, about whether the use of guidance was appropriate. We became increasingly aware that guidance should be considered carefully.

We have opened up an area about which we are now much more aware—the committee is obviously on a learning curve—but I want to move on quickly to the paragraph in the minister's letter on instruments laid at Westminster, which mentions an issue to do with the Water Industry (Scotland) Act 2002. We wrote to the previous Minister for Parliamentary Business, Patricia Ferguson, and received a helpful reply suggesting that, if further issues arose, we would—as far as humanly possible—be informed. I think that the matter has been covered satisfactorily, but do members wish to raise any other points?

Members *indicated disagreement.*

11:45

The Convener: We welcome what is in the rest of the letter. The issue of European Union obligations and transposition notes is on-going. We welcome what is said in the letter but I would like to ask about timescales.

Patrick Layden: I am reliably informed that the first transposition note should be with you very soon.

The Convener: Excellent.

Patrick Layden: Thereafter we will use the notes increasingly. I will not give a date by which every implementation of a piece of European legislation will be accompanied by a transposition note, but that is our aim. We will start with a pilot for a particular set of regulations, but we are waiting for colleagues in the south to complete their equivalent set of regulations.

Murray Sinclair: The note has been prepared and it is just a question of when the regulations are ready. I think that we will be writing to the committee with the note just after the regulations have been laid, indicating that this is the start of the pilot. We will see how we get on after that. I hope that we can develop the pilot into a workable on-going arrangement.

Christine May: I have asked about this issue on almost every possible occasion, so I am very pleased to hear what you say.

Patrick Layden: I will not say that I am sure, because I am not sure about anything in this weary world, but I earnestly hope that, by the next time that we have a meeting such as this, the committee will have received transposition notes to consider and on which to comment.

Christine May: Good. Thank you.

Mr Maxwell: I would like clarification on one point. What you say is welcome and the committee will feel that it represents a step forward. However, you spoke about a pilot. I understand that you cannot give a time by which every piece of legislation will have a transposition note when appropriate, but a pilot project will surely have a definite timetable and end date, after which you would move towards rolling out the programme.

Patrick Layden: "Pilot" was perhaps the wrong word to use. We know that we have a transposition note prepared for a particular set of regulations. We will endeavour to add transposition notes to future sets of regulations as and when we get the resources in place.

Mr Maxwell: So it is not a pilot project as such.

Patrick Layden: It is not a pilot in which we are trying out something to see whether it works; we are committed to the idea of producing transposition notes and are moving towards producing them for all sets of regulations. I am not saying how fast we are moving, but it is as fast as we can.

The Convener: The next paragraph in the letter concerns the publishing of Executive notes on the website—something that is obviously welcome. After that comes a paragraph on the consolidation of subordinate legislation. Again, do you have a timetable for that work?

Patrick Layden: We have started consolidating things. For example, SSI 2004/280 was a consolidation with some amendments; SSI 2004/381 was a consolidation; and SSI 2002/110 is being consolidated at present. The Oil and Fibre Plant Seed (Scotland) Regulations 2004 was a consolidation with amendments; and the Organic Aid (Scotland) Regulations 2004 was a consolidation with amendments. Those are relatively minor examples, but the Police (Scotland) Regulations 1976 were consolidated before the summer recess. That was a large exercise involving a large number of people. However, the department and colleagues in the office of the solicitor to the Scottish Executive kept the focus narrow and concentrated on consolidating rather than on adding changes that people wanted to make. The consolidation was, therefore, carried out successfully.

As the minister's letter says, a working group was set up to look into consolidations. However, I got a letter saying that we were suspending that work during the consultation exercise that you are conducting. That was a matter of some regret to us, as there are a range of issues to do with consolidation that are as much for you as for us. We would very much like to carry on with the work of that working group, as there are considerations of parliamentary scrutiny and the parliamentary handling of consolidations that we really need to go into before we can arrive at a complete plot.

The Convener: Exactly. That brings me to my next question. You mentioned that there were people who wanted to add things in to that particular piece of consolidation, how we would go about doing that and making the exercise worth while, and whether that would involve not only the Subordinate Legislation Committee, but the subject committees, or whatever. Are you saying that, until the review has worked its way through, we have to stop thinking about the process, or can we be thinking about the process as well?

Patrick Layden: We would be happy to carry on with the working group in the meantime.

The Convener: That would be helpful. In our discussions, one of the issues has been how best

to deal with the consolidated material. We would like you to share with us any ideas that you have.

Murray Sinclair: The resuscitation of the working group would seem to be a good way of dealing with that. It is a discrete topic, and I hope that it can be dealt with on its own in parallel to your inquiry.

The Convener: Do members have any other comments? Are we happy with that?

Christine May: We are happy and welcome that answer.

The Convener: Okay.

Let us move to super-affirmative procedures. The minister suggests, in the penultimate section of her letter, that we might like to draft a note about how useful those procedures would be and how we see their being used. We are quite happy to do that and to get back to you on that.

At the end of the letter, the minister mentions the regulatory framework. Are there any other questions that members want to ask?

Christine May: No. I thank Mr Layden and his colleagues for a helpful letter and their helpful explanations.

Patrick Layden: Thank you very much. We welcome the opportunity to discuss matters with the committee either formally or, as we have said, informally. I do not know whether it is more useful to the committee to take formal evidence or to do things informally. As a general rule, informal discussion might be an easier way of going about things, but we are in your hands.

Murray Tosh: We can do whatever is most appropriate in the circumstances. [*Laughter.*]

The Convener: I somehow knew that you were going to say that.

Patrick Layden: We could look at the whole thing on a case-by-case basis. We commend that approach.

The Convener: On that note, I thank you for coming along. It has been very helpful.

Delegated Powers Scrutiny

Gaelic Language (Scotland) Bill: Stage 1

11:53

The Convener: Agenda item 2 is delegated powers scrutiny. Last week, we asked two questions of the Scottish Executive about the Gaelic Language (Scotland) Bill at stage 1. The first question related to section 2 and the national Gaelic language plan. The reply indicates that there will be a lot of consultation and that the plan will be laid before Parliament, so that MSPs will see it. Is that sufficient? I think that that is more or less what we asked for last week.

Secondly, we asked why a slightly different approach had been taken in relation to the guidance on Gaelic education. The explanation that has been given, which our legal advisers have looked at, is that it is an issue of style because the Standards in Scotland's Schools etc Act 2000 is being followed. Do members want to follow up any points on that?

Members: No.

The Convener: Are we quite happy with the explanation that has been given?

Members *indicated agreement*.

The Convener: It is suggested that we pass on the Executive's response to the lead committee. Is that correct?

Alasdair Rankin (Clerk): Yes; we will report to the lead committee and to the Parliament.

Draft Instruments Subject to Approval

Agricultural Holdings (Right to Buy Modifications) (Scotland) Regulations 2004 (draft)

Budget (Scotland) Act 2004 Amendment (No 2) Order 2004 (draft)

11:54

The Convener: The original version of the first draft instrument subject to approval contained an error of form, so the Executive withdrew it and substituted it with a corrected version. No points have been identified on either draft instrument.

Draft Instrument Subject to Annulment

Holyrood Park Amendment Regulations 2004 (draft)

11:55

The Convener: Our legal adviser has made a few points on the draft regulations. I think that Stewart Maxwell has an issue to raise.

Mr Maxwell: The legal advice asks why the regulations are a matter of devolved competence rather than a reserved matter. The most appropriate paragraph in our briefing is paragraph 19, which says:

"although the physical management may be reserved (in the sense that it cannot be transferred to anyone else) the right… to make regulations governing management is not."

That seems reasonable.

It is clear that there are reserved matters to do with Holyrood park, as it is a royal park, but it is fine that the regulations deal with a devolved matter. I raise the issue because I do not think that there is any problem with the Executive's approach. It is entirely correct that the Executive is making regulations on parking at Holyrood. I agree with the definition that paragraph 19 provides and I do not think that we need to raise the matter with the Executive, as there is not a problem.

The Convener: The second point that the legal briefing makes is about the purpose and effect of new regulation 4B(4) and the use of the phrase "recoverable as a penalty", which appears to be an English term that has no meaning in Scots law. Do members agree to ask the Executive about that?

Members *indicated agreement*.

Mike Pringle (Edinburgh South) (LD): I am sorry to come in late, but I have a question about new regulation 4B(2), which says:

"The excess charge shall be paid to the Scottish Ministers".

I am not sure who will collect the money that is raised under the regulations and where it will go.

The Convener: We will ask that question, too; that is no problem.

Murray Tosh: Can I just clarify whether what Stewart Maxwell said means that we will not ask the first question in the legal briefing?

Mr Maxwell: I was indeed suggesting that it was unnecessary to ask that question, because I felt that the comments in paragraph 19 provided an acceptable answer.

Murray Tosh: You may well be right, but if we are asking the second question, it might be useful to get an explanation of the first point on the record.

Mr Maxwell: I disagree; I think that the explanation is clear. The predecessor committee dealt with similar regulations and it took the view that I expressed, which was that it was not necessary to ask the Executive for an explanation. Although that should not necessarily influence what we do, I feel that there is no great reason why we should make such a request. Why do you want to pursue the matter? Do you not accept the explanation that paragraph 19 provides, which is that regulations that govern the management of land in a royal park are not subject to reserved powers?

Murray Tosh: The fact that you are so keen to stop us asking a perfectly straightforward question—the answer to which would give us an explanation on the record of an issue that was apparently not pursued on a previous occasion—makes me instinctively suspicious. As we are writing to the Executive to ask the second question, we may as well ask the first one.

The Convener: We may as well do that.

Mr Maxwell: I will not go to the wall on the issue, even though I think that the explanation that we have been given is clear.

The Convener: Do members agree to ask that question?

Members *indicated agreement*.

Instruments Subject to Annulment

Scottish Network 2 Tourist Board Scheme Amendment Order 2004 (SSI 2004/465)

12:00

The Convener: Agenda item 5 is instruments subject to annulment, the first of which is the Scottish Network 2 Tourist Board Scheme Amendment Order 2004 (SSI 2004/465). No points arise on the order.

Education (Graduate Endowment, Student Fees and Support) Switzerland (Scotland) Amendment Regulations 2004 (SSI 2004/469)

Debt Arrangement Scheme (Scotland) Amendment Regulations 2004 (SSI 2004/470)

The Convener: No points have been identified on the regulations.

Marketing of Fruit Plant Material Amendment (Scotland) Regulations 2004 (SSI 2004/471)

The Convener: No particular points have been identified, except that there is the issue of late implementation, which is due to implementing the regulations on a UK basis, so that measures come into force at the same time.

Food Labelling Amendment (No 2) (Scotland) Regulations 2004 (SSI 2004/472)

Nature Conservation (Designation of Relevant Regulatory Authorities) (Scotland) Order 2004 (SSI 2004/474)

Conservation (Natural Habitats, &c) Amendment (Scotland) Regulations 2004 (SSI 2004/475)

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

Land Registration (Scotland) Amendment Rules 2004 (SSI 2004/476)

The Convener: The rules amend the Land Registration (Scotland) Rules 1980, consequential on the coming into force of the Title Conditions (Scotland) Act 2003. Although no points of substance arise, a number of minor points arise. I suggest that the three such points that are identified in paragraphs 42 to 44 of our legal briefing be passed on in an informal letter. Is that agreed?

Members *indicated agreement.*

Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Order 2004 (SSI 2004/477)

The Convener: No points of substance arise, but there is a slight issue to do with the fact that the order assumes that all the bodies that are listed in the schedule to the order meet the criterion that is described in paragraph 46 of our briefing. However, as the requirement is mandatory, it might have been advisable for a statement to have been produced to the effect that the bodies that are listed meet the requirement. Do members wish to raise that in an informal letter?

Members *indicated agreement.*

Abolition of Feudal Tenure etc (Scotland) Act 2000 (Prescribed Periods) Order 2004 (SSI 2004/478)

The Convener: It is suggested that we ask the Executive to justify the vires of article 2, given that there appears to be nothing in the enabling power that permits different provisions to be made for different circumstances. Members will see from the order that different provisions have been made.

Murray Tosh: The Executive should have included a supplemental provision.

Lands Tribunal for Scotland (Title Conditions Certificates) (Fees) Rules 2004 (SSI 2004/479)

The Convener: No points of substance arise.

Instruments Not Subject to Parliamentary Procedure

Food Protection (Emergency Prohibitions) (Diarrhetic Shellfish Poisoning) (East Coast) (No 2) (Scotland) Revocation Order 2004 (SSI 2004/463)

12:02

The Convener: Agenda item 6 is instruments not subject to parliamentary procedure. No points have been identified on the order.

Instruments Not Laid Before the Parliament

Scottish Network 1 Tourist Board Scheme Amendment Order 2004 (SSI 2004/464)

12:03

The Convener: Finally, agenda item 7 is instruments not laid before Parliament. On the Scottish Network 1 Tourist Board Scheme Amendment Order 2004 (SSI 2004/464), no points have been raised.

Lands Tribunal for Scotland Amendment (Fees) Rules 2004 (SSI 2004/480)

The Convener: No points of substance have been identified.

I thank colleagues for attending a rather longer meeting than we usually have. We will see you next week.

Meeting closed at 12:03.

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